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A Man's Word and Making Money: Contract Law in New York, 1920-1960

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A MAN'S WORD AND MAKING MONEY: CONTRACT LAW IN NEW YORK, 1920-1960

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In early twentieth-century America, contract law was about men keeping their word to each other. We must understand at the outset, however, that only a small portion of all people, even those of male gender, were truly men; there were also women, foreigners, and boys. The moral precepts underlying classical Langdellian contract law required only that men keep their word toward other equal men; the precepts did not require that men keep, or even give, their word to their inferiors. Hence, it did not prevent them from exploiting the women, the immigrants, and the boys in their midst and, through such exploitation, making money.

The moralistic precepts underlying Langdellian contract doctrine were under challenge throughout the 1920's, but it was the Great Depression and the Second World War that finally demolished them. During the Great Depression, most men stopped making money, and that caused them to doubt the verity of their moral precepts. The Second World War, in turn, transformed many male members of the underclass into true men who were no longer willing to accept exploitation. Thus, in the aftermath of the War, there were too many men seeking to exploit too few women, immigrants, and boys; they now needed to exploit each other, rather than merely keep their word to each other, if some of them were to make money.[1]

With the help of leading legal luminaries, contract law transformed itself to accommodate those seeking wealth, and the underlying foundation of contract became making money, rather than keeping one's word. That transformation is the subject of this Article. More specifically, the Article will examine changes in contract law between the key dates of 1920 and 1960 in one single state—namely, New York.

These two dates are important because contract law rested, as late as 1920, on the precept that men should keep their word, whereas, by 1960, the utilitarian goal of making money had become preeminent. A single state was chosen for study because focusing on this state makes it possible to analyze not only the many leading contract cases that arose there, but also the hundreds of more mundane cases that applied their holdings on a day-to-day basis. In this context, New York enjoys a special advantage in that it possesses a more complete set of lower court opinions than any other state. While study of any single state will provide only an incomplete sketch of developments in the nation at large, the Author is convinced that the picture that emerges from studying New York, which, through

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1. For a discussion of the transformation of the prejudiced, inegalitarian world of 1920 into a more egalitarian, assimilationist society by 1960, in large part as a result of World War II, *see* William E. Nelson, *The Changing Meaning of Equality in Twentieth-Century Constitutional Law*, 52 WASH. & LEE L. REV. 3 (1995).

the period under study, was the most populous state and the economic and cultural leader of the nation, will be less incomplete or distorted than that which would emerge from the study of any other jurisdiction.

The second reason for focusing on the single state of New York is that New Yorkers were early leaders in the twentieth century's transformation of contract law. Two New Yorkers, in particular, stand out: Benjamin Cardozo, who, as a judge of the Court of Appeals in the 1920s, wrote a line of pathbreaking contract decisions, and Karl Llewellyn, who, as a professor of law at Columbia University, authored Article 2 of the Uniform Commercial Code (UCC) during the 1940s. Both men were committed to modernizing contract law so that it could serve not just a few people, but all the people of New York—the Catholic and Jewish descendants of immigrants as well as old-line WASPs—in their efforts at enhancing the quality of their lives. The central claim of this Article is that the twentieth century's transformation of contract from the moralistic doctrine of Christopher Columbus Langdell to the business-oriented rules of the UCC occurred first in New York, under the leadership of figures such as Cardozo and Llewellyn, for reasons connected to the special demography of New York.

I. THE CORE PRECEPT OF FREEDOM OF CONTRACT

A. Freedom of Contract

Central to the classical Langdellian law of contract in New York, as late as the 1920s, was the precept "that men of full age and competent understanding . . . ha[d] the utmost liberty of contracting."[2] Under the classical model, "[a]dult persons, suffering from no disabilities, ha[d] complete freedom of contract,"[3] including the right "'to select and determine with whom' they would deal and not to 'have another person thrust on [them] without [their] consent.'"[4] In "a free enterprise system" in which parties with equal bargaining power could "protect their own rights and interests and avoid oppressive contracts by seeking bargains elsewhere,"[5] every business entity was "entitled to carry on its affairs and adopt in connection therewith such means of encouraging its business as it . . . [saw] fit . . . ."[6]

It followed from the general principle of freedom of contract that no one could "be made a debtor . . . except by his consent"[7] or otherwise "held to contract

2. 379 Madison Ave., Inc. v. Stuyvesant Co., 275 N.Y.S. 953, 956 (N.Y. App. Div. 1934), *aff'd*, 198 N.E. 412 (N.Y. 1935). *Accord* Kooleraire Serv. & Installation Corp. v. Board of Educ. of New York, 305 N.Y.S.2d 424, 425 (N.Y. App. Div. 1969), *rev'd on other grounds*, 268 N.E.2d 782 (N.Y. 1971); Herskovitz v. Todd Co., 85 N.Y.S.2d 707, 711 (N.Y. Sup. Ct. 1949). For this reason, New York's palimony case of *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980), held that "an unmarried couple living together [were] free to contract with each other in relation to personal services, including domestic or 'housewifely' services." *Id.* at 1156. *But cf.* Dombrowski v. Somers, 362 N.E.2d 257 (N.Y. 1977) (holding that the language was too vague to support finding of contract), *rev'd on other grounds*, 362 N.E.2d 257 (N.Y. 1977).

3. Schiff v. Kirby, 194 N.Y.S.2d 695, 700 (N.Y. Sup. Ct. 1959). *Accord In re* Estate of Vought, 334 N.Y.S.2d 720, 728 (N.Y. Sur. Ct. 1972), *aff'd*, 360 N.Y.S.2d 199 (N.Y. App. Div. 1974).

4. Harding v. Knapp, 8 N.Y.S.2d 224, 226 (Rochester City Ct. 1938) (quoting Arkansas Valley Smelting Co. v. Bel Len Min. Co., 127 U.S. 379, 387 (1888)).

5. Harwood v. Lincoln Square Apartments Section 5 Inc., 359 N.Y.S.2d 387, 390 (N.Y. Civ. Ct. 1974).

6. People v. Berger, 254 N.Y.S. 136, 139 (N.Y. Ct. Gen. Sess. 1931). *Accord* Soule v. Bon Ami Co., 195 N.Y.S. 574, 577 (N.Y. App. Div. 1922) (dictum), *aff'd*, 139 N.E. 754 (N.Y. 1923).

7. Credit Alliance Corp. v. Sheridan Theater Co., 149 N.E. 837, 838 (N.Y. 1925).

where there [was] no assent."[8] Thus, a newspaper could not be required to publish advertising that it did not wish to print.[9] Nor could a person who understood he was engaging merely in negotiations looking toward a contract find himself bound to contractual liability.[10]

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8. Tannenbaum Textile Co. v. Schlanger, 40 N.E.2d 225, 226-27 (N.Y. 1942). *Accord* Joseph Schultz & Co. v. Camden Fire Ins. Ass'n, 106 N.E.2d 273 (N.Y. 1952); Manufacturers' Trust Co. v. Weldon, 196 N.E. 545 (N.Y. 1935); Bell v. Metz, 231 N.Y.S. 203, 209 (N.Y. App. Div. 1928), *aff'd*, 166 N.E. 348 (N.Y. 1929); Stone v. Commonwealth Fin. Corp., 216 N.Y.S. 639 (N.Y. Sup. Ct. 1924), *aff'd*, 212 N.Y.S. 924 (N.Y. App. Div. 1925); Uni-Serv Corp. v. Frede, 271 N.Y.S.2d 478 (N.Y. Civ. Ct. 1966), *aff'd*, 279 N.Y.S.2d 510 (N.Y. Sup. Ct. 1967). *Cf.* Becker v. Faber, 19 N.E.2d 997 (N.Y. 1939) (holding contractual obligation cannot be altered without consent). *But see* New Amsterdam Cas. Co. v. Parsons, 220 N.Y.S. 340, 343 (N.Y. App. Div. 1927) ("under certain circumstances a person signing a contract . . . , although not named therein as a party, may become obligated thereon").

9. *See* Poughkeepsie Buying Serv., Inc. v. Poughkeepsie Newspapers, Inc., 131 N.Y.S.2d 515 (N.Y. Sup. Ct. 1954). *Accord* Camp-of-the Pines, Inc. v. New York Times Co., 53 N.Y.S.2d 475 (N.Y. Sup. Ct. 1945).

10. *See* Robinson v. Grace, 103 N.Y.S.2d 514 (N.Y. App. Div. 1951). Whether negotiations between the parties in any given case had produced a binding informal agreement prior to the execution of a contemplated formal writing was "basically a question of their intent to become or not to become bound." McLean v. Kessler, 426 N.Y.S.2d 704, 706 (N.Y. Civ. Ct. 1980). *Accord* Municipal Consultants & Publishers, Inc. v. Town of Ramapo, 390 N.E.2d 1143, 1144-45 (N.Y. 1979); *In re* Dolgin Eldert Corp., 286 N.E.2d 228 (N.Y. 1972); Scheck v. Francis, 260 N.E.2d 493 (N.Y. 1970); Willmott v. Giarraputo, 157 N.E.2d 282, 282-83 (N.Y. 1959); 1130 President St. Corp. v. Bolton Realty Corp., 89 N.E.2d 16, 18 (N.Y. 1949); Slater v. Gulf, Mobile & Ohio R.R., 108 N.Y.S.2d 145, 147-48 (N.Y. App. Div. 1951), *aff'd*, 107 N.E.2d 163 (N.Y. 1952); No. 2 and 4 Roman Ave., Inc. v. Goddard, 221 N.Y.S. 284 (N.Y. App. Div. 1927); Hohauser v. Berwin, 211 N.Y.S. 580 (N.Y. App. Term 1925); Patrick v. Kleine, 215 N.Y.S. 305 (N.Y. Sup. Ct. 1926); Eisenberg v. Spachmann, 190 N.Y.S. 662, 663 (N.Y. Sup. Ct. 1921). A related issue was the liability of principals on agreements made by their agents. *See* Ernst Iron Works, Inc. v. Duralith Corp., 200 N.E. 683, 684 (N.Y. 1936); Bradford Co. v. Dunn, 166 N.E. 167 (N.Y. 1929); Gerfish Realty Co. v. Dowd, 162 N.E. 516 (N.Y. 1928); Leibfreed v. Kleine, 222 N.Y.S. 366 (N.Y. App. Div. 1927); Educational Films Corp. v. International Film Serv. Co., 221 N.Y.S. 330 (N.Y. Sup. Ct. 1927), *aff'd*, 225 N.Y.S. 818 (N.Y. App. Div. 1927); Batavia Times Publ'g Co. v. Hall, 221 N.Y.S. 89, 90 (N.Y. Sup. Ct. 1927). *Cf.* United States Printing & Lithograph Co. v. Powers, 135 N.E. 225, 226-27 (N.Y. 1922) (joint obligation); Universal Major Elec. Appliances, Inc. v. Rudisco, Inc., 159 N.Y.S.2d 250 (N.Y. App. Div. 1957) (corporate successorship); Giventer v. Antonofsky, 205 N.Y.S. 287 (N.Y. App. Div. 1924) (joint obligation). Another related issue was whether an alleged third party beneficiary could recover on a contract made by others. *See* American Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435, 448-49 (S.D.N.Y. 1976); Greene v. Hellman, 412 N.E.2d 1301, 1306 (N.Y. 1980); Port Chester Elec. Constr. Corp. v. Atlas, 357 N.E.2d 983, 985-86 (N.Y. 1976); Newin Corp. v. Hartford Accident & Ind. Co., 333 N.E.2d 163, 167 (N.Y. 1975); Ferro v. Bologna, 286 N.E.2d 244, 245-46 (N.Y. 1972); Forman v. Forman, 217 N.E.2d 645, 648 (N.Y. 1966); Tomaso, Feitner & Lane, Inc. v. Brown, 151 N.E.2d 221 (N.Y. 1958); Fieger v. Glen Oaks Village, Inc., 132 N.E.2d 492, 495 (N.Y. 1956); Allhusen v. Caristo Constr. Corp., 103 N.E.2d 891, 893 (N.Y. 1952); Filardo v. Foley Bros., 78 N.E.2d 480, 484-85 (N.Y. 1948), *rev'd on other grounds*, 336 U.S. 281 (1949); Brewster v. Kable News Co., 45 N.E.2d 426 (N.Y. 1942); Associated Flour Haulers & Warehousemen, Inc. v. Hoffman, 26 N.E.2d 7, 9-10 (N.Y. 1940); McCarthy v. Pieret, 24 N.E.2d 102, 103 (N.Y. 1939); Erb v. Banco di Napoli, 152 N.E. 460 (N.Y. 1926); Flemington Nat'l Bank & Trust Co. v. Domler Leasing Corp., 410 N.Y.S.2d 75 (N.Y. App. Div. 1978), *aff'd*, 397 N.E.2d 393 (N.Y. 1979); United States Cas. Co. v. Jungreis, 250 N.Y.S.2d 749 (N.Y. App. Div. 1964); Davis v. Hogan, 79 N.Y.S.2d 331, 334 (N.Y. App. Div. 1948); Root v. City of Saratoga Springs, 218 N.Y.S. 204, 206 (N.Y. App. Div. 1926); Hardie v. Bent Milk Food Corp., 203 N.Y.S. 145, 148 (N.Y. App. Div. 1924), *aff'd*, 144 N.E. 911 (N.Y. 1924); Read v. Morford, 196 N.Y.S. 433, 434 (N.Y. App. Div. 1922); *In re* Schmoll's Estate, 181 N.Y.S. 542, 545 (N.Y. App. Div. 1920), *aff'd*, 130 N.E. 893 (N.Y. 1920); Smart Set Specialty Clothing Co. v. Franklin Knitting Mills, 180 N.Y.S. 821, 824 (N.Y. App. Div. 1920). *Cf.* 165 Broadway Bldg. v. City Investing Co., 120 F.2d 813 (2d Cir. 1941) (case of covenant running with the land); Nicholson v. 300 Broadway Realty Corp., 164 N.E.2d 832 (N.Y. 1959) (same); Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938) (same); Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp., 333 N.Y.S.2d 472 (N.Y. Sup. Ct. 1972) (same), *aff'd as modified*, 344 N.Y.S.2d 30 (N.Y. App. Div. 1973).

While parties were free to "make their own bargains," conversely, they had to "be held to the terms of their agreement[s] . . . ."[11] In enforcing contracts, courts could "neither . . . mitigate nor relieve against their operation."[12] According to the Court of Appeals, "'the right of private contract [was] no small part of the liberty of the citizen, and the usual and most important function of courts of justice [was] rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation . . . .'"[13] "[N]atural justice and the stability of society," the court added in another case, "requires us to compel the performance of contracts . . . ."[14] It was simply not the function of courts "to guarantee every businessman's success in his enterprise, . . . or to relieve him from contracts freely negotiated, that prove to be onerous . . . . [T]he vitality of our marketplace [was] derived to a great degree from the time-honored caveat that the individual must enjoy the right of 'freedom of contract . . . .'"

Related to freedom of contract in a manner never fully specified by the courts was the concept of mutuality of obligation, which was defined as a requirement "that in order to form a binding contract there must be mutual assent to the terms

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11. Cohen v. E. & J. Bass, Inc., 158 N.E. 618, 620-21 (N.Y. 1927). Thus, a signer of an instrument would be held to its terms even if he had failed to read them. *See* Acme Builders, Inc. v. Facilities Dev. Corp., 413 N.E.2d 1164 (N.Y. 1980); Wawrzonek v. Central Hudson Gas & Elec. Corp., 12 N.E.2d 525, 529 (N.Y. 1938); *In re* Stone's Estate, 5 N.E.2d 61, 62 (N.Y. 1936); Albert v. Freedman, 171 N.E. 760 (N.Y. 1930); Pimpinello v. Swift & Co., 170 N.E. 530, 530-31 (N.Y. 1930); Metzger v. Aetna Ins. Co., 125 N.E. 814, 816 (N.Y. 1920); Manufacturers & Traders Trust Co. v. Commercial Door & Hardware, Inc., 381 N.Y.S.2d 709 (N.Y. App. Div. 1976); Meier v. Brooks, 253 N.Y.S.2d 564, 568 (N.Y. App. Div. 1964); Moses v. Carver, 298 N.Y.S. 378, 387 (N.Y. Sup. Ct. 1937), *aff'd*, 5 N.Y.S.2d 783 (N.Y. App. Div. 1938); Capitol Automatic Music Co. v. Jones, 114 N.Y.S.2d 185, 188 (N.Y. Municipal Ct. 1952). *Cf.* Lincoln Trust Co. v. Williams Bldg. Corp., 128 N.E. 209 (N.Y. 1920) (parties presumed to enter contracts with intelligence). *But see* Casey v. Kastel, 142 N.E. 671, 673 (N.Y. 1924) (contract with infant voidable by infant); *In re* Romero's Estate, 131 N.Y.S.2d 561, 562 (N.Y. Sup. Ct. 1954) (contract with incompetent void); Sabelli Bellanca Aircraft Corp., 235 N.Y.S. 321 (N.Y. Sup. Ct. 1929) (party may disown signature given in reliance on other party's statement of contents of document), *aff'd*, 238 N.Y.S. 923 (N.Y. App. Div. 1930).

12. Johnson v. City of New York, 181 N.Y.S. 137, 138 (N.Y. App. Div. 1920), *aff'd*, 132 N.E. 890 (N.Y. 1921). *Accord* George Backer Management Corp. v. Acme Quilting Co., 385 N.E.2d 1062, 1065 (N.Y. 1978); Milau Assocs., Inc. v. North Ave. Dev. Corp., 368 N.E.2d 1247, 1250 (N.Y. 1977); Delancy Kosher Restaurant & Caterers Corp. v. Gluckstern, 112 N.E.2d 276, 279 (N.Y. 1953); Abrams v. Thompson, 167 N.E. 178, 180 (N.Y. 1929); Walton Water Co. v. Village of Walton, 143 N.E. 786, 788 (N.Y. 1924); Streat Coal Co. v. Frankfort Gen. Ins. Co., 142 N.E. 352, 355 (N.Y. 1923); Zimmerman v. Roessler & Hasslacher Chem. Co., 207 N.Y.S. 370 (N.Y. App. Div. 1925), *aff'd*, 148 N.E. 659 (N.Y. 1925); Cuciniello v. Cuciniello, 378 N.Y.S.2d 976, 977 (N.Y. Sup. Ct. 1976); Bayview Gen. Hosp. v. Associated Hosp. Serv. of New York, 256 N.Y.S.2d 471, 474 (N.Y. Sup. Ct. 1964); Flesch v. Flesch, 181 N.Y.S.2d 694, 698 (N.Y. Sup. Ct. 1958); Halpern v. Rodway, 167 N.Y.S.2d 260, 262 (N.Y. Sup. Ct. 1957); Jones v. Crawford, 148 N.Y.S.2d 335, 338-39 (N.Y. Sup. Ct. 1956), *rev'd on other grounds*, 162 N.Y.S.2d 41 (N.Y. App. Div. 1957); Siccardi v. Ajello, 190 N.Y.S. 704, 705 (N.Y. Sup. Ct. 1921); Melodies, Inc. v. Mirabile, 163 N.Y.S.2d 131, 134 (Albany City Ct. 1957), *aff'd as modified*, 179 N.Y.S.2d 991 (N.Y. App. Div. 1958).

13. Miller v. Continental Ins. Co., 358 N.E.2d 258, 261 (N.Y. 1976) (quoting Baltimore & Ohio Ry. v. Voight, 176 U.S. 498, 505 (1900)). *Accord* Levey v. Saphier, 370 N.Y.S.2d 808, 813 (N.Y. Sup. Ct. 1975).

14. Nichols v. Nichols, 119 N.E.2d 351, 355 (N.Y. 1954). *Accord* First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 237 N.E.2d 868, 870-71 (N.Y. 1968).

and conditions thereof."[15] There "always" had to "be two parties to a contract"[16] who entered into "an agreement"[17] to which they gave their "[m]utual assent," which was "essential to the formation of a contract."[18] In "the figurative language frequently used by the courts,"[19] contracts were formed by "a meeting of the minds,"[20] which occurred when a recipient of an offer accepted it in precisely the terms in which the offeror had communicated it.[21]

Formation of a Langdellian contract required not only mutuality of obligation, but also "a sufficient consideration . . . or, in other words, mutual binding promises, a mutuality of consideration."[22] "Consideration [was] the very essence of a contract and a contract or promise for which there [was] no consideration

15. Gupta v. University of Rochester, 395 N.Y.S.2d 566, 567 (N.Y. App. Div. 1977) (citations omitted). *Accord* Brooklyn Bus Corp. v. City of New York, 8 N.E.2d 309, 312 (N.Y. 1937); Smith v. Diem, 229 N.Y.S. 56, 59 (N.Y. App. Div. 1928), *aff'd*, 164 N.E. 595 (N.Y. 1928); Dorrance, Sullivan & Co. v. Bright Star Battery Co., 227 N.Y.S. 675, 677 (N.Y. App. Div. 1928), *rev'd on other grounds*, 164 N.E. 596 (N.Y. 1928); Van Slyke News Agency, Inc. v. News Syndicate Co., 202 N.Y.S. 725, 728 (N.Y. App. Div. 1924); Railroad Serv. & Adver. Co. v. Lazell, Perfumer, 192 N.Y.S. 686 (N.Y. App. Div. 1922); Gold Bond Stamp Co. v. MacDonald Stamp Co., 228 N.Y.S.2d 448 (N.Y. Sup. Ct. 1962), *rev'd on other grounds*, 230 N.Y.S.2d 467 (N.Y. App. Div. 1962); J.D. & H. Enters. Corp. v. Byrne, 175 N.Y.S.2d 726, 728 (N.Y. Sup. Ct. 1958); Berlin & Jones Co. v. Monroe Paper Box Co., 137 N.Y.S.2d 155, 156 (N.Y. Sup. Ct. 1954). *But cf.* Kadetz v. Harwood, 188 N.Y.S. 134 (N.Y. App. Term 1921) (contract not void for mutuality because one party reserves right to cancel).

16. Persky v. Bank of Am. Nat'l Ass'n, 185 N.E. 77, 79 (N.Y. 1933).

17. J.B. Preston Co. v. Funkhouser, 184 N.E. 737, 738 (N.Y. 1933), *aff'd*, 290 U.S. 163 (1933).

18. Lally v. Cronen, 159 N.E. 723, 725 (N.Y. 1928). At common law, a party could bind itself unilaterally to contractual liability by use of a seal. *See* United States Trust Co. v. Frelinghuysen, 43 N.E.2d 492, 493 (N.Y. 1942); Cochran v. Taylor, 7 N.E.2d 89, 91 (N.Y. 1937); Royal Bank of Canada v. Williams, 222 N.Y.S. 425, 428 (N.Y. App. Div. 1927). But, by statutory changes in 1935 and 1941, the legislature deprived seals of all legal effect. *See* Brick v. Cohn-Hall-Marx Co., 27 N.E.2d 518, 520 (N.Y. 1940); United States Trust Co. v. Preston, 34 N.Y.S.2d 646, 649 (N.Y. App. Div. 1942); Fox v. Sizeland, 9 N.Y.S.2d 350, 356 (N.Y. Sup. Ct. 1938).

19. Hughes v. John Hancock Mut. Life Ins. Co., 297 N.Y.S. 116, 119 (N.Y. Mun. Ct. 1937).

20. Farago v. Burke, 186 N.E. 683, 684 (N.Y. 1933). *Accord* Arliss v. Herbert Brenon Film Corp., 130 N.E. 587, 588 (N.Y. 1921); Radiocoin Co. v. Luria Steel & Trading Corp., 46 N.Y.S.2d 625, 627 (N.Y. App. Div. 1944), *aff'd*, 61 N.E.2d 253 (N.Y. 1945); Watts v. Thomas Carter & Sons, Inc., 202 N.Y.S. 852, 854 (N.Y. App. Div. 1924); Joseph v. Atlantic Basin Iron Works, 132 N.Y.S.2d 671, 673 (N.Y. Sup. Ct. 1954), *aff'd*, 143 N.Y.S.2d 601 (N.Y. App. Div. 1955); Wiederman v. Wiehl, 28 N.Y.S.2d 128 (N.Y. Sup. Ct. 1941); Hughes v. John Hancock Mut. Life Ins. Co., 297 N.Y.S. 116, 119 (N.Y. Mun. Ct. 1937). Despite use of the phrase "meeting of the minds," courts made it clear that parties became bound to contracts on the basis of their objective manifestations of intent, not their subjective intent. *See* Messina v. Lufthansa German Airlines, 390 N.E.2d 758, 759 (N.Y. 1979); Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp., 361 N.E.2d 999, 1001 (N.Y. 1977); Mencher v. Weiss, 114 N.E.2d 177, 181 (N.Y. 1953); Ahern v. South Buffalo Ry. Co., 104 N.E.2d 898, 907 (N.Y. 1952), *aff'd*, 344 U.S. 367 (1953); Porter v. Commercial Cas. Ins. Co., 54 N.E.2d 353, 356 (N.Y. 1944); P.J. Carlin Constr. Co. v. Whiffen Elec. Co., 411 N.Y.S.2d 27, 28-29 (N.Y. App. Div. 1978); Triboro Coach Corp. v. New York State Labor Relations Bd., 27 N.Y.S.2d 83, 85 (N.Y. App. Div. 1941), *aff'd*, 36 N.E.2d 315 (N.Y. 1941).

21. Gram v. Mutual Life Ins. Co., 91 N.E.2d 307, 310-11 (N.Y. 1950); Josephine & Anthony Corp. v. Horwitz, 396 N.Y.S.2d 53 (N.Y. App. Div. 1977); Hall v. Mutual Life Ins. Co., 122 N.Y.S.2d 239, 244 (N.Y. App. Div. 1953) (dictum), *aff'd*, 119 N.E.2d 598 (N.Y. 1954); Cohen v. Cerame, 89 N.Y.S.2d 635 (N.Y. App. Div. 1949); Benjamin v. Arundel Corp., 59 N.Y.S.2d 437 (N.Y. App. Div. 1946); Gunderson v. Kenyon, 2 N.Y.S.2d 1 (N.Y. App. Div. 1938); Barber-Greene Co. v. M.F. Dollard, Jr., Inc., 269 N.Y.S. 211, 215-16 (N.Y. App. Div. 1934), *aff'd*, 196 N.E. 571 (N.Y. 1935); Machinery Utils. Co. v. Fry, 231 N.Y.S. 148, 152 (N.Y. App. Div. 1928); Stearns v. Parkin, 229 N.Y.S. 215 (N.Y. App. Div. 1928); Eustathopoulo v. Gillespie, 218 N.Y.S. 24, 30 (N.Y. App. Div. 1926); New York Oversea Co. v. China, Japan & S. Am. Trading Co., 194 N.Y.S. 552 (N.Y. App. Div. 1922), *rev'd on other grounds*, 200 N.Y.S. 449 (N.Y. App. Div. 1923); Malis v. Knapp & Baxter, Inc., 188 N.Y.S. 5, 6 (N.Y. App. Div. 1921). *Cf.* S.A. Ghuneim & Co. v. Southwestern Shipping Corp., 124 N.Y.S.2d 303, 305-06 (N.Y. Sup. Ct. 1953) (mere acknowledgment of receipt of offer not an acceptance). *But see* Eastern Brass & Copper Co. v. General Elec. Supply Corp., 101 F. Supp. 410, 412 (S.D.N.Y. 1951) (answer need not repeat all terms of original offer); Club Chain of Manhattan, Ltd. v. Christopher & Seventh Gourmet, Ltd., 427 N.Y.S.2d 627, 631 (N.Y. App. Div. 1980) (even silence can constitute acceptance if misleading and inconsistent with honest dealings). The principle stated in the text was overruled by § 2-207 of the UCC. *See* Rite Fabrics, Inc. v. Stafford-Higgins Co., 366 F. Supp. 1, 6-9 (S.D.N.Y. 1973); CBS, Inc. v. Auburn Plastics, Inc., 413 N.Y.S.2d 50 (N.Y. App. Div. 1979).

22. Nassau Supply Co. v. Ice Serv. Co., 169 N.E. 383, 384 (N.Y. 1929).

[could] not be enforced at law."[23] With consideration, in short, a contract was good, but in its absence, a contract was "invalid."[24] Of necessity, therefore, the New York courts spent considerable energy determining what constituted good and sufficient consideration, arriving at rather standard Langdellian results.[25]

The rules applied in cases of implied contracts similarly protected parties from liability in cases in which they did not intend to be liable. Although judges rec-

23. Benet v. Berkey, 57 N.Y.S.2d 329, 330 (N.Y. Sup. Ct. 1945). *Accord* Porter v. Beha, 12 F.2d 513, 516 (2d Cir. 1926).

24. *In re* Crea's Estate, 266 N.E.2d 815, 817 (N.Y. 1971). *Accord* Ruegg v. Fairfield Sec. Corp., 125 N.E.2d 585, 591 (N.Y. 1955); Evans v. 2168 Broadway Corp., 22 N.E.2d 152, 154 (N.Y. 1939); Markson v. Markson's Furniture Stores, Inc., 195 N.E. 824, 825-26 (N.Y. 1935); Grossman v. Herman, 194 N.E. 694, 695-96 (N.Y. 1935); Keller v. American Chain Co., 174 N.E. 74, 75 (N.Y. 1930); Topken, Loring & Schwartz, Inc. v. Schwartz, 163 N.E. 735, 736 (N.Y. 1928); Moller v. Paulivico, 149 N.E. 829 (N.Y. 1925); *In re* Bogert's Estate, 222 N.Y.S. 221 (N.Y. App. Div. 1927); Crocker v. Page, 206 N.Y.S. 481, 483 (N.Y. App. Div. 1924), *aff'd*, 148 N.E. 738 (N.Y. 1925); Walton Water Co. v. Village of Walton, 203 N.Y.S. 343, 346-47 (N.Y. App. Div. 1924), *rev'd on other grounds*, 143 N.E. 786 (N.Y. 1924); Rodgers v. Rodgers, 197 N.Y.S. 494, 496 (N.Y. App. Div. 1922), *aff'd as modified*, 139 N.E. 557 (N.Y. 1923); Glickman v. Glickman, 185 N.Y.S. 421, 423 (N.Y. App. Div. 1920); Larido Corp. v. Crusader Mfg. Corp., 155 N.Y.S.2d 715, 719-20 (N.Y. Sup. Ct. 1956).

25. Consideration sufficient to make a promise binding was defined by the Court of Appeals as a "thing to be done in exchange for" the promise. Hammond Oil Co. v. Standard Oil Co., 181 N.E. 583, 587 (N.Y. 1932). Thus, "a promise exchanged for a bargained-for-promise [was] sufficient consideration." Cowan v. Dewitt, 129 N.Y.S.2d 724, 727 (N.Y. Sup. Ct. 1954), *aff'd*, 135 N.Y.S.2d 379 (N.Y. App. Div. 1954). *Cf.* Dairymen's League Co-Op Ass'n v. Holmes, 202 N.Y.S. 663, 669 (N.Y. App. Div. 1924) (implied promise sufficient consideration), *aff'd*, 147 N.E. 171 (N.Y. 1924). An act done in exchange for a promise would likewise constitute sufficient consideration, even "where there [was] no benefit" to the promissor, but "merely a detriment to the other of the parties." Osborne v. Curtis, 204 N.Y.S. 304, 306 (N.Y. App. Div. 1924), *aff'd*, 147 N.E. 219 (N.Y. 1925). *Accord* Scott v. Motor Lodge Properties, Inc., 231 N.Y.S.2d 780, 782-83 (Monroe County Ct. 1962). *But cf.* Petterson v. Pattberg, 161 N.E. 428, 429 (N.Y. 1928) (promise not binding until act performed). Agreements to modify existing contracts or to settle bona fide disputes were also deemed to be supported by sufficient consideration. For cases dealing with modification of existing contracts which were deemed to be supported by sufficient consideration, *see* Rodgers v. Rodgers, 139 N.E. 557 (N.Y. 1923); Beacon Terminal Corp. v. Chemprene, Inc., 429 N.Y.S.2d 715, 717-18 (N.Y. App. Div. 1980); Peabody v. Interborough Rapid Transit Co., 209 N.Y.S. 380, 384 (N.Y. App. Div. 1925); Lemont v. Schindelar, 181 N.Y.S. 765 (N.Y. App. Div. 1920); Peabody v. Interborough Rapid Transit Co., 202 N.Y.S. 287, 291 (N.Y. Sup. Ct. 1923); *cf. In re* Estate of Rothko, 372 N.E.2d 291, 298-99 (N.Y. 1977) (whether contract altered an issue of fact). For cases dealing with settlement of a bona fide dispute, *see* Joseph T. Ryerson & Son, Inc. v. A.V. O'Donnell, Inc., 17 N.E.2d 788, 791 (N.Y. 1938); Schuttinger v. Woodruff, 181 N.E. 361, 362 (N.Y. 1932); Fristenberg v. Wasserman, 189 N.Y.S.2d 411, 413 (N.Y. App. Div. 1959); Elgin Nat'l Watch Co. v. Bulova Watch Co., 118 N.Y.S.2d 197, 200 (N.Y. App. Div. 1953); Smith & McCrorken, Inc. v. Chatham Phenix Nat'l Bank & Trust Co., 221 N.Y.S. 638, 640 (N.Y. App. Div. 1927); Soevyn v. Ruhl, 104 N.Y.S.2d 771, 772 (N.Y. Sup. Ct. 1951); National Union Bank of Monticello v. Baker, 250 N.Y.S. 217, 219 (N.Y. Sup. Ct. 1931); Weill v. Paradiso, 188 N.Y.S. 287, 289 (N.Y. Sup. Ct. 1921); Harvey v. J.P. Morgan & Co., 2 N.Y.S.2d 520, 525 (N.Y. Mun. Ct. 1937), *rev'd on other grounds*, 25 N.Y.S.2d 636 (N.Y. App. Term 1938); Plunkett v. O'Connor, 295 N.Y.S. 492, 495 (N.Y. Mun. Ct. 1937). On the other hand, a promise to perform an act that the promissor was already obligated to perform could not constitute consideration. *See* Ripley v. International Rys. of Cent. Am., 171 N.E.2d 443, 447 (N.Y. 1960); Schram v. Cotton, 24 N.E.2d 305, 308 (N.Y. 1939); Ashton v. Baker Mfg. Corp., 201 N.Y.S. 259 (N.Y. App. Div. 1923); Nahoum v. Slocum, Avram & Slocum Trading Co., 182 N.Y.S. 318, 320 (N.Y. App. Div. 1920); Rapp v. Cansdale, 214 N.Y.S.2d 522, 530-31 (N.Y. Sup. Ct. 1960), *aff'd*, 211 N.Y.S.2d 1002 (N.Y. App. Div. 1961); Berwin Paper Corp. v. Village of Dansville, 50 N.Y.S.2d 636, 641 (N.Y. Sup. Ct. 1944). *But cf.* Duffy Bros., Inc. v. Bing & Bing, Inc., 215 N.Y.S. 755, 758 (N.Y. App. Div. 1926) (promise to complete work more rapidly upheld). Likewise, a promise to pay extra compensation for the performance of such an act was, therefore, without consideration. *See* Schwartzreich v. Bauman-Basch, Inc., 131 N.E. 887, 889 (N.Y. 1921); Gotterer v. South River Spinning Co., 199 N.Y.S. 542 (N.Y. App. Term 1923); Acme Wood Carpet Flooring Co. v. Braddock, 203 N.Y.S. 554, 557 (N.Y. Sup. Ct. 1924). Acts of love and affection, *see* Collins v. Collins, 88 N.Y.S.2d 136, 137 (N.Y. City Ct. 1949), friendship of courtesy, *see* Gilman v. Hunnewell, 181 N.Y.S. 202 (N.Y. App. Div. 1920), or mere moral obligation, *see* Pershall v. Elliott, 163 N.E. 554, 556 (N.Y. 1928), all failed to constitute consideration. Finally, the courts maintained that "nothing [was] consideration that [was] not regarded as such by both parties; that the fortuitous presence in a promise of some detriment [was] not enough; the promissor and promisee must have dealt with it as the inducement to the promise." United States Trust Co. v. Frelinghuysen, 28 N.Y.S.2d 448, 451 (N.Y. App. Div. 1941), *rev'd on other grounds*, 43 N.E.2d 492 (N.Y. 1942). *Accord* Beck v. Sheldon, 181 N.E. 360, 361 (N.Y. 1932); McGovern v. City of New York, 138 N.E. 26, 31 (N.Y. 1923); Keeler v. Templeton, 298 N.Y.S. 193, 195 (N.Y. Sup. Ct. 1937). *But cf.* Kessler v. A.W. Haile Motor Co., 217 N.Y.S. 182, 184 (N.Y. Sup. Ct. 1926) (promise can be good consideration, even if beneficiary unknown at time promise made).

ognized that contractual liability could be implied on the basis of either conduct or language,[26] they also held that "[a]n agreement by conduct [did] not differ from an express agreement, except in the manner by which its existence is established."[27] Thus, they would normally refuse to imply a contract unless both parties thereto had acted on the understanding that they were assuming contractual liability.[28] Nor would a contract be implied "where an express and enforceable contract exist[ed] between the same parties as to the same subject matter and where a conflict would result."[29] "'The doctrine of implied contract [could] not be invoked to do rough justice and fasten liability where the legal requirements specifically prohibit[ed].'"[30] As the Court of Appeals reiterated,

> A contract cannot be implied *in fact* where the facts are inconsistent with its existence, or against the declaration of the party to be charged, or where there is an express contract covering the subject-matter involved, or against the intention or understanding of the parties . . . . The assent of the person to be charged is necessary, and unless he has conducted himself in such a manner that his assent may be fairly inferred, he has not contracted.[31]

Courts would imply contractual liability in the absence of assent only in the narrow area of quasi-contract. As the Court of Appeals explained, however, "[q]uasi contracts [were] not contracts at all," but "mere fiction[s] . . . . [Quasi contracts were] imposed by law where there [had] been no agreement or expression of assent, by word or act, on the part of either party involved."[32] Quasi-contractual liability, which was, in many ways, more akin to tort than to contract, rested "'upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.'"[33] Although "the existence of an express contract covering the subject matter" would bar "recovery on an inconsistent contract implied *in fact*," it would not bar recovery on "a quasi contract, which [was] implied in law."[34]

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26. *See* Long Island R.R. v. Northville Indus. Corp., 362 N.E.2d 558, 562 (N.Y. 1977) (dictum); Berth v. Knapp, 212 N.Y.S. 771 (N.Y. App. Div. 1925); Robinson v. Hayes' Estate, 202 N.Y.S. 732, 735 (N.Y. App. Div. 1924), *aff'd*, 147 N.E. 175 (N.Y. 1924); *In re* Klausner's Will, 77 N.Y.S.2d 775, 785 (N.Y. Sur. Ct. 1948).

27. Ahern v. South Buffalo Ry., 104 N.E.2d 898, 907 (N.Y. 1952), *aff'd*, 344 U.S. 367 (1953). *Accord* Jemzura v. Jemzura, 330 N.E.2d 414, 420 (N.Y. 1975).

28. *See* Shapira v. United Med. Serv., Inc., 205 N.E.2d 293, 298 (N.Y. 1965); Anderson v. Distler, 17 N.Y.S.2d 674, 679-80 (N.Y. Sup. Ct. 1940); Patchogue Properties, Inc. v. Cirillo, 283 N.Y.S.2d 560, 563 (N.Y. Dist. Ct. 1967), *aff'd*, 302 N.Y.S.2d 58 (N.Y. Sup. App. Term 1969).

29. Abinet v. Mediavilla, 169 N.Y.S.2d 231, 232 (N.Y. App. Div. 1957). *Cf.* Raile v. Peerless Am. Prods. Co., 182 N.Y.S. 721, 723 (N.Y. App. Div. 1920) (recovery in quantum meruit may not exceed amount recoverable under express contract).

30. Kelly v. Cohoes Hous. Auth., 280 N.Y.S.2d 250, 252 (N.Y. App. Div. 1967) (quoting Lutzken v. City of Rochester, 184 N.Y.S.2d 483, 486 (N.Y. App. Div. 1959)), *aff'd*, 243 N.E.2d 746 (N.Y. 1968).

31. Grombach Prods., Inc. v. Waring, 59 N.E.2d 425, 428 (N.Y. 1944) (quoting Miller v. Schloss, 113 N.E. 337, 339 (N.Y. 1916)).

32. Bradkin v. Leverton, 257 N.E.2d 643, 645 (N.Y. 1970).

33. *Id.* (quoting Miller v. Schloss, 113 N.E. at 339). *Accord* Stern v. Warren, 125 N.E. 811, 812-13 (N.Y. 1920); Singer Co. v. Alka Knitting Mills, Inc., 343 N.Y.S.2d 146, 148 (N.Y. App. Div. 1973); Mautner v. Eitingon, 189 N.Y.S. 567, 569 (N.Y. App. Div. 1921); Lengel v. Lengel, 382 N.Y.S.2d 678, 681 (N.Y. Sup. Ct. 1976); Andrews v. O'Grady, 252 N.Y.S.2d 814, 817-18 (N.Y. Sup. Ct. 1964); Marrano v. State, 364 N.Y.S.2d 751, 754-55 (N.Y. Ct. Cl. 1975); *In re* Phillips, 173 N.Y.S.2d 632, 635 (N.Y. Sur. Ct. 1958); Royal Indem. Co. v. Sol Lustbader, Inc., 26 N.Y.S.2d 328, 330 (N.Y. City Ct. 1941).

34. Polley v. Plainshun Corp., 186 N.Y.S.2d 295, 297 (N.Y. App. Div. 1959).

B. Contract Interpretation

The core principle of freedom of contract, in turn, dictated the core principle of contract interpretation—that is, that "[i]n construing contracts the courts endeavor to arrive at the meaning intended by the parties,"[35] "who must be presumed to have known what was essential to a valid contract . . . ."[36] In searching for "the intention of the parties," courts, at least initially, looked to "the language [they] employed"[37] which, in specified instances, was required to be in writing.[38] But,

35. Fox Film Corp. v. Springer, 8 N.E.2d 23, 24 (N.Y. 1937). *Accord In re* Estate of Wilson, 405 N.E.2d 220, 222-23 (N.Y. 1980); Cromwell Towers Redevelopment Co. v. City of Yonkers, 359 N.E.2d 333, 336-37 (N.Y. 1976); Mallad Constr. Corp. v. County Fed. Sav. & Loan Ass'n, 298 N.E.2d 96, 101 (N.Y. 1973); Rudman v. Cowles Communications, Inc., 280 N.E.2d 867, 873 (N.Y. 1972); *In re* Schmith's Estate, 227 N.E.2d 290, 292 (N.Y. 1967); Morlee Sales Corp. v. Manufacturers Trust Co., 172 N.E.2d 280, 281 (N.Y. 1961); Inman v. Binghamton Hous. Auth., 143 N.E.2d 895, 900 (N.Y. 1957); Madawick Contracting Co. v. Travelers Ins. Co., 120 N.E.2d 520, 523 (N.Y. 1954); Skinner v. Paramount Pictures, Inc., 63 N.E.2d 64, 66 (N.Y. 1945); Empire Properties Corp. v. Manufacturers Trust Co., 43 N.E.2d 25, 27-28 (N.Y. 1942); *In re* Lawyers Westchester Mortgage & Title Co., 41 N.E.2d 449, 452 (N.Y. 1942); Thompson-Starrett Co. v. Otis Elevator Co., 2 N.E.2d 35, 37 (N.Y. 1936); Updike v. Oakland Motor Car Co., 242 N.Y.S. 329, 332 (N.Y. App. Div. 1930); Wagner v. G. Gaudig & Blum Corp., 228 N.Y.S. 139, 142 (N.Y. App. Div. 1928); International Fuel & Iron Corp. v. Donner, 223 N.Y.S. 110, 115 (N.Y. App. Div. 1927); Gale v. Frost-Anderson Sales Co., 215 N.Y.S. 267 (N.Y. App. Div. 1926); Cromwell v. American Bible Soc'y, 195 N.Y.S. 217, 224 (N.Y. App. Div. 1922); Cleveland v. Clark, 181 N.Y.S. 756, 758 (N.Y. App. Div. 1920).

36. *In re* Huxley, 61 N.E.2d 419, 421 (N.Y. 1945).

37. Hartford Accident & Indem. Co. v. Wesolowski, 305 N.E.2d 907, 909 (N.Y. 1973). *Accord* Breed v. Insurance Co. of N. Am., 385 N.E.2d 1280, 1282 (N.Y. 1978); Rodolitz v. Neptune Paper Prods. Co., 239 N.E.2d 628, 630-31 (N.Y. 1968); Wilson Sullivan Co. v. International Paper Makers Realty Corp., 119 N.E.2d 573, 574 (N.Y. 1954); Green v. Doniger, 90 N.E.2d 56, 59-60 (N.Y. 1949); Engel v. Guaranty Trust Co., 19 N.E.2d 673, 675 (N.Y. 1939); Wirth & Hamid Fair Booking, Inc. v. Wirth, 192 N.E. 297, 299 (N.Y. 1934); Hopwood Plays, Inc. v. Kemper, 189 N.E. 461, 462-63 (N.Y. 1934); Brown v. Bedell, 188 N.E. 641 (N.Y. 1934); Hutchison v. Ross, 187 N.E. 65, 72 (N.Y. 1933); Edward S. Mitchell, Inc. v. Dannemann Hosiery Mills, 179 N.E. 39, 41 (N.Y. 1931); Urbis Realty Co. v. Globe Realty Co., 139 N.E. 238, 239 (N.Y. 1923); Ivor B. Clark, Inc. v. Boston Road Shopping Ctr, Inc., 207 N.Y.S.2d 582, 588 (N.Y. Sup. Ct. 1960).

Construction of the language of a "plain contract, clear and explicit in its terms," was a matter of law for the court, but if the language was ambiguous, then parole evidence of the circumstances surrounding the making of the contract became admissible, and the determination of meaning became a question for the trier of fact. Weinberg & Holman, Inc. v. Providence Washington Ins. Co., 173 N.E. 556, 557 (N.Y. 1930). *Accord* Teitelbaum Holdings, Ltd. v. Gold, 396 N.E.2d 1029, 1031 (N.Y. 1979); Schuler-Haas Elec. Co. v. Aetna Cas. & Sur. Co., 357 N.E.2d 1003, (N.Y. 1976); West, Weir & Bartel, Inc. v. Mary Carter Paint Co., 255 N.E.2d 709, 711 (N.Y. 1969); Nucci v. Warshaw Constr. Corp., 186 N.E.2d 401, 402 (N.Y. 1962); Bethlehem Steel Co. v. Turner Constr. Co., 141 N.E.2d 590, 592 (N.Y. 1957); Heller & Henretig, Inc. v. 3620-168th Street, Inc., 98 N.E.2d 458, 459 (N.Y. 1951); General Phoenix Corp. v. Cabot, 89 N.E.2d 238, 240 (N.Y. 1949); Johnson v. Western Union Tel. Co., 57 N.E.2d 721, 725 (N.Y. 1944); Nau v. Vulcan Rail & Constr. Co., 36 N.E.2d 106, 111 (N.Y. 1941); Elco Shoe Mfrs., Inc. v. Sisk, 183 N.E. 191, 192 (N.Y. 1932); Brainard v. New York Cent. R.R., 151 N.E. 152, 154 (N.Y. 1926); Crown Corset Co. v. C. Ludwig Baumann & Co., 210 N.Y.S. 60, 63 (N.Y. App. Div. 1925), *aff'd*, 150 N.E. 574 (N.Y. 1926); Slattery v. Cothran, 206 N.Y.S. 576, 577 (N.Y. App. Div. 1924); Robinson v. Liebman, 202 N.Y.S. 645, 646 (N.Y. App. Div. 1924). *See also* 67 Wall Street Co. v. Franklin Nat'l Bank, 333 N.E.2d 184, 186 (N.Y. 1975); Aron v. Gillman, 128 N.E.2d 284, 288 (N.Y. 1955); Mascioni v. I.B. Miller, Inc., 184 N.E. 473 (N.Y. 1933); Becker v. Peter A. Frasse & Co., 173 N.E. 905, 906-07 (N.Y. 1930); Rose Stone & Concrete, Inc. v. County of Broome, 429 N.Y.S.2d 295, 296 (N.Y. App. Div. 1980); Nord v. Ruderman, 309 N.Y.S.2d 709 (N.Y. App. Div. 1970); Savage Realty Co. v. Lust, 196 N.Y.S. 296, 298 (N.Y. App. Div. 1922); Delaware Mills, Inc. v. Carpenter Bros., 193 N.Y.S. 201 (N.Y. App. Div. 1922), *aff'd*, 139 N.E. 725 (N.Y. 1923); American Aniline Prods., Inc. v. Mitsui & Co., 179 N.Y.S. 895, 898 (N.Y. App. Div. 1920); Meltzer v. Kaminer, 227 N.Y.S. 459, 460 (N.Y. Sup. Ct. 1927). *Cf.* Liberty Pipe & Boiler Covering Co. v. Zichlin & Fischer, Inc., 127 N.Y.S.2d 83 (N.Y. App. Term 1953) (parole evidence admissible to show illegality of contract). *But see* Intercontinental Planning, Ltd. v. Daystrom, Inc., 248 N.E.2d 576, 579-80 (N.Y. 1969) (parole evidence not admissible if contract unambiguous); Mitchell v. Lath, 160 N.E. 646 (N.Y. 1928) (same); Ruppert v. Singhi, 153 N.E. 33, 34 (N.Y. 1926) (same); Whirlpool Corp. v. Regis Leasing Corp., 288 N.Y.S.2d 337, 339-40 (N.Y. App. Div. 1968) (parole evidence not admissible to contradict writing); Gold v. Ross, 187 N.Y.S. 72, 74 (N.Y. App. Div. 1921) (parole evidence not admissible if contract unambiguous), *aff'd*, 138 N.E. 471 (N.Y. 1922); Meyers v. Knights of Pythias Bronx Temple Ass'n, 185 N.Y.S. 436, 438 (N.Y. App. Div. 1920) (parole evidence not admissible to construe contract under seal); United Display Fixture Co. v. S. & W. Bauman, 183 N.Y.S. 4 (N.Y. App. Term 1920) (parole evidence not admissible to contradict writing).

38. Judicial interpretation of the statute of frauds, or the law dealing with the requirement that certain contracts be in writing, remained substantially unchanged during the period under study. Let us begin with contracts for the sale or devise of land, which had to be in writing. *See* Sleeth v. Sampson, 142 N.E. 355 (N.Y.

1923); Sinclair v. Purdy, 210 N.Y.S. 208, 212 (N.Y. App. Div. 1925), *aff'd*, 152 N.E. 426 (N.Y. 1926); Peters v. Day, 210 N.Y.S. 42 (N.Y. Sup. Ct. 1925); Diesel v. Otto, 196 N.Y.S. 120, 122 (N.Y. Sup. Ct. 1922), *aff'd*, 203 N.Y.S. 926 (N.Y. App. Div. 1924). *But see* Becker v. Wells, 78 N.E.2d 609 (N.Y. 1948) (broker's agreement to invest funds in mortgages need not be in writing); Mattikow v. Sudarsky, 162 N.E. 296 (N.Y. 1928) (formation of partnership to engage in land transactions need not be in writing). They also had to satisfy a series of other requirements. They had to state fully the terms of the deal, *see* Pollak v. Dapper, 220 N.Y.S. 104 (N.Y. App. Div. 1924), *aff'd*, 157 N.E. 886 (N.Y. 1927); Poulcek v. Jahoda, 196 N.Y.S. 445, 446 (N.Y. App. Div. 1922); they had to identify by name or description the buyer and seller, *see* LeRand Corp. v. Meltzer, 196 N.E. 283 (N.Y. 1935); Irvmore Corp. v. Rodewald, 171 N.E. 747 (N.Y. 1930); Tobias v. Lynch, 182 N.Y.S. 643, 644 (N.Y. App. Div. 1920), *aff'd*, 135 N.E. 898 (N.Y. 1922); Halperin v. Magida, 201 N.Y.S. 180, 181 (N.Y. Sup. Ct. 1923); and they had to be subscribed by the seller, *see* Hefford v. Lichtman, 190 N.Y.S. 554, 557 (N.Y. Sup. Ct. 1921); In re Degenkolb's Estate, 113 N.Y.S.2d 880, 882 (N.Y. Sur. Ct. 1952); *see also* Zilmaur Realty Corp. v. Pinkney, 203 N.Y.S. 715, 716 (N.Y. App. Div. 1924) (purchaser need not sign contract) (dictum); Schaefer v. Steuernagel, 187 N.Y.S. 261 (N.Y. App. Term 1921); Alpert v. G.R.E. Constr. Corp., 215 N.Y.S. 322 (N.Y. Sup. Ct. 1926) (same); or the seller's agent, *see* Le Long v. Siebrecht, 187 N.Y.S. 150, 151 (N.Y. App. Div. 1921); *cf.* Walter v. Laidlaw, 162 N.E. 580 (N.Y. 1928) (contract enforceable against co-vendors if signed by one vendor); and, if by an agent, the authority of the agent had to be established in writing, *see* Davis v. Dunnet, 146 N.E. 620 (N.Y. 1925). A principal's ratification of an agent's signature could serve as a substitute for a written authorization. *See* Mills v. Giometti, 218 N.Y.S. 276, 278 (N.Y. App. Div. 1926). Prior to *Davis v. Dunnet, supra*, an undisclosed principal could recover on a contract signed by an agent even without written proof of the agency. *See* Byrne v. McDonough, 186 N.Y.S. 807, 808-09 (N.Y. Sup. Ct. 1921), *aff'd*, 188 N.Y.S. 913 (N.Y. App. Div. 1921). Leases of land for a term in excess of one year also had to be in writing. *See* Geraci v. Jenrette, 363 N.E.2d 559, 562 (N.Y. 1977); Commission on Ecumenical Mission v. Roger Gray, Ltd., 267 N.E.2d 467, 469 (N.Y. 1971); Raleigh Assocs., Inc. v. Henry, 99 N.E.2d 289, 290 (N.Y. 1951); 300 West End Ave. Corp. v. Warner, 165 N.E. 271 (N.Y. 1929). But many of the special requirements for contracts dealing with the sale of land did not apply. *See* Delk Realty Corp. v. Rubin, 182 N.Y.S. 786 (N.Y. App. Term 1920); Diamond v. Talbot, 205 N.Y.S. 309, 311 (N.Y. Sup. Ct. 1924).

Contracts to guarantee the debt of another also had to be in writing, *see* Savoy Record Co. v. Cardinal Export Corp., 203 N.E.2d 206 (N.Y. 1964); Buckley v. Shaw, 44 N.E.2d 398 (N.Y. 1942); Newburger v. Lubell, 193 N.E. 440, 441 (N.Y. 1934); and they also had to satisfy strict requirements. Such a contract, for example, had to state, in full, its terms, nature, and extent. *See* Griffin v. Bookman, 346 N.E.2d 534 (N.Y. 1976); Carson Petroleum Co. v. Union Commerciale des Petroles, 213 N.Y.S. 630, 632 (N.Y. App. Div. 1926), *aff'd*, 154 N.E. 592 (N.Y. 1926). *See also* Watson v. Quilter, 222 N.Y.S. 386 (N.Y. App. Div. 1927) (informal letter by officer of corporation to take care of plaintiff's salary from corporation not an adequate memorandum under statute), *aff'd*, 164 N.E. 584 (N.Y. 1928). It also had to state the consideration given for the guarantee. *See* Standard Oil Co. v. Koch, 183 N.E. 278, 278-79 (N.Y. 1932); Keating v. Flaherty, 221 N.Y.S. 127 (N.Y. App. Term 1927). *But cf.* Sun Oil Co. v. Heller, 161 N.E. 319, 320 (N.Y. 1928) (consideration sufficiently stated). As was the case with contracts for the sale of land, courts were concerned with protecting the freedom of individuals not to be bound to contractual liability in the absence of a clearly expressed intent to be bound. As the Court of Appeals explained in 1934,

> it is many times hard enough for a man to pay his own debts without assuming the debts of others, and the law has very wisely required such an assumption or obligation to be reduced by formality to writing, where the nature of the undertaking will not be left to the uncertainty of memory or the misunderstanding of parties.

Newburger v. Lubell, 193 N.E. 440, 441-42 (N.Y. 1934). Thirty years later, the Court of Appeals still agreed that the Statute of Frauds was

> [d]esigned to safeguard against false claims . . . [and was] based upon the sound consideration of policy that . . . [t]he obligation of a guarantor is, admittedly, a heavy one, and the courts should refrain from foisting such an obligation upon a party . . . absent the requisite clear and unequivocal evidence, to be gathered from the writing itself.

Savoy Record Co. v. Cardinal Export Corp., 203 N.E.2d 206, 208-09 (N.Y. 1964).

New York courts had a totally different attitude toward the requirement that ordinary commercial contracts for the sale of goods in excess of statutorily specified values be evidenced by a written memorandum. *See* Schaefer v. Alvarez, 162 N.E. 603 (N.Y. 1928). Their concern here was to keep the wheels of commerce turning. The courts always enforced the main rule that a memorandum evidencing a sale of goods had to be signed by the party to be charged or its agent. *See* Bellas Hess & Co. v. Alexander & Co., 186 N.Y.S. 792, 793 (N.Y. App. Div. 1921); Schwarzenbach v. Schwartz, 193 N.Y.S. 573 (N.Y. App. Term 1922); Eugene L. Lezinsky Co. v. Hoffman, 181 N.Y.S. 732 (N.Y. App. Term 1920), *aff'd*, 185 N.Y.S. 937 (N.Y. App. Div. 1920); Joseph Galin Co. v. Newhouse, 180 N.Y.S. 812, 814 (N.Y. App. Term 1920); Fox v. Cavalcade Fabrics, Inc., 115 N.Y.S.2d 65, 66-67 (N.Y. City Ct. 1950), *aff'd*, 113 N.Y.S.2d 474 (N.Y. App. Div. 1952). *See also* Apollo Steel Co. v. C.H. Brushaber & Co., 206 N.Y.S. 301, 303 (N.Y. App. Div. 1924) (signature by agent will bind undisclosed principal). But, there was no requirement that the signature be subscribed or that the buyer and seller be identified as such. *See* Schwartz v. Vigden, 206 N.Y.S. 321 (N.Y. App. Div. 1924); Pearlberg v. Levisohn, 182 N.Y.S. 615, 618 (N.Y. App. Term 1920). Until a 1960 statutory change copied from § 2-201 of the UCC, the courts additionally stated that the memorandum had to contain all the material terms of the agreement. *See* Donald Friedman & Co. v. Newman, 174 N.E. 703 (N.Y. 1931); Bell Clothes Shops, Inc. v. Kamber, 197 N.Y.S. 244 (N.Y. App. Div. 1922), *aff'd*, 142 N.E. 287 (N.Y. 1923); Kronfeld v. Natelson, 187 N.Y.S. 449 (N.Y. App. Term 1921); Wieser v. Emerman & Baumoehl Co., 185 N.Y.S. 79 (N.Y. App. Term 1920); Nordic Trading Co. v. Imperial Forwarding Co., 96 N.Y.S.2d 745, 747 (N.Y. City Ct. 1949), *aff'd*, 98 N.Y.S.2d 412 (N.Y. Sup. Ct. 1950). But, in order to find such terms, they were frequently willing to turn to parole evidence, *see*

Northeastern Paper Co. v. Concord Paper Co., 212 N.Y.S. 318, 321 (N.Y. App. Div. 1925) (precise quantity can be determined from parole evidence if rough quantity stated), *aff'd*, 152 N.E. 428 (N.Y. 1926); custom, *see* Le Roy Silk Mills, Inc. v. Majestic Shirt Co., 204 N.Y.S. 528 (N.Y. App. Div. 1924) (custom admissible to show size of pieces of cloth sold under contract); and a duty to act reasonably, *see* Van Iderstine Co. v. Barnet Leather Co., 152 N.E. 250, 251 (N.Y. 1926) (if time for delivery not stated, a reasonable time will be implied). After the 1960 statutory change and the subsequent enactment of the UCC, quantity was the only term required to be specified. *See* Oswald v. Allen, 417 F.2d 43, 46 (2d Cir. 1969). *But see* Morris Cohon & Co. v. Russell, 245 N.E.2d 712, 715-16 (N.Y. 1969). The memorandum evidencing the sale of goods, moreover, was "not the contract itself," but "only the evidentiary manifestation of the contract." Abkco Indus., Inc. v. Apple Films, Inc., 350 N.E.2d 899, 901 (N.Y. 1976). Thus, the memorandum did not have to contain all the terms of the contract, as long as it acknowledged that the contract existed and contained the required signature. *See* Howell v. Garrett & Co., 218 N.Y.S. 301, 304-05 (N.Y. App. Div. 1926); Naus Trimming Co. v. Lubars, 48 N.Y.S.2d 385 (N.Y. Sup. Ct. 1944); Tilton & Keeler, Inc. v. Bachrach, 202 N.Y.S. 506 (N.Y. City Ct. 1923). Nor was a contract for specially-manufactured goods required to satisfy the statute. *See* Berman Stores Co. v. Hirsh, 148 N.E. 212 (N.Y. 1925) (dictum).

New York judges were equally flexible and liberal with the Statute of Frauds provision requiring a written memorandum for all contracts that could not be performed within a year. *See* Zupan v. Blumberg, 141 N.E.2d 819 (N.Y. 1957); Martocci v. Greater New York Brewery, Inc., 92 N.E.2d 887, 889 (N.Y. 1950); Dorman v. Cohen, 413 N.Y.S.2d 377, 378-79 (N.Y. App. Div. 1979); Lonsdale v. J.A. Migel, Inc., 225 N.Y.S. 593, 598-99 (N.Y. App. Div. 1927); Alhambra Amusement Co. v. Associated First Nat'l Pictures, Inc., 202 N.Y.S. 605, 606-07 (N.Y. App. Div. 1924), *aff'd*, 152 N.E. 413 (N.Y. 1926). In this instance, the court effectively gutted the statute by holding that no writing was necessary if a contract theoretically could "be performed within a year . . . even if, as a practical matter, it were well nigh impossible of performance." Shirley Polykoff Adver., Inc. v. Houbigant, Inc., 374 N.E.2d 625, 626 (N.Y. 1978); Freedman v. Chemical Constr. Corp., 372 N.E.2d 12, 15 (N.Y. 1977); North Shore Bottling Co. v. C. Schmidt & Sons, 239 N.E.2d 189 (N.Y. 1968); Cinefot Int'l Corp. v. Hudson Photographic Indus., 196 N.E.2d 54 (N.Y. 1963); Duncan v. Clarke, 125 N.E.2d 569, 571 (N.Y. 1955). As was true in the case of contracts for the sale of goods, a contract to be performed over a term longer than a year could be evidenced by a writing or writings executed after the contract had taken effect and made for a different purpose than providing a record thereof. *See* Crabtree v. Elizabeth Arden Sales Corp., 110 N.E.2d 551, 552 (N.Y. 1953).

Like contracts not to be completed within a year, contracts that could not be completed within a lifetime and contracts to make testamentary gifts also had to be in writing. *See In re* Levin's Estate, 99 N.E.2d 877 (N.Y. 1951) (by implication); Meltzer v. Koenigsberg, 99 N.E.2d 679 (N.Y. 1951); Ralph v. Cronk, 195 N.E. 139 (N.Y. 1934); Keezer v. Seely, 142 N.E. 286 (N.Y. 1923). *But cf.* Schechner v. Zipser, 89 N.Y.S.2d 354 (N.Y. Sup. Ct. 1949) (written memorandum held sufficient to satisfy Statute of Frauds), *aff'd*, 97 N.Y.S.2d 914 (N.Y. App. Div. 1950). Similarly affected were contracts in contemplation of marriage. *See In re* Goldberg's Estate, 9 N.E.2d 829 (N.Y. 1937); *but cf.* Hurwitz v. Hurwitz, 215 N.Y.S. 184 (N.Y. App. Div. 1926) (upholding written antenuptial agreement in Hebrew promising future wife all property rights of a widow under Jewish law). Contracts to pay brokers' fees also had to be in writing. *See* Karlin v. Avis, 457 F.2d 57 (2d Cir. 1972); Munichiello v. Royal Bus. Funds Corp., 223 N.E.2d 793, 795 (N.Y. 1966).

Other doctrines also limited the impact of the Statute of Frauds. The most important provided that performance, *see* Kelley v. Champlain Studios, Inc., 228 N.Y.S. 500, 504 (N.Y. App. Div. 1928); Suren v. Handel, 200 N.Y.S. 474 (N.Y. App. Div. 1923); or even part performance, *see* Hyman-Michaels Co. v. Senior & Palmer, Inc., 192 N.E. 407, 408 (N.Y. 1934); Thomaier v. Hoffman Chevrolet, Inc., 410 N.Y.S.2d 645, 648 (N.Y. App. Div. 1978); Sayer v. Sunderland, 220 N.Y.S. 409, 412-13 (N.Y. App. Div. 1927); Tabor v. Hills, 218 N.Y.S. 323 (N.Y. Sup. Ct. 1926); Whitaker v. Westberg, 208 N.Y.S. 638, 639-40 (N.Y. Sup. Ct. 1925), *aff'd*, 213 N.Y.S. 935 (N.Y. App. Div. 1925); Brune v. VonLehn, 183 N.Y.S. 360, 363-64 (N.Y. Sup. Ct. 1920), *aff'd*, 187 N.Y.S. 928 (N.Y. App. Div. 1921); *but see* Drake v. Sop, 227 N.Y.S. 576, 578 (N.Y. Sup. Ct. 1928) (part performance insufficient); of a contract obviated any need for a writing, at least as long as the performance was unequivocably referable to the contract. *See* Wills v. Wills, 269 N.E.2d 40 (N.Y. 1971); Wilson v. LaVan, 238 N.E.2d 738, 739-40 (N.Y. 1968); Neverman v. Neverman, 173 N.E. 838, 839 (N.Y. 1930); Burns v. McCormick, 135 N.E. 273, 273-74 (N.Y. 1922); All-Year Golf, Inc. v. Products Investors Corp., 310 N.Y.S.2d 881, 885 (N.Y. App. Div. 1970); Marsh v. Marsh, 227 N.Y.S. 34, 36 (N.Y. App. Div. 1928), *aff'd*, 162 N.E. 520 (N.Y. 1928); Life Savers' Club, Inc. v. Mosher, 209 N.Y.S. 741 (N.Y. Sup. Ct. 1925). Another rule declared that a failure to plead the Statute of Frauds would constitute waiver because the Statute of Frauds does "not make the contract void but merely unenforcible." Acuri v. Figliolli, 398 N.Y.S.2d 923, 926 (N.Y. Dist. Ct. 1977). *Accord* Harmon v. Alfred Peats Co., 154 N.E. 314, 315 (N.Y. 1926). The courts also held that the statute could not be pleaded by "one who by his agreement, acts, and conduct ha[d] induced another to incur expense and alter his position to his damage," M. H. Metal Prod. Corp. v. April, 167 N.E. 201, 202 (N.Y. 1929); *accord* Walter v. Hoffman, 196 N.E. 291, 292-93 (N.Y. 1935); or by one seeking "to take advantage of its own wrong." Keystone Hardware Corp. v. Tague, 158 N.E. 27, 28 (N.Y. 1927). Finally, the courts permitted written contracts to be modified orally, *see* Perlman v. East Annadale Beach Corp., 253 N.Y.S. 775, 778 (N.Y. App. Div. 1931); unless the contract was one required by the Statute of Frauds to be in writing, *see* Cammack v. J.B. Slattery & Brother, Inc., 148 N.E. 781, 782-83 (N.Y. 1925); A. Sidney Davison Coal Co. v. Weston, Dodson & Co., 205 N.Y.S. 49, 52 (N.Y. App. Div. 1924), *aff'd*, 148 N.E. 767 (N.Y. 1925); Charles Albert Co. v. Newtown Creek Realty Corp., 206 N.Y.S. 673 (N.Y. App. Div. 1924); Maddaloni Olive Oil Co. v. Aquino, 180 N.Y.S. 724, 726 (N.Y. App. Div. 1920); or unless the original contract provided that modifications had to be in writing. *See* DFI Communications, Inc. v. Greenberg, 363 N.E.2d 312, 314-15 (N.Y. 1977); 20 East 74th Street, Inc. v. Minskoff, 126 N.E.2d 532, 535-36 (N.Y. 1955).

in cases of ambiguity, canons of interpretation also became operative.[39] Most frequently cited was the canon that, "where there is ambiguity in the terms of a contract prepared by one of the parties, 'it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against' such party."[40] Other canons dictated that courts should not "'adopt an interpretation' which [would] operate to leave a 'provision of a contract . . . without force and effect.'"[41] Instead, they should give preference to specific provisions over general provisions[42] and avoid constructions that would produce harsh results, forfeitures,[43] or give one party "an unfair and unreasonable advantage over the other."[44] In order that "[f]orm . . . not prevail over substance,"[45] courts were free to ignore "the literal meaning of the language used."[46] The words of a contract could even be "transposed, rejected, or supplied, to make its meaning more clear."[47]

In construing contracts, however, courts could not "'make a new contract for the parties under the guise of interpreting the writing,'"[48] although they could receive parole evidence and reform a contract to reflect the true intent of the par-

39. *See* Central Union Trust Co. v. Trimble, 174 N.E. 72, 73 (N.Y. 1930). *But see* First Nat'l Bank of East Islip v. National Sur. Co., 127 N.E. 479, 480 (N.Y. 1920) (canons of construction inapplicable when contract clear).

40. Rentaways, Inc. v. O'Neill Milk & Cream Co., 126 N.E.2d 271, 273 (N.Y. 1955) (citation omitted). *Accord* Taylor v. United States Cas. Co., 199 N.E. 620, 621-22 (N.Y. 1936); Evelyn Bldg. Corp. v. City of New York, 178 N.E. 771, 774 (N.Y. 1931); Ira S. Bushey & Sons v. American Ins. Co., 142 N.E. 340, 341 (N.Y. 1923); Schneider v. Vietor, 203 N.Y.S. 897, 899 (N.Y. App. Div. 1924); Fellows v. Fairbanks Co., 199 N.Y.S. 772, 774 (N.Y. App. Div. 1923); Edwards v. Tennis, 179 N.Y.S. 807, 810 (N.Y. App. Div. 1920); Steinhilber v. Challenger Steel Prods. Corp., 187 N.Y.S.2d 373, 374 (N.Y. Sup. Ct. 1959), *rev'd on other grounds*, 191 N.Y.S.2d 1009 (N.Y. App. Div. 1959); Craine, Inc. v. Platt, 49 N.Y.S.2d 709, 711 (N.Y. Sup. Ct. 1944); Robie v. Wheeler Shipyard, Inc., 3 N.Y.S.2d 813, 815 (N.Y. Sup. Ct. 1938), *aff'd*, 12 N.Y.S.2d 764 (N.Y. App. Div. 1939); Dery v. Blatz, 205 N.Y.S. 15 (N.Y. Sup. Ct. 1924), *aff'd*, 146 N.E. 204 (N.Y. 1924); Frye v. State, 78 N.Y.S.2d 342, 346 (N.Y. Ct. Cl. 1948); Stream v. Sportscar Salon, Ltd., 397 N.Y.S.2d 677, 681 (N.Y. Civ. Ct. 1977). *But cf.* Surry Strathmore Corp. v. Dollar Savings Bank, 325 N.E.2d 527, 529-30 (N.Y. 1975) (canons of construction cannot be used to fill in terms parties declined to include).

41. Corhill Corp. v. S.D. Plants, Inc., 176 N.E.2d 37, 38 (N.Y. 1961). *Accord* Laba v. Carey, 277 N.E.2d 641, 644 (N.Y. 1971); National Conversion Corp. v. Cedar Bldg. Corp., 246 N.E.2d 351, 353-54 (N.Y. 1969); Muzak Corp. v. Hotel Taft Corp., 133 N.E.2d 688, 690 (N.Y. 1956); Fox Film Corp. v. Hirschman, 202 N.Y.S. 854, 856-57 (N.Y. Sup. Ct. 1924), *aff'd*, 207 N.Y.S. 838 (N.Y. App. Div. 1925).

42. *See* William Higgins & Sons, Inc. v. State, 231 N.E.2d 285, 286 (N.Y. 1967); Wilson & English Constr. Co. v. New York Cent. R.R., 269 N.Y.S. 874, 878-79 (N.Y. App. Div. 1934); Dwane v. Weil, 192 N.Y.S. 393, 404 (N.Y. App. Div. 1922), *aff'd*, 139 N.E. 720 (N.Y. 1923). *But cf.* McGarry Contracting Co. v. Board of Educ., 30 N.E.2d 482 (N.Y. 1940) (construction contract to be preferred over specifications).

43. *See* Fifty States Management Corp. v. Pioneer Auto Parks, Inc., 389 N.E.2d 113, 115-16 (N.Y. 1979); O & W Lines, Inc. v. St. John, 228 N.E.2d 370, 373 (N.Y. 1967); *In re* Herzog, 93 N.E.2d 336, 340 (N.Y. 1950); Schnitzer v. Freuhauf Trailer Co., 128 N.Y.S.2d 242, 253 (N.Y. App. Div. 1954), *aff'd*, 122 N.E.2d 754 (N.Y. 1954); Savery v. Commercial Travelers' Mut. Accident Ass'n, 263 N.Y.S. 118, 119 (N.Y. App. Div. 1933); Jessar Realty Corp. v. Louis Friedman Realty Co., 236 N.Y.S. 565 (N.Y. App. Div. 1929), *rev'd on other grounds*, 171 N.E. 62 (N.Y. 1930). *Cf.* McLean v. F.W. Woolworth Co., 198 N.Y.S. 467, 470 (N.Y. App. Div. 1923) (deeds should be construed to limit restrictions), *aff'd*, 142 N.E. 305 (N.Y. 1923).

44. Kavanaugh v. Cohoes Power & Light Corp., 187 N.Y.S. 216, 227 (N.Y. Sup. Ct. 1921). *Accord* ARC Elec. Constr. Co. v. George A. Fuller Co., 247 N.E.2d 111, 112 (N.Y. 1969); Tibbetts Contracting Corp. v. O & E Contracting Co., 206 N.E.2d 340, 345 (N.Y. 1965); Shore Bridge Corp. v. State, 61 N.Y.S.2d 32, 42 (N.Y. Ct. Cl. 1946), *aff'd*, 66 N.Y.S.2d 921 (N.Y. App. Div. 1946).

45. William C. Atwater & Co. v. Panama R.R., 159 N.E. 418, 419 (N.Y. 1927). *Accord* Heller v. Pope, 164 N.E. 881, 882 (N.Y. 1928). *See also* Nassau Chapter, Civil Serv. Employees Ass'n v. County of Nassau, 430 N.Y.S.2d 98, 100 (N.Y. App. Div. 1980), *aff'd*, 429 N.E.2d 831 (N.Y. 1981).

46. *In re* Bond & Mortgage Guar. Co., 196 N.E. 313, 315 (N.Y. 1935).

47. Castellano v. State, 374 N.E.2d 618, 620 (N.Y. 1978). *See also* City of New York v. Pennsylvania R.R., 333 N.E.2d 361, 362 (N.Y. 1975).

48. Friedman v. Handelman, 90 N.E.2d 31, 34 (N.Y. 1949). *Accord* Fiore v. Fiore, 389 N.E.2d 138 (N.Y. 1979).

ties if the apparent contract had rested on a mutual mistake of fact.[49] Rescission or cancellation of a contract was available for unilateral mistake,[50] but a contract could not be reformed on that ground.[51]

II. THE DEVELOPMENT OF LIMITATIONS ON FREEDOM OF CONTRACT

Although the New York courts continued to pay heed to the core precept of freedom of contract throughout the twentieth century, important doctrinal changes also began occurring as early as the 1920s. Over time, the most important of these changes cut a deep swath into the classic Langdellian core, with the result that, by mid-century, concerns other than contract freedom lay at the foundation of contract doctrine.

The engine that initially drove the doctrinal changes of the 1920s was the emergence of a new majority on the seven-judge Court of Appeals. As of the beginning of 1920, all the judges on the Court that were elected to full fourteen-year terms, with the single exception of Benjamin N. Cardozo, were Protestants, and all, but Cardozo, were from upstate counties. Then, at the beginning of 1924, a second Jew from Manhattan, Irving Lehman, joined the Court for a full term, and a Catholic, John F. O'Brien, also of New York City, joined the Court permanently in 1927. Meanwhile, a Protestant from a New York City suburb, Frederick E. Crane, had been elected to a fourteen-year term which began on January 1, 1921. Thus, by the end of the decade, four of the seven judges on the Court of Appeals came from the New York City metropolitan region, and three

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49. *See* Brandwein v. Provident Mut. Life Ins. Co., 146 N.E.2d 693, 695 (N.Y. 1957); Raphael v. Booth Mem'l Hosp., 412 N.Y.S.2d 409, 411 (N.Y. App. Div. 1979); Gibbons v. Perkins, 230 N.Y.S. 273, 277 (N.Y. Sup. Ct. 1928); Schultz v. Busendorf, 191 N.Y.S. 629, 632 (N.Y. Sup. Ct. 1921). *But cf.* Ariel v. Ariel, 165 N.Y.S.2d 986, 990 (N.Y. Sup. Ct. 1957) (no relief for mistake of law), *rev'd in part on other grounds*, 171 N.Y.S.2d 138 (N.Y. App. Div. 1958).

50. *See* Rosenblum v. Manufacturers Trust Co., 200 N.E. 587 (N.Y. 1936); People v. John W. Rouse Constr. Corp., 274 N.Y.S.2d 981, 984 (N.Y. App. Div. 1966); Sheridan Drive-In, Inc. v. State, 228 N.Y.S.2d 576, 582 (N.Y. App. Div. 1962); Moses v. Carver, 5 N.Y.S.2d 783, 785 (N.Y. App. Div. 1938); Batto v. Westmoreland Realty Co., 246 N.Y.S. 498, 504 (N.Y. App. Div. 1930); Balaban-Gordon Co. v. Brighton Sewer Dist. No. 2, 323 N.Y.S.2d 724, 730 (N.Y. Sup. Ct. 1971), *aff'd*, 342 N.Y.S.2d 435 (N.Y. App. Div. 1973); Brook-Lea Country Club, Inc. v. Hanover Ins. Co., 306 N.Y.S.2d 780, 784 (N.Y. Sup. Ct. 1969); Van Curler Dev. Corp. v. City of Schenectady, 300 N.Y.S.2d 765, 773 (N.Y. Sup. Ct. 1969); Union Free School Dist. No. 1 v. Gumbs, 133 N.Y.S.2d 499, 503 (N.Y. Sup. Ct. 1954); Seidman v. New York Life Ins. Co., 296 N.Y.S. 55 (N.Y. Sup. Ct. 1937), *aff'd*, 2 N.Y.S.2d 634 (N.Y. App. Div. 1938), *aff'd*, 17 N.E.2d 680 (N.Y. 1938). *Cf.* Gramby v. Carold Realty Co., 248 N.Y.S.2d 772, 774 (N.Y. App. Div. 1964) (dictum) (rescission allowed for innocent misrepresentation); Eastern Dist. Piece Dye Works, Inc. v. Travelers' Ins. Co., 190 N.Y.S. 822, 826 (N.Y. App. Div. 1921) (same), *aff'd*, 138 N.E. 401 (N.Y. 1923). The standard for rescission in federal government contract cases was higher: a mistake had to be so great that the other party should have been aware of it. *See* Universal Transistor Prods. Corp. v. United States, 214 F. Supp. 486, 488 (E.D.N.Y. 1963). A contract would not be rescinded, however, if a party assumed the risk that a fact might be other than what was desired. For example, when an experienced cattle breeder purchased a bull calf prior to the age at which the calf's fertility could be determined, the court held that the breeder knew of the risk that the calf would prove sterile and, therefore, that the breeder intended to assume the risk. Backus v. MacLaury, 106 N.Y.S.2d 401, 404 (N.Y. App. Div. 1951). Thus, the court declined to rescind the contract and permit return of the bull to the seller. *Id.* Similarly, the Second Circuit held in a leading case that, "[w]hen the government sells surplus goods," buyers "know perfectly well that there is always the chance of buying property that may turn out to be of little value, or may develop into a great bargain with a huge windfall profit," and it accordingly declined to allow either rescission or reformation. Dadourian Export Corp. v. United States, 291 F.2d 178, 182 (2d Cir. 1961).

51. *See* Rosenblum v. Manufacturers Trust Co., 200 N.E. 587, 587-89 (N.Y. 1936); American Motorists Ins. Co. v. Reich, 237 N.Y.S.2d 369, 371 (N.Y. Sup. Ct. 1963).

were either Catholic or Jewish.[52] Thereafter, at least three, and often a majority, of the judges of the seven-member court were either Catholics or Jews, and comparable numbers of judges had their origins in New York City and its suburbs.

The religion, ethnicity, and geographic origins of the judges were important. Langdellian contract law had been framed for late nineteenth-century, rural America, where business enterprises were small and local and where the geographic regions in which they operated enjoyed substantial ethnic and religious homogeneity that gave shared meaning to the words people used in effectuating their business dealings. Protestant, small-town, upstate New York, in 1920, still resembled Langdell's America. But, New York City, with its immigrant masses and its national and even international commercial dealings, did not. It therefore needed a somewhat different body of contract law, and as its judges came to dominate the Court of Appeals, they began to give it that new law.

Part II of this Article will consider, in turn, each of the changes in doctrine that the Court of Appeals began to fashion in the 1920s. First, it will examine the emergence of rules for filling in essential contractual terms left open by the parties. Then, it will turn to the development of the doctrine of substantial performance. The next two subjects will be unconscionability and promissory estoppel. Finally, some miscellaneous doctrines will be analyzed.

A. Closing Contractual Gaps

An important set of rules, derived from classic precepts of freedom of contract, provided that, if the parties to a contract neglected to specify all the terms of their agreement, their contract would fail for indefiniteness. The classic concept was that judges could enforce only what the parties had stipulated and that, in the absence of key terms, there was nothing to enforce.

As early as the 1920s, however, the New York courts were routinely declining to honor the classic doctrine. Throughout the century, the courts took an approach, later codified in the UCC, that filled gaps in agreements by reference to business custom or other standards of reasonableness. Requirements contracts, for example, were readily upheld.[53] Other cases similarly determined that, when

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52. *See generally* the page at the outset of each volume of the NEW YORK REPORTS, which lists the judges of the Court of Appeals, and WHO WAS WHO IN AMERICA, vols. 1-4 (Chicago: Marquis-Who's Who, Inc., 1943-1968). For Judge Crane's religious affiliation, *see F.E. Crane, 78, Dies; Led State Jurists*, N.Y. TIMES, Nov. 22, 1947, at 15.

53. *See* Stern v. Premier Shirt Corp., 183 N.E. 363 (N.Y. 1932); Randolph McNutt Co. v. Eckert, 177 N.E. 386, 388 (N.Y. 1931); Ehrenworth v. George F. Stuhmer & Co., 128 N.E. 108 (N.Y. 1920); Edison Elec. Illuminating Co. v. Thacher, 128 N.E. 124 (N.Y. 1920); Mar-Bond Beverage Corp. v. Dublin Distrib., Inc., 195 N.Y.S.2d 730 (N.Y. App. Div. 1959); E. Richard Meinig Co. v. United States Fastener Co., 193 N.Y.S. 106 (N.Y. App. Div. 1922); Phillips-Jones Co. v. Reiling & Schoen, Inc., 184 N.Y.S. 387, 393 (N.Y. App. Div. 1920); Gutman v. Sal-Vio Masons, Inc., 339 N.Y.S.2d 562, 565 (N.Y. Sup. Ct. 1972), *aff'd*, 359 N.Y.S.2d 766 (N.Y. App. Div. 1974); Tauchner v. Burnett, 223 N.Y.S.2d 800 (N.Y. Sup. Ct. 1961); *In re* Harman, 155 N.Y.S.2d 482, 486 (N.Y. Sup. Ct. 1956). But, the early cases held that indefiniteness as to quantity would preclude a contract if no standard existed by which to determine quantity. *See* Oscar Schlegel Mfg. Co. v. Peter Cooper's Glue Factory, 132 N.E. 148, 149 (N.Y. 1921); Plant Mfg. Corp. v. Renner, 212 N.Y.S. 710, 713-14 (N.Y. App. Div. 1925), *aff'd*, 154 N.E. 604 (N.Y. 1926); Tura, Inc. v. Metaplast Corp., 72 N.Y.S.2d 836 (N.Y. Sup. Ct. 1947). For a case involving a requirements contract under the UCC, *see* Orange & Rockland Utils., Inc. v. Amerada Hess Corp., 397 N.Y.S.2d 814 (N.Y. App. Div. 1977).

a contract failed to specify a time for performance, performance had to occur within a reasonable time;[54] that, if a method of performance was unspecified, the method had to be reasonable;[55] and that a failure to specify a rate of interest would result in interest payments at the legal rate.[56] As Judge Cardozo declared in one early case construing a contract clause giving a buyer the "'privilege . . . to confirm more of the above if'" the seller "'can get more,'" the clause "was drawn by merchants," who "reading it would not be doubtful of its meaning. It was meant to accomplish something. We find no such elements of vagueness as to justify the conclusion that in reality it accomplished nothing."[57] As Cardozo added, invalidation of a contract for indefiniteness was "at best a last resort."[58] A half century later, the Court of Appeals still agreed that "[p]ractical business people [could] not be expected to govern their actions with reference to nice legal formalisms" and hence, "failure to articulate . . . [an] agreement in the precise language of a [Langdellian] lawyer . . . [would] not prevent formation of a contract."[59]

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54. *See* Lee v. Joseph Seagram & Sons, Inc., 413 F. Supp. 693, 698 (S.D.N.Y. 1976), *aff'd*, 552 F.2d 447 (2d Cir. 1977); Haines v. City of New York, 364 N.E.2d 820, 822 (N.Y. 1977); Rosen v. Equitable Paper Bag Co., 36 N.E.2d 641, 643 (N.Y. 1941); A.B. Murray Co. v. Lidgerwood Mfg. Co., 150 N.E. 514 (N.Y. 1926); John F. Trainor Co. v. G. Amsinck & Co., 140 N.E. 931 (N.Y. 1923); Lake Steel Erection, Inc. v. Egan, 403 N.Y.S.2d 387, 389 (N.Y. App. Div. 1978); Perillo v. De Martini, 387 N.Y.S.2d 280 (N.Y. App. Div. 1976); Mercer Tube & Mfg. Co. v. American Zinc Sales Co., 17 N.Y.S.2d 132, 134 (N.Y. App. Div. 1940), *aff'd*, 30 N.E.2d 491 (N.Y. 1940); C. Bahnsen & Co. v. Leaf, 197 N.Y.S. 160 (N.Y. App. Div. 1922); Turner-Looker Co. v. Aprile, 187 N.Y.S. 367, 369 (N.Y. App. Div. 1921), *aff'd*, 138 N.E. 429 (N.Y. 1922); Helburn v. Dawson, 200 N.Y.S. 281 (N.Y. App. Term 1923); Valley Nat'l Bank of Long Island v. Babylon Chrysler-Plymouth, Inc., 280 N.Y.S.2d 786, 788 (N.Y. Sup. Ct. 1967), *aff'd*, 284 N.Y.S.2d 849 (N.Y. App. Div. 1967); Bonjour Realty Corp. v. Maslin, 235 N.Y.S.2d 158, 162 (N.Y. Sup. Ct. 1962); Mitler v. Friedeberg, 222 N.Y.S.2d 480, 489 (N.Y. Sup. Ct. 1961); Craine, Inc. v. Platt, 49 N.Y.S.2d 709, 712 (N.Y. Sup. Ct. 1944); 41st St. Bus Terminal, Inc. v. Klinger, 235 N.Y.S. 45 (N.Y. Sup. Ct. 1929), *aff'd*, 246 N.Y.S. 888 (N.Y. App. Div. 1930); George v. Davoli, 397 N.Y.S.2d 895 (Geneva City Ct. 1977). *Cf.* United States Surgical Corp. v. Oregon Med. & Surgical Specialties, Inc., 497 F. Supp. 68, 71-72 (S.D.N.Y. 1980) (allowing termination of franchise agreement after reasonable time); Farm Supplies Corp. v. Goldstein, 270 N.Y.S. 430, 433 (N.Y. App. Div. 1934) (payment for services due when services performed); Spielvogel v. Veit, 189 N.Y.S. 899, 901 (N.Y. App. Div. 1921) (dictum) (if no time specified for payment of note, it will be payable on demand); Suessel v. J. Early Wood & Co., 39 N.Y.S.2d 112 (N.Y. City Ct. 1942) (time of the essence in commercial contracts). *See also* Berman v. Standard Wood Heel Co., 211 N.Y.S. 649 (N.Y. App. Term 1925) (omission of contract date immaterial). *But see* M & S Mercury Air Conditioning Corp. v. Dunkirk Bldg. Corp., 239 N.Y.S.2d 190, 192 (N.Y. App. Div. 1963) (dictum); Clifton Shirting Co. v. Bronne Shirt Co., 209 N.Y.S. 709 (N.Y. App. Div. 1925); Frederick R. Smith, Inc. v. Karsh, 206 N.Y.S. 685 (N.Y. App. Term 1924).

55. *See* Foster v. Stewart, 188 N.Y.S. 151, 153 (N.Y. App. Div. 1921) (dictum); Lunn v. Silfies, 431 N.Y.S.2d 282, 284 (N.Y. Sup. Ct. 1980); Rose v. Brown, 58 N.Y.S.2d 654, 656-57 (N.Y. Sup. Ct. 1945); Miles v. Fraternal Order of Eagles Lodge 544, 84 N.Y.S.2d 773 (Middletown City Ct. 1948).

56. *See* Spielvogel v. Veit, 189 N.Y.S. 899, 901 (N.Y. App. Div. 1921) (dictum). *But see* Neiss v. Franze, 422 N.Y.S.2d 345, 347 (N.Y. Sup. Ct. 1979).

57. Heyman Cohen & Sons, Inc. v. M. Lurie Woolen Co., 133 N.E. 370, 371 (N.Y. 1921) (quoting the parties' pleadings).

58. *Id.* at 371. *Accord* Geiger v. Bush, 43 N.E.2d 445, 448 (N.Y. 1942); Wedtke Realty Corp. v. Karanas, 143 N.Y.S.2d 198, 199 (N.Y. App. Div. 1955), *aff'd*, 131 N.E.2d 579 (N.Y. 1955). Thus, a court might sustain an action for damages even when a contract was too indefinite to support a decree for specific performance. *See* Corti v. Continental Copper & Steel Export Corp., 223 F. Supp. 503, 510 (S.D.N.Y. 1963). Or, a court might even excise a portion of a contract that was void for indefiniteness and uphold the remainder of the contract. *See* Reiburn v. Roseman, 239 N.E.2d 174 (N.Y. 1968). *But see* Chiapparelli v. Baker, Kellogg & Co., 169 N.E. 274, 277 (N.Y. 1929) (striking down a promise as too indefinite for legal enforcement).

59. Kleinschmidt Div. of SCM Corp. v. Futuronics Corp., 363 N.E.2d 701, 702 (N.Y. 1977). *Accord* Luis v. Rosenblatt Casing Co., 418 F.2d 1300, 1301-02 (2d Cir. 1969); V'Soske v. Barwick, 404 F.2d 495, 500 (2d Cir. 1968); Morse v. Swank, Inc., 459 F. Supp. 660, 666-67 (S.D.N.Y. 1978); Niederhoffer, Cross & Zeckhauseer, Inc. v. Telstat Systems, Inc., 436 F. Supp. 180, 183 n.3 (S.D.N.Y. 1977); Metro-Goldwyn-Mayer, Inc. v. Scheider, 360 N.E.2d 930, 931 (N.Y. 1976); Park Inn Hotel, Inc. v. Messing, 224 N.Y.S.2d 179, 184 (N.Y. Sup. Ct. 1962). *But see* Allen & Co. v. Occidental Petroleum Corp., 382 F. Supp. 1052, 1057-58 (S.D.N.Y. 1974) (refusing to enforce contract when parties did not intend to be bound), *aff'd*, 519 F.2d 788 (2d Cir. 1975); Trimmer v. Van Bomel, 434 N.Y.S.2d 82, 89 (N.Y. Sup. Ct. 1980) (refusing to enforce agreement between wealthy widow and male companion because agreement lacked "clear bounds and parameters").

Although some early cases refused to fix uncertain price terms by reference to outside market standards,[60] others did anticipate the UCC[61] and take that step.[62] The New York courts also anticipated other important rules, subsequently codified in the Code, reflective of the fact that in "transaction[s] between laymen," people "used expressions as businessmen understand them," not as lawyers.[63] Thus, as early as the 1920s, the courts, in order to give precise meaning to ambiguous contract provisions, were prepared to receive evidence concerning

60. *See* Ansorge v. Kane, 155 N.E. 683, 684 (N.Y. 1927); Sun Printing & Publ'g Ass'n v. Remington Paper & Power Co., 139 N.E. 470 (N.Y. 1923); St. Regis Paper Co. v. Hubbs & Hastings Paper Co., 138 N.E. 495, 496-07 (N.Y. 1923); Ray Proof Corp. v. Buffalo Gravel Corp., 170 N.Y.S.2d 657 (N.Y. App. Div. 1958); Harry Friedman, Inc. v. Comet Knitting Mills, Inc., 89 N.Y.S.2d 185 (N.Y. App. Div. 1949); Warrin v. Charm Fashions, Inc., 82 N.Y.S.2d 476, 478 (N.Y. Sup. Ct. 1948), *aff'd*, 89 N.Y.S.2d 704 (N.Y. App. Div. 1949); Quale v. McDaniels, 217 N.Y.S. 22 (N.Y. Sup. Ct. 1926); Queensboro Farm Prods., Inc. v. State, 24 N.Y.S.2d 413 (N.Y. Ct. Cl. 1940), *aff'd*, 29 N.Y.S.2d 563 (N.Y. App. Div. 1941), *aff'd*, 40 N.E.2d 1017 (N.Y. 1942); *In re* Galewitz' Estate, 148 N.Y.S.2d 823, 829 (N.Y. Sur. Ct. 1955), *aff'd*, 163 N.Y.S.2d 937 (N.Y. App. Div. 1957). *See also* Schnall v. Clearfield Cheese Co., 257 N.Y.S.2d 491 (N.Y. App. Div. 1965) (both price and quantity unspecified).

61. *See* U.C.C. § 2-305.

62. *See* Huron Mill Co. v. Hedges, 257 F.2d 258, 261-62 (2d Cir. 1958); Franklin Sugar Ref. Co. v. Lipowicz, 160 N.E. 916, 918-20 (N.Y. 1928); Cronk v. Vogt's Ice Cream, Inc., 15 N.Y.S.2d 649, 652 (N.Y. Sup. Ct. 1939) (dictum). *Cf.* Knapp v. McFarland, 344 F. Supp. 601, 612 (S.D.N.Y. 1971) (employment agreement not within scope of UCC); Meaott Constr. Co. v. Ross, 431 N.Y.S.2d 207, 208 (N.Y. App. Div. 1980) (same); Ehrlich v. Cohn, 145 N.Y.S.2d 117, 120-21 (N.Y. Sup. Ct. 1955) (construing agreement to pay when "financially able"), *rev'd on other grounds*, 151 N.Y.S.2d 802 (N.Y. App. Div. 1956).

63. Distillers Factors Corp. v. Country Distillers Prods., Inc., 71 N.Y.S.2d 654, 658 (N.Y. Sup. Ct. 1947).

trade usage and custom,[64] as well as the parties' course of dealing,[65] both of which were considered to reflect the parties' practical understanding of the contract's meaning. Finally, New York judges anticipated the UCC with the rule that

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Accord Outlet Embroidery Co. v. Derwent Mills, Ltd., 172 N.E. 462, 463 (N.Y. 1930) (opinion of the Court by Cardozo, C.J.).

64. *See* du Pont de Nemours Int'l v. S.S. Mormacvega, 367 F. Supp. 793, 797 (S.D.N.Y. 1972), *aff'd*, 493 F.2d 97 (2d Cir. 1974); Eskimo Pie Corp. v. Whitelawn Dairies, Inc., 284 F. Supp. 987, 992 (S.D.N.Y. 1968); Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 119 (S.D.N.Y. 1960) (dictum); Schubtex, Inc. v. Allen Snyder, Inc., 399 N.E.2d 1154, 1156 (N.Y. 1979); B.M. Heede, Inc. v. Roberts, 103 N.E.2d 419, 420-21 (N.Y. 1952); Stulsaft v. Mercer Tube & Mfg. Co., 43 N.E.2d 31, 33 (N.Y. 1942); Mann v. R. Simpson & Co., 36 N.E.2d 658, 662 (N.Y. 1941); Mesibov, Glinert & Levy, Inc. v. Cohen Bros. Mfg. Co., 157 N.E. 148, 150 (N.Y. 1927); Shoyer v. Edmund Wright-Ginsberg Co., 148 N.E. 328, 330 (N.Y. 1925); Mutual Chem. Co. v. Marden, Orth & Hastings Co., 139 N.E. 221, 222 (N.Y. 1923); Krstovic v. Van Buren, 138 N.E. 749, 750 (N.Y. 1923); Universal Ltd. v. S. Stern & Co., 311 N.Y.S.2d 317, 318-19 (N.Y. App. Div. 1970); R.L. Rothstein Corp. v. Kerr S.S. Co., 251 N.Y.S.2d 81, 84 (N.Y. App. Div. 1964) (dictum), *aff'd*, 206 N.E.2d 360 (N.Y. 1965); Kasen v. Morrell, 175 N.Y.S.2d 315, 317 (N.Y. App. Div. 1958); Yarmove v. Robinson, 161 N.Y.S.2d 815 (N.Y. App. Div. 1957); First Nat'l Bank of Bridgeport v. Blackman, 227 N.Y.S. 602, 605 (N.Y. App. Div. 1928), *rev'd on other grounds*, 164 N.E. 113 (N.Y. 1928); MacDowell-Peterman Co. v. Independent Packing Co., 208 N.Y.S. 341, 349 (N.Y. App. Div. 1925); Deveso v. Chandler, 206 N.Y.S. 604, 606-08 (N.Y. App. Div. 1924), *aff'd*, 150 N.E. 554 (N.Y. 1925); Vietor v. National City Bank, 193 N.Y.S. 868, 878 (N.Y. App. Div. 1922); Carroll v. Harris, 186 N.Y.S. 539, 540-41 (N.Y. App. Term 1921); New Hampshire Ins. Co. v. Cruise Shops, Inc., 323 N.Y.S.2d 352, 354 (N.Y. Sup. Ct. 1971); Evans v. Criss, 240 N.Y.S.2d 517, 519-20 (N.Y. Sup. Ct. 1963); Hayes v. Board of Trustees, 225 N.Y.S.2d 316, 320 (N.Y. Sup. Ct. 1962); Joannes Bros. Co. v. Czarnikow-Rionda Co., 201 N.Y.S. 409, 412-14 (N.Y. Sup. Ct. 1923), *aff'd*, 205 N.Y.S. 930 (N.Y. App. Div. 1924); Cable-Wiedemer, Inc. v. A. Friederich & Sons Co., 336 N.Y.S.2d 139, 141 (N.Y. County Ct. 1972); Lucisano v. Paratore, 88 N.Y.S.2d 715 (Syracuse Mun. Ct. 1949), *aff'd*, 98 N.Y.S.2d 608 (N.Y. Co. Ct. 1950). Of course, a custom would not be enforceable unless known to the party to be charged. *See* Hutchison v. Brown, 97 N.Y.S.2d 757, 762 (N.Y. App. Div. 1950); Ford v. Snook, 199 N.Y.S. 630, 633-34 (N.Y. App. Div. 1923), *aff'd*, 148 N.E. 732 (N.Y. 1925); Harris v. H.W. Gossard Co., 185 N.Y.S. 861, 864 (N.Y. App. Div. 1921). Nor could a custom be proved to vary a rule of law, *see* In re A.W. Cowen & Bros., Inc., 11 F.2d 692, 695 (2d Cir. 1926); Cudahy Packing Co. v. Narzisenfeld, 3 F.2d 567, 572 (2d Cir. 1924); to vary an unambiguous contractual provision, *see* Pink v. American Surety Co., 28 N.E.2d 842, 845 (N.Y. 1940); Green v. Wachs, 173 N.E. 575, 576-07 (N.Y. 1930); Roberts Bros. Co. v. Grein, 221 N.Y.S. 321, 322 (N.Y. Sup. Ct. 1927), or to vary a contractual understanding, *see* Cohen v. Bratt & Doxey Supply Co., 379 N.Y.S.2d 155, 157-58 (N.Y. App. Div. 1976). With regard to the distinction between custom or usage, on the one hand, and rules of a supervisory body, on the other, *see* Hyman v. Sachs, 86 N.Y.S.2d 237 (N.Y. Sup. Ct. 1948), *aff'd*, 89 N.Y.S.2d 608 (N.Y. App. Div. 1949), *aff'd*, 89 N.E.2d 20 (N.Y. 1949).

65. *See* Intersynco Suisse v. Amtraco Supply Co., 590 F.2d 55, 56 (2d Cir. 1979); Schubtex, Inc. v. Allen Snyder, Inc., 399 N.E.2d 1154, 1156 (N.Y. 1979); Gearns v. Commercial Cable Co., 56 N.E.2d 67, 69 (N.Y. 1944) (dictum); Hedeman v. Fairbanks, Morse & Co., 36 N.E.2d 129, 134 (N.Y. 1941); Chinnery v. Kennosset Realty Co., 36 N.E.2d 97, 99 (N.Y. 1941) (dictum); Brooklyn Public Library v. City of New York, 166 N.E. 179, 181 (N.Y. 1929); Newburger v. American Surety Co., 151 N.E. 155, 158 (N.Y. 1926); Webster's Red Seal Publications, Inc. v. Gilberton World-Wide Publications, Inc., 415 N.Y.S.2d 229, 230 (N.Y. App. Div. 1979), *aff'd*, 421 N.E.2d 118 (N.Y. 1981); Borden v. Chesterfield Farms, Inc., 277 N.Y.S.2d 494, 495 (N.Y. App. Div. 1967); Taber v. First Citizens Bank & Trust Co., 288 N.Y.S. 350, 357 (N.Y. App. Div. 1936), *aff'd*, 7 N.E.2d 682 (N.Y. 1937); McCulloch v. Morton Lodge, No. 63, F. & A.M., 267 N.Y.S. 5 (N.Y. App. Div. 1933); Long Island Coach Co. v. Hartford Accident & Indem. Co., 227 N.Y.S. 633, 635 (N.Y. App. Div. 1928), *aff'd*, 162 N.E. 552 (N.Y. 1928); Meers v. Munsch-Protzmann Co., 217 N.Y.S. 256, 259 (N.Y. App. Div. 1926); Niagara Falls Int'l Bridge Co. v. Grand Trunk Ry., 209 N.Y.S. 79, 83-84 (N.Y. App. Div. 1925) (dictum), *aff'd as modified*, 148 N.E. 797 (N.Y. 1925); Hernandez v. Brookdale Mills, Inc., 185 N.Y.S. 485, 490 (N.Y. App. Div. 1920); Battista v. Carlo, 293 N.Y.S.2d 227, 229 (N.Y. Sup. Ct. 1968); Farmers' Loan & Trust Co. v. Park & Tilford, 215 N.Y.S. 244, 248 (N.Y. Sup. Ct. 1925) (dictum); Jewett Refrigerator Co. v. Lawless, 198 N.Y.S. 617, 619 (N.Y. Sup. Ct. 1923); *In re* Hayden's Estate, 16 N.Y.S.2d 126, 133 (N.Y. Sur. Ct. 1939), *aff'd*, 26 N.Y.S.2d 490 (N.Y. App. Div. 1941). *But see* Eisert v. Ermco Erectors, Inc., 401 N.Y.S.2d 553, 555 (N.Y. App. Div. 1978) (course of conduct cannot be proved to contradict explicit language).

all parties were under an obligation of good faith and fair dealing in their performance of contracts.[66]

B. Substantial Performance

Another significant limitation on freedom of contract is the doctrine of substantial performance. At the outset of the 1920s, this doctrine was in a state of chaos. For example, in one case in which a plaintiff had agreed to pump water from the hold of the defendant's ship, but failed to complete the job when its line became clogged with coal and saltpeter from the hold, the court would not allow recovery for the work done, even on *quantum meruit*, since the plaintiff had "agreed to produce a result" and "did . . . not perform."[67] Likewise, the *Bullinger v. Interboro Brewing Co.*[68] court ruled that the "doctrine of substantial performance . . . [had] no application" in favor of a bar owner who had intentionally bought a small portion of his beer from a distributor other than the defendant when the bar owner had agreed to purchase all its requirements from the defendant.[69] Hence, the distributor was permitted to rescind the contract when the price of beer rose.[70]

The Court of Appeals similarly permitted a contractor to rescind its agreement with the City of New York to collect trash at fourteen dumps to be supplied by the City.[71] The reason for rescission was that the City supplied only ten of the promised dumps, or seventy-one percent of the total.[72] In the words of the court, this default was not "incidental, inconsequential, or subordinate to the main purpose of the contract," but "was substantial, . . . lay at the basis of the entire contract, went to its entire consideration . . . , and hence furnished ample basis for rescission."[73]

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66. *See* Filner v. Shapiro, 633 F.2d 139, 143 (2d Cir. 1980); Niagara Mohawk Power Corp. v. Graver Tank & Mfg. Co., 470 F. Supp. 1308, 1316 (N.D.N.Y. 1979); Neuman v. Pike, 456 F. Supp. 1192, 1209 (S.D.N.Y. 1978), *rev'd in part on other grounds*, 591 F.2d 191 (2d Cir. 1979); *In re* Davidoff, 351 F. Supp. 440, 444 (S.D.N.Y. 1972); Feld v. Henry S. Levy & Sons, Inc., 335 N.E.2d 320, 322 (N.Y. 1975); Associated Teachers of Huntington, Inc. v. Board of Educ., 306 N.E.2d 791, 794 (N.Y. 1973); Gordon v. Nationwide Mut. Ins. Co., 285 N.E.2d 849, 854 (N.Y. 1972); Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publ'g Co., 281 N.E.2d 142, 144 (N.Y. 1972); Grad v. Roberts, 198 N.E.2d 26, 28 (N.Y. 1964); Mutual Life Ins. Co. of New York v. Tailored Woman, Inc., 128 N.E.2d 401, 403 (N.Y. 1955) (dictum); May Metro. Corp. v. May Oil Burner Corp., 49 N.E.2d 13, 16 (N.Y. 1943) (by implication); M. O'Neil Supply Co. v. Petroleum Heat & Power Co., 19 N.E.2d 676, 678 (N.Y. 1939); Kirke La Shelle Co. v. Paul Armstrong Co., 188 N.E. 163, 167 (N.Y. 1933); Collard v. Incorporated Village of Flower Hill, 427 N.Y.S.2d 301, 302 (N.Y. App. Div. 1980), *aff'd*, 421 N.E.2d 818 (N.Y. 1981); City of Rochester v. Vanderlinde Elec. Corp., 392 N.Y.S.2d 167, 170 (N.Y. App. Div. 1977); Title Guarantee & Trust Co. v. Pam, 182 N.Y.S. 824, 858 (N.Y. App. Div. 1920), *aff'd*, 134 N.E. 525 (N.Y. 1922); Cominelli v. Pisani, 180 N.Y.S. 104 (N.Y. App. Div. 1920); Richard Bruce & Co. v. J. Simpson & Co., 243 N.Y.S.2d 503, 506 (N.Y. Sup. Ct. 1963); Lowe v. Feldman, 168 N.Y.S.2d 674, 680 (N.Y. Sup. Ct. 1957), *aff'd*, 174 N.Y.S.2d 949 (N.Y. App. Div. 1958); Madison Pictures, Inc. v. Pictorial Films, Inc., 151 N.Y.S.2d 95, 117-18 (N.Y. Sup. Ct. 1956); Umlas v. Acey Oldsmobile, Inc., 310 N.Y.S.2d 147, 149-50 (N.Y. Civ. Ct. 1970).

67. Johnson Brothers v. American Union Line, 185 N.Y.S. 390 (N.Y. App. Term 1920).

68. 185 N.Y.S. 481 (N.Y. App. Div. 1920).

69. *Id.* at 484.

70. *Id.* at 485.

71. Clarke Contracting Co. v. City of New York, 128 N.E. 241 (N.Y. 1920).

72. *Id.*

73. *Id.* at 243.

Nevertheless, the New York Court of Appeals, in 1921, took a key step forward when Judge Benjamin N. Cardozo wrote the now leading case of *Jacob & Youngs, Inc. v. Kent.*[74] The contract for construction of a country residence called for use of pipe "of Reading manufacture," but the plaintiff had used different pipe of equal quality. Unfortunately, the defect was not discovered until the residence was nearly completed, so that replacement of the pipe would have "meant the demolition at great expense of substantial parts of the completed structure."[75]

The issue, according to Cardozo, was whether the term providing for the use of Reading pipe was a condition precedent to the builder's right to payment or a mere promise for which the homeowner could receive an allowance as damages. "Considerations partly of justice and partly of presumable intention," he added, "are to tell us whether this or that promise shall be placed in one class or in another."[76] "The margin of departure within the range of normal expectation," he noted, "upon a sale of common chattels," such as typically occurred in rural, upstate New York, "will vary from the margin to be expected upon a contract for the construction of a mansion or a 'skyscraper'" in New York City.[77] He also recognized that "[s]ubstitution of equivalents may not have the same significance in fields of art on the one side and in those of mere utility on the other."[78] All of his distinctions led to the conclusion that the term was a promise, rather than a condition, and that the measure of damages for breach of the promise would be "not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing."[79]

Three judges dissented on grounds of freedom of contract. In their view, the "defendant had a right to contract for what he wanted . . . [and] to get what the contract called for."[80] It was no answer that some other kind of pipe,

> according to the opinion of the contractor, or experts, would have been "just as good, better, or done just as well." He agreed to pay only upon condition that the pipe installed were made by that company and he ought not to be compelled to pay unless that condition be performed.[81]

While Cardozo recognized that the parties were "free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery,"[82] he also appreciated the difficulties that ordinary business people would have functioning efficiently under such a standard. Hence, he permitted business efficiency to trump freedom of contract as long as the deficiencies of business were both "trivial and innocent."[83]

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74. 129 N.E. 889 (N.Y. 1921).
75. *Id.* at 890.
76. *Id.*
77. *Id.*
78. *Id.* at 891.
79. *Id.*
80. *Id.* at 892.
81. *Id.*
82. *Id.* at 891.
83. *Id.* at 890.

The lower courts, however, remained more committed to freedom of contract. For example, one case held that a plumber who failed to connect eleven basins to hot-water pipes had not substantially performed,[84] while another held that a substitute for edge-bolting in the construction of a schooner, which an expert "denominate[d] 'just as good,'" had also failed the substantial performance standard.[85] Other cases during the 1920s agreed.[86] Most importantly, the courts made it clear that the "doctrine of substantial performance ha[d] no application where there [was] an intentional, deliberate, and willful departure from the contract."[87]

The Court of Appeals likewise took a more cautious attitude toward the doctrine of substantial performance when it returned to the issue in the 1933 case of *Nieman-Irving & Co. v. Lazanby*.[88] Writing for a unanimous court, Judge Irving Lehman ruled as follows:

> The rule that recovery under a contract can be had only upon proof of performance has been relaxed in actions upon building contracts. It has not been abrogated . . . . [T]here may be a recovery upon proof of substantial performance where the omissions and defects are trivial and innocent and can be atoned for by the allowance of the resultant change. The contract price is the stipulated reward for a stipulated benefit. A contractor is not entitled to compensation from an owner even for improvements which benefit the owner unless that is the benefit for which an owner agreed to pay . . . . There can be no adjustment based upon the conjecture of judge or jury that a payment to the contractor of a sum substantially less than the stipulated price for stipulated work will be fair compensation for an accession of value to the real property, though not through performance of the stipulated work.[89]

Meanwhile, though, the lower courts were applying a doctrine of substantial performance in cases involving the sale of goods[90] and, even more significantly, were allowing sellers in default to recover the value, though not the contract price, of goods held by the buyer.[91] Analogously, the Court of Appeals, in a case where there was "no controlling New York . . . authority,"[92] allowed a home-remodeling contractor, who had stopped work on a job following a breach by the homeowner, to recover not the full contract price, but only "quantum meruit for what ha[s] been finished . . . [or] the contract price, less payments made and less the cost of completion."[93] In short, the trend of decision in cases in which con-

84. *See* Coopersmith v. Wang, 197 N.Y.S. 419 (N.Y. App. Div. 1922).

85. Mississippi Shipbuilding Corp. v. Lever Brothers Co., 199 N.Y.S. 777, 779 (N.Y. App. Div. 1923), *rev'd on other grounds*, 142 N.E. 332 (N.Y. 1923).

86. *See* Dearstine v. Dunckel, 228 N.Y.S. 191 (N.Y. App. Div. 1928), *reversing* 223 N.Y.S. 234 (N.Y. Sup. Ct. 1926); Schieven v. Emerick, 221 N.Y.S. 780 (N.Y. App. Div. 1927); Cohen v. Eggers, 220 N.Y.S. 109 (N.Y. App. Div. 1927).

87. Cramer v. Esswein, 220 N.Y.S. 634 (N.Y. App. Div. 1927).

88. 188 N.E. 265 (N.Y. 1933).

89. *Id.* at 266 (citations omitted).

90. *See* American Steel & Iron Co. v. L.B. Foster Co., 266 N.Y.S. 800 (N.Y. Sup. Ct. 1932) (allowing a party that had only substantially performed a contract to recover damages for the other party's breach), *aff'd*, 262 N.Y.S. 1008 (N.Y. App. Div. 1933), *aff'd*, 188 N.E. 92 (N.Y. 1933).

91. *See* Guaranty Trust Co. v. Gerseta Corp., 208 N.Y.S. 270, 272-73 (N.Y. App. Div. 1925).

92. New Era Homes Corp. v. Forster, 86 N.E.2d 757, 759 (N.Y. 1949).

93. *Id. Accord* Werner Ek Bldg. Corp. v. Melrose Lumber Co., 198 N.E.2d 900 (N.Y. 1964), *reversing* 241 N.Y.S.2d 83 (N.Y. App. Div. 1963).

tractual relationships had broken down prior to completion of performance was to allow those who had provided goods or labor to recover the rough value of what they had provided.

In light of this trend, it became easy in construction cases for lower courts to declare it "well established that substantial performance will support recovery of the contract price less appropriate allowances for the cost of completing omissions and correcting defects," even when there existed "numerous instances of incomplete and defective performance"[94] amounting, in one instance, to five percent of the total contract price.[95] It was equally easy to extend the doctrine of substantial performance to employment contract cases,[96] while in sale of goods cases, the UCC made it clear that sellers who tendered less than perfect performance had to be given a reasonable opportunity to cure their imperfect tender.[97] Only in cases involving "a complete failure to perform without either a valid reason for noncompliance or even an attempt to perform"[98] or some other deliberate breach[99] would the doctrine of substantial performance be inapplicable by the middle of the century.

C. Unconscionability

During the first half of the century, New York courts were also in the forefront of developing the modern UCC doctrine of unconscionability, which sprang, in turn, out of the ancient rule that rendered unenforceable a contract involving

94. Pilgrim Homes & Garages, Inc. v. Fiore, 427 N.Y.S.2d 851, 853 (N.Y. App. Div. 1980).

95. *See* Soundwall Constr. Corp. v. Moncarol Constr. Corp., 290 N.Y.S.2d 363 (N.Y. Sup. Ct. 1968).

96. *See* Hadden v. Consolidated Edison Co., 312 N.E.2d 445, 449 (N.Y. 1974); Scientific Management Inst., Inc. v. Mirrer, 278 N.Y.S.2d 58, 60 (N.Y. App. Div. 1967) (dictum).

97. *See* U.C.C. § 2-508 (granting the opportunity to cure to all sellers, except those who had no reasonable ground to believe their performance would be acceptable to their buyers).

98. Witherell v. Lasky, 145 N.Y.S.2d 624, 627 (N.Y. App. Div. 1955). *Accord* City of New York v. Skyway-Dyckman, Inc., 256 N.Y.S.2d 840, 842 (N.Y. App. Div. 1965).

99. *See* Barney's Clothes, Inc. v. W.B.O. Broad. Corp., 1 N.Y.S.2d 42, 44 (N.Y. Sup. Ct. 1937), *aff'd*, 3 N.Y.S.2d 206 (N.Y. App. Div. 1938).

fraud,[100] duress,[101] or illegality.[102] Unconscionability itself had a long history in probate litigation, where courts continued, in the 1920s and 1930s, to set aside contracts in which decedents promised money in return for services. In such

100. *See* Ainger v. Michigan Gen. Corp., 476 F. Supp. 1209, 1227-31 (S.D.N.Y. 1979), *aff'd*, 632 F.2d 1025 (2d Cir. 1980); Hong Kong Export Credit Ins. Corp. v. Dun & Bradstreet, 414 F. Supp. 153, 158-59 (S.D.N.Y. 1975); Kamerman v. Curtis, 33 N.E.2d 530, 532 (N.Y. 1941); New York Tel. Co. v. Jamestown Tel. Corp., 26 N.E.2d 295, 297-98 (N.Y. 1940) (dictum); Gilbert v. Rothschild, 19 N.E.2d 785, 787 (N.Y. 1939) (dictum); State St. Trust Co. v. Ernst, 15 N.E.2d 416 (N.Y. 1938); Jones v. Title Guarantee & Trust Co., 14 N.E.2d 459 (N.Y. 1938); Brennan v. National Equitable Inv. Co., 160 N.E. 924 (N.Y. 1928); Clark v. Kirby, 153 N.E. 79 (N.Y. 1926); Sayres v. Decker Auto. Co., 145 N.E. 744, 745 (N.Y. 1924); Merry Realty Co. v. Shamokin & Hollis Real Estate Co., 130 N.E. 306 (N.Y. 1921); Rosehchein v. McNally, 233 N.Y.S.2d 254 (N.Y. App. Div. 1962); 200 East End Ave. Corp. v. General Elec. Corp., 172 N.Y.S.2d 409 (N.Y. App. Div. 1958) (dictum), *aff'd*, 158 N.E.2d 508 (N.Y. 1959); Sheridan v. Weber, 299 N.Y.S. 726, 732 (N.Y. App. Div. 1937); Clark v. Kirby, 198 N.Y.S. 172, 174-75 (N.Y. App. Div. 1923); Kaston v. Zimmerman, 183 N.Y.S. 615 (N.Y. App. Div. 1920); Grudberg v. Midvale Realty Co., 196 N.Y.S. 760, 760-61 (N.Y. App. Term 1922); Idyll v. Kohn, 199 N.Y.S.2d 165, 167-68 (N.Y. Sup. Ct. 1960); Roddy-Eden v. Berle, 108 N.Y.S.2d 597 (N.Y. Sup. Ct. 1951); Unger v. Eagle Fish Co., 56 N.Y.S.2d 265 (N.Y. Sup. Ct. 1945), *aff'd*, 58 N.Y.S.2d 332 (N.Y. App. Div. 1945); *In re* Wolfensohn's Estate, 44 N.Y.S.2d 848, 852 (N.Y. Sur. Ct. 1943); *In re* Moore's Will, 41 N.Y.S.2d 697, 701 (N.Y. Sur. Ct. 1943) (dictum). *But cf.* Amend v. Hurley, 59 N.E.2d 416, 420 (N.Y. 1944) (mere silence not fraud); Stauss v. Title Guarantee & Trust Co., 29 N.E.2d 462, 463 (N.Y. 1940) (victim must act promptly after discovery of fraud); Schenck v. State Line Tel. Co., 144 N.E. 592, 593 (N.Y. 1924) (dictum) (same); Flamm v. Noble, 43 N.Y.S.2d 922 (N.Y. Sup. Ct. 1943) (same), *aff'd*, 45 N.Y.S.2d 413 (N.Y. App. Div. 1943).

101. *See* Hellenic Lines, Ltd. v. Louis Dreyfus Corp., 372 F.2d 753, 756-58 (2d Cir. 1967) (dictum); Erie County Water Auth. v. Hen-Gar Constr. Corp., 473 F. Supp. 1310, 1313 (W.D.N.Y. 1979); Union Exch. Nat'l Bank v. Joseph, 131 N.E. 905 (N.Y. 1921); Williams v. Macchio, 329 N.Y.S.2d 405, 408 (N.Y. Sup. Ct. 1972); Hornstein v. Paramount Pictures, Inc., 37 N.Y.S.2d 404, 415-16 (N.Y. Sup. Ct. 1942), *aff'd*, 41 N.Y.S.2d 210 (N.Y. App. Div. 1943); Maisel v. Sigman, 205 N.Y.S. 807, 814 (N.Y. Sup. Ct. 1924); Fratello v. Fratello, 193 N.Y.S. 865 (N.Y. Sup. Ct. 1922); *In re* Carpenter's Will, 52 N.Y.S.2d 377, 380 (N.Y. Sur. Ct. 1944) (dictum). However, a failure to claim duress promptly constituted a waiver of the claim and an affirmation of the contract. *See* Feyh v. Brandtjen & Kluge, Inc., 151 N.Y.S.2d 454, 456 (N.Y. App. Div. 1956), *aff'd*, 146 N.E.2d 794 (N.Y. 1957).

102. *See In re* Gorden's Estate, 168 N.E.2d 239, 240 (N.Y. 1960); McConnell v. Commonwealth Pictures Corp., 166 N.E.2d 494 (N.Y. 1960); Southwestern Shipping Corp. v. National City Bank, 160 N.E.2d 836 (N.Y. 1959); Hettich v. Hettich, 105 N.E.2d 601, 602 (N.Y. 1952) (dictum); Stone v. Freeman, 82 N.E.2d 571 (N.Y. 1948); Haas v. Haas, 80 N.E.2d 337 (N.Y. 1948) (dictum); Tooker v. Inter-County Title Guar. & Mortgage Co., 68 N.E.2d 179, 180-81 (N.Y. 1946); Boyd H. Wood Co. v. Horgan, 52 N.E.2d 932, 933 (N.Y. 1943); *In re* Rhinelander's Estate, 47 N.E.2d 681, 684 (N.Y. 1943) (dictum); Harris v. Harris, 40 N.E.2d 245, 246-47 (N.Y. 1942); Carmine v. Murphy, 35 N.E.2d 19, 20-21 (N.Y. 1941); Miller v. Vanderlip, 33 N.E.2d 51 (N.Y. 1941) (dictum); Flegenheimer v. Brogan, 30 N.E.2d 591 (N.Y. 1940); Locke v. Pembroke, 21 N.E.2d 495 (N.Y. 1939); John E. Rosasco Creameries, Inc. v. Cohen, 11 N.E.2d 908, 909 (N.Y. 1937) (dictum); Bay Parkway Nat'l Bank v. Shalom, 200 N.E. 685, 686 (N.Y. 1936); McQuade v. Stoneham, 189 N.E. 234, 236 (N.Y. 1934); Kirshenbaum v. General Outdoor Adver. Co., 180 N.E. 245, 246 (N.Y. 1932) (dictum); Lindgrove v. Schluter & Co., 176 N.E. 832, 833 (N.Y. 1931); Fells v. Katz, 175 N.E. 516, 517-18 (N.Y. 1931); F.A. Straus & Co. v. Canadian Pacific Ry., 173 N.E. 564, 567 (N.Y. 1930); Municipal Metallic Bed Mfg. Corp. v. Dobbs, 171 N.E. 75 (N.Y. 1930) (dictum); Brearton v. De Witt, 170 N.E. 119 (N.Y. 1930); Meyer v. Price, 165 N.E. 814, 817 (N.Y. 1929); Mirizio v. Mirizio, 150 N.E. 605, 608 (N.Y. 1926); Adler v. Zimmerman, 135 N.E. 840 (N.Y. 1922); New York City Transit Auth. v. Jamaica Buses, Inc., 229 N.Y.S.2d 794 (N.Y. App. Div. 1962); New York City Transit Auth. v. Green Bus Lines, Inc., 229 N.Y.S.2d 787 (N.Y. App. Div. 1962); Boyd v. Collins, 195 N.Y.S.2d 153 (N.Y. App. Div. 1960); Martin v. Martin, 172 N.Y.S.2d 636, 638-39 (N.Y. App. Div. 1958); Miltenberg & Samton, Inc. v. Mallor, 151 N.Y.S.2d 748 (N.Y. App. Div. 1956); Dunn v. Dunn, 149 N.Y.S.2d 351 (N.Y. App. Div. 1956); O'Mara v. Dentinger, 62 N.Y.S.2d 282, 290 (N.Y. App. Div. 1946); Allcock v. Cohen, 58 N.Y.S.2d 905, 906 (N.Y. App. Div. 1945); O'Connor v. Hudson River Day Line, 58 N.Y.S.2d 175 (N.Y. App. Div. 1945), *aff'd*, 68 N.E.2d 450 (N.Y. 1946); Rush v. Curtiss-Wright Export Corp., 31 N.Y.S.2d 550 (N.Y. App. Div. 1941); Gould v. Gould, 27 N.Y.S.2d 54 (N.Y. App. Div. 1941); Williams v. Williams, 25 N.Y.S.2d 940 (N.Y. App. Div. 1941), *aff'd*, 40 N.E.2d 1017 (N.Y. 1942); Pine v. Okoniewski, 11 N.Y.S.2d 13, 15 (N.Y. App. Div. 1939); Levin v. Levin, 300 N.Y.S. 1042, 1043 (N.Y. App. Div. 1937); Bergoff Detective Serv., Inc. v. Walters, 267 N.Y.S. 464 (N.Y. App. Div. 1933); Attridge v. Pembroke, 256 N.Y.S. 257 (N.Y. App. Div. 1932); Bolivar v. Monnat, 248 N.Y.S. 722, 730 (N.Y. App. Div. 1931) (dictum); Angresani v. Tozzi, 216 N.Y.S. 161 (N.Y. App. Div. 1926), *aff'd*, 157 N.E. 856 (N.Y. 1927); Hamburg v. Bauer, 210 N.Y.S. 661 (N.Y. App. Div. 1925); Segal v. Chemical Importing & Mfg. Co., 199 N.Y.S. 250, 254 (N.Y. App. Div. 1923); Marsell v. Maires, 196 N.Y.S. 739 (N.Y. App. Div. 1922), *aff'd*, 142 N.E. 265 (N.Y. 1923); McCraith v. Buss, 190 N.Y.S. 597 (N.Y. App. Div. 1921); Brescia Constr. Co. v. Stone Masons' Contractors' Ass'n, 187 N.Y.S. 77 (N.Y. App. Div. 1921); St. Andrews Parish v. Gallagher, 200 N.Y.S. 590 (N.Y. App. Term 1923); Goldner Trucking Corp. v. Stoll Packing Corp., 234 N.Y.S.2d 406, 414 (N.Y. Sup. Ct. 1962), *rev'd on other grounds*, 242 N.Y.S.2d 706 (N.Y. Sup. Ct. 1963); Height v. Height, 187 N.Y.S.2d 260 (N.Y. Sup. Ct. 1959); Brill v. Wagner, 161 N.Y.S.2d 490, 494 (N.Y. Sup. Ct. 1957); Norton v. John T. Clark & Son, 144 N.Y.S.2d 245, 247 (N.Y. Sup. Ct. 1955), *rev'd in*

cases, when the parties "did not deal on terms of equality" because of "superior knowledge, or . . . overmastering influence" on the one side or "weakness, dependence, [or] unfair advantage" on the other, probate judges would typically require "the stronger party to show affirmatively that no deception nor undue influence was used, and that all was fair, open, voluntary, and well understood."[103]

In one of the earliest cases outside the probate context to apply a principle analogous to unconscionability, the 1922 case of *Cushing v. Hughes*,[104] the court was faced with complex facts involving both possible fraud and duress. The defendant's daughter had received a series of checks from one Mr. Paul in return for her promise to marry him, but she had breached that promise and given herself to another in marriage, following which she nonetheless cashed the last of Mr. Paul's checks.[105] Mr. Paul thereupon threatened to prosecute the daughter for obtaining money under false pretenses, but he withdrew the threats when the defendant gave him a note and mortgage covering his losses.[106] When Mr. Paul's assignee brought suit to collect the money due, the court dismissed the suit, declaring that the note and mortgage had been given under "constraint," with

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part on other grounds, 156 N.Y.S.2d 233 (N.Y. App. Div. 1956); Corcoran v. John F. Trommer, Inc., 113 N.Y.S.2d 627, 629 (N.Y. Sup. Ct. 1952), *aff'd*, 126 N.Y.S.2d 895 (N.Y. App. Div. 1953); Anonymous v. Anonymous, 86 N.Y.S.2d 196 (N.Y. Sup. Ct. 1948); Kingsbury v. Kingsbury, 75 N.Y.S.2d 699, 701 (N.Y. Sup. Ct. 1947); Cantales v. Mazzei, 73 N.Y.S.2d 902 (N.Y. Sup. Ct. 1947); William Mayer, Jr. Co. v. Union Parts Mfg. Co., 67 N.Y.S.2d 885 (N.Y. Sup. Ct. 1946) (dictum); Roth v. Patino, 56 N.Y.S.2d 853 (N.Y. Sup. Ct. 1945), *rev'd on other grounds*, 80 N.E.2d 673 (N.Y. 1948); Ballantine v. Ferretti, 28 N.Y.S.2d 668, 682-83 (N.Y. Sup. Ct. 1941) (dictum); Rush v. Curtis Wright Export Co., 25 N.Y.S.2d 597 (N.Y. Sup. Ct. 1941), *rev'd on other grounds*, 31 N.Y.S.2d 550 (N.Y. App. Div. 1941); Gehring v. Gehring, 23 N.Y.S.2d 920, 922 (N.Y. Sup. Ct. 1940), *rev'd in part on other grounds*, 30 N.Y.S.2d 257 (N.Y. App. Div. 1941); Lamb v. Eastern Star Tent No. 43, 13 N.Y.S.2d 1015 (N.Y. Sup. Ct. 1939); St. John v. Crocker, 278 N.Y.S. 754 (N.Y. Sup. Ct. 1935); Kraus v. H. Pacter & Co., 234 N.Y.S. 687 (N.Y. Sup. Ct. 1929); Miller v. Miller, 228 N.Y.S. 657 (N.Y. Sup. Ct. 1928); S.R. & P. Import Co. v. American Union Bank, 204 N.Y.S. 755 (N.Y. Sup. Ct. 1924); Peck v. Sands, 198 N.Y.S. 313, 315 (N.Y. Sup. Ct. 1922), *rev'd on other grounds*, 201 N.Y.S. 931 (N.Y. App. Div. 1923); *In re* Dunbar's Will, 71 N.Y.S.2d 287, 293 (N.Y. Sur. Ct. 1947). For important cases in which the Court of Appeals refused to find illegality, *see* Roth v. Patino, 80 N.E.2d 673 (N.Y. 1948) *and* Clark v. Dodge, 199 N.E. 641 (N.Y. 1936).

The issue of illegality that came before the courts most frequently concerned covenants not to compete, which were upheld if they protected the legitimate interests of the promisee, but not if they unduly burdened either the public interest or the ability of the promisor to earn a living. *See* Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 397 N.E.2d 358 (N.Y. 1979); Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp., 369 N.E.2d 4 (N.Y. 1977); Gelder Med. Group v. Webber, 363 N.E.2d 573 (N.Y. 1977); Gramercy Park Animal Ctr., Inc. v. Novick, 362 N.E.2d 608 (N.Y. 1977); Reed, Roberts Assocs. v. Strauman, 353 N.E.2d 590 (N.Y. 1976); Karpinski v. Ingrasci, 268 N.E.2d 751 (N.Y. 1971); Purchasing Assocs. v. Weitz, 196 N.E.2d 245 (N.Y. 1963); Paramount Pad Co. v. Baumrind, 151 N.E.2d 609 (N.Y. 1958); Simons v. Fried, 98 N.E.2d 456 (N.Y. 1951); Clark Paper & Mfg. Co. v. Stenacher, 140 N.E. 708 (N.Y. 1923); Atkin v. Union Processing Corp., 430 N.Y.S.2d 735 (N.Y. App. Div. 1980); Goos v. Pennisi, 197 N.Y.S.2d 253 (N.Y. App. Div. 1960); Cole Steel Equip. Co. v. Art-Lloyd Metal Prods. Corp., 148 N.Y.S.2d 440 (N.Y. App. Div. 1956); Goldstein v. Maisel, 67 N.Y.S.2d 410 (N.Y. App. Div. 1947); Handal v. Knepper, 58 N.Y.S.2d 132 (N.Y. App. Div. 1945); McCarty v. Constable, 223 N.Y.S. 484 (N.Y. App. Div. 1927); King v. Krischer Mfg. Co., 222 N.Y.S. 66 (N.Y. App. Div. 1927); People's Trust Co. v. Schultz Novelty & Sporting Goods Co., 215 N.Y.S. 564 (N.Y. App. Div. 1926), *aff'd as modified*, 154 N.E. 649 (N.Y. 1926); Triple D & E, Inc. v. Van Buren, 339 N.Y.S.2d 821 (N.Y. Sup. Ct. 1972), *aff'd*, 346 N.Y.S.2d 737 (N.Y. App. Div. 1973); Rubel Bros., Inc. v. Dumont Coal & Ice Co., 180 N.Y.S. 662 (N.Y. Sup. Ct. 1920). For cases involving other sorts of covenants restraining competition, *see* Alexander's Dep't Stores, Inc. v. Ohrbach's, Inc., 42 N.Y.S.2d 703 (N.Y. App. Div. 1943) *and* Bryan L. Kennelly, Inc. v. Shapiro, 226 N.Y.S. 692 (N.Y. App. Div. 1928), *aff'd*, 166 N.E. 309 (N.Y. 1928).

103. *In re* Gallagher's Estate, 241 N.Y.S. 759, 763 (N.Y. Sur. Ct. 1930). *Accord In re* Michelbacher's Estate, 241 N.Y.S. 178, 186 (N.Y. App. Div. 1929), *aff'd*, 171 N.E. 762 (N.Y. 1930); *In re* Hearn's Will, 285 N.Y.S. 935, 941-42 (N.Y. Sur. Ct. 1936).

104. 195 N.Y.S. 200 (N.Y. Sup. Ct. 1922).

105. *Id.* at 201.

106. *Id.*

"the parties . . . not meeting on equal terms."[107] Even though the daughter was "guilty of a crime and [was] liable to criminal prosecution," the debt was uncollectible since it had been given in order "to stifle prosecution."[108]

The holding of the *Cushing* case is far from clear. The case did not involve duress since a threat to do a lawful act—in this case, to bring a criminal prosecution against the daughter—could not constitute duress.[109] Arguably, though, the note was void because it was given as part of an illegal bargain aimed at stifling a prosecution. At the same time, however, the opinion suggested a new concept, like unconscionability—that the note was void because it resulted from bargaining between parties forced to deal with each other on unequal terms.

Five years later, *Anthony v. Syracuse University,* even though it was subsequently reversed, made the new concept explicit.[110] In *Anthony*, the court held that a dismissal of a student, pursuant to a contractual provision allowing for dismissals without any statement of reasons, created an "unconscionable situation."[111] In ordering the reinstatement of the student to the university, the court proclaimed its power to refuse enforcement to any contract containing

> an extraordinary provision, one which, as a matter of law, renders the contract obnoxious to every sense of fairness, honesty and right, and is such as to make its enforcement clearly unconscionable . . . . Where it is perfectly plain that one party has overreached the other and has gained an unjust and undeserved advantage which it would be inequitable and unrighteous to permit him to enforce, a court of equity should not hesitate to interfere, even though the victimized parties owe their predicament largely to their own stupidity and carelessness . . . . [W]here the simplicity and credulity of people are taken advantage of by the shrewdness, overreaching and misrepresentation of those with whom they are dealing, and they are thereby induced to do, unwittingly, something the effect of which they do not intend, foresee or comprehend, and which if permitted to culminate would be shocking to equity and good conscience, a court of equity may with propriety interpose.[112]

The next case to involve facts on which to predicate a finding of unconscionability came before the Court of Appeals.[113] It involved an acceleration clause in a note and mortgage entitling a creditor to demand immediate payment of the entire principal if the debtor was late in making any quarterly payment.[114] As a result of a clerical error by the debtor's bookkeeper, the check for the inter-

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107. *Id.* at 202.
108. *Id.*
109. *See* Criterion Holding Co. v. Cerussi, 250 N.Y.S. 735, 737 (N.Y. Sup. Ct. 1931) (dictum). *Accord* Business Incentives Co. v. SONY Corp. of Am., 397 F. Supp. 63, 69 (S.D.N.Y. 1975). *But cf.* United States v. Bedford Assocs., 491 F. Supp. 851, 865 (S.D.N.Y. 1980) (threat to exercise legal right would constitute duress if "made primarily to coerce"), *rev'd in part on other grounds*, 657 F.2d 1300 (2d Cir. 1981).
110. 223 N.Y.S. 796 (N.Y. Sup. Ct. 1927), *rev'd*, 231 N.Y.S. 435 (N.Y. App. Div. 1928).
111. *Id.* at 808.
112. *Id.* at 810-11.
113. Graf v. Hope Bldg. Corp., 171 N.E. 884 (N.Y. 1930).
114. *Id.*

est payment due on July 1, 1927 was written for $4219.69, rather than the amount due, which was $4621.56, and the remaining $401.87 was not paid until one day after the expiration of the grace period.[115] Upon receiving this technically late payment, the creditor invoked the acceleration clause and demanded payment in full.[116]

Writing for himself and two other judges, Chief Judge Cardozo found "no undeviating principle that equity shall enforce the covenants of a mortgage, unmoved by an appeal ad misericordiam, however urgent or affecting."[117] Using the word "unconscionable" on three occasions in his opinion,[118] Cardozo declared, instead, that "the hardship [was] so flagrant, the misadventure so undoubted, the oppression so apparent, as to justify a holding that only through an acceptance" of the late payment could "equity be done."[119] Although he had "neither purpose nor desire to impair the stability of the rule" upholding acceleration clauses in cases of late payment of interest, he thought it appropriate to exercise a "dispensing power" through the doctrine of unconscionability under the special facts of the particular case.[120] Although the four-judge majority on the Court also referred to the concept of unconscionability on three occasions in its opinion,[121] it did not find enforcement of the acceleration clause unconscionable under the particular facts of the case.[122]

Despite the majority's hesitancy, lower court judges nonetheless continued through the 1930s and 1940s to extend the range of unconscionability and the related concept of economic duress. One case held, for example, that "the pressure of financial circumstances," plus the threat of a debtor's agent "to take affirmative action to prevent the making of the loan which it had undertaken to procure," constituted sufficient duress to invalidate a less favorable loan agreement made with the agent under such pressure.[123] Another case declared that an "agreement leav[ing] the defendant corporation at the mercy of the plaintiff" would not be "favored by the courts,"[124] and a third opined that, while "mere inadequacy of consideration is insufficient to avoid a contract," relief for unconscionability would be granted if the inadequacy of consideration was "so gross as to offend the conscience of the court."[125] Other courts agreed that the "modern doctrine of economic duress [could be] invoked where there is an unjustified

115. *Id.*
116. *Id.* at 885.
117. *Id.* at 886 (dissenting opinion).
118. *See id.* at 887-88. (dissenting opinion).
119. *Id.* at 889 (dissenting opinion).
120. *Id.* at 887 (dissenting opinion).
121. *See id.* at 885-886.
122. *Id.*
123. Criterion Holding Co. v. Cerussi, 250 N.Y.S. 735, 737 (N.Y. Sup. Ct. 1931).
124. Westchester Lab. Sales Corp. v. Westchester Lab., Inc., 3 N.Y.S.2d 224, 225 (N.Y. Sup. Ct. 1938). *Accord* Price v. Spielman Motor Sales Co., 26 N.Y.S.2d 836, 839 (N.Y. App. Div. 1941).
125. Woodworth v. Prudential Ins. Co., 13 N.Y.S.2d 145, 151 (N.Y. Sup. Ct. 1939), *rev'd on other grounds*, 15 N.Y.S.2d 541 (N.Y. App. Div. 1939). *Cf.* Chas. Chipman's Sales Co. v. Ely & Walker Dry Goods Co., 48 N.Y.S.2d 483 (N.Y. Sup. Ct. 1944) (invalidating twelve-fold price increase pursuant to price escalator clause in contract), *aff'd*, 60 N.Y.S.2d 282 (N.Y. App. Div. 1946). As suggested in *Woodworth,* however, it was "not the function of the Court to make other and different contracts for the parties" in the absence of gross unfairness. Empire Sportswear, Inc. v. Newsday, Inc., 178 N.Y.S.2d 833, 835 (N.Y. Sup. Ct. 1958), *aff'd*, 185 N.Y.S.2d 78 (N.Y. App. Div. 1959). *Accord* Schneidman v. Steckler, 173 N.Y.S.2d 89, 91 (N.Y. Sup. Ct. 1958); *In re* Estate of Schanzer, 177 N.Y.S.2d 124, 125 (N.Y. Sur. Ct. 1958), *rev'd on other grounds*, 182 N.Y.S.2d 475 (N.Y. App. Div. 1959).

threat to injure or withhold property . . . or . . . rights of the promisor."[126] As one final judge noted, "the modern doctrine of economic duress . . . [was] being extended and expanded and [bore] slight resemblance to common-law duress."[127]

A major line of cases focused on when a seller of goods could disclaim warranties. Although the courts recognized that "adult persons of sound mind" could "limit . . . or exclud[e] implied warranties,"[128] they would not permit disclaimers that were concealed from buyers[129] or were otherwise contrary to "natural justice and good morals."[130] Thus, an illiterate buyer would not be bound by a printed disclaimer of which the seller's agent had given no oral notice.[131] Similarly, a printed disclaimer in a written contract would not suffice to override an admitted, express warranty of quality,[132] while a disclaimer indorsed on a mere invoice or on some other document that did not constitute a contract would not override even an implied warranty.[133]

The most important unconscionability case prior to the UCC was *Mandel v. Liebman*,[134] in which the Appellate Division, in 1950, found "void, unconscionable and against public policy" a contract which, in its view, released an "attorney from any requirement to render services while it purported to retain for him substantial rights and benefits in defendant's earnings, . . . amounting to what might be called a tribute in perpetuity."[135] The Court of Appeals agreed that there would "be some force to the claim of unconscionability . . . if the contract could properly be construed as was done by . . . the Appellate Division."[136] So construed, the contract would be so unequal that "'no man in his senses and not under a delusion would make'" it.[137] Indeed, it would be so "unreasonable . . . in

126. Oleet v. Pennsylvania Exch. Bank, 137 N.Y.S.2d 779, 783 (N.Y. App. Div. 1955) (dictum). *Accord* Brown & Guenther v. North Queensview Homes, Inc., 239 N.Y.S.2d 482 (N.Y. App. Div. 1963); Gallagher Switchboard Corp. v. Heckler Elec. Co., 229 N.Y.S.2d 623, 630 (N.Y. Sup. Ct. 1962); Nixon v. Leitman, 224 N.Y.S.2d 448 (N.Y. Sup. Ct. 1962); Wou v. Galbreath-Ruffin Realty Co., 195 N.Y.S.2d 886, 888 (N.Y. Sup. Ct. 1959); Weiner v. Tele King Corp., 123 N.Y.S.2d 101, 104-05 (N.Y. Sup. Ct. 1953); *In re* Estate of Bennett, 205 N.Y.S.2d 50, 53 (N.Y. Sur. Ct. 1960). *But see* Spancrete Northeast, Inc. v. K.W. Constr. Corp., 394 N.Y.S.2d 674, 675 (N.Y. App. Div. 1977) (adding requirement that ordinary remedy of action at law must be inadequate). *Accord* Joseph F. Egan, Inc. v. City of New York, 215 N.E.2d 490, 493-94 (N.Y. 1966); Colonie Constr. Corp. v. DeLollo, 266 N.Y.S.2d 283, 285 (N.Y. App. Div. 1966), *aff'd*, 233 N.E.2d 287 (N.Y. 1967).

127. Manno v. Mutual Benefit Health & Accident Ass'n, 187 N.Y.S.2d 709, 713 (N.Y. Sup. Ct. 1959).

128. Lumbrazo v. Woodruff, 175 N.E. 525, 528 (N.Y. 1931). *Accord* Alaska Pac. Salmon Co. v. Reynolds Metals Co., 163 F.2d 643, 656-57 (2d Cir. 1947); Railroad Waterproofing Corp. v. Memphis Supply, Inc., 104 N.E.2d 486 (N.Y. 1952); Rugenstein v. Frosty Teddy Corp., 285 N.Y.S.2d 403 (N.Y. App. Div. 1967); Broderick Haulage, Inc. v. Mack-Int'l Motor Truck Corp., 153 N.Y.S.2d 127 (N.Y. App. Div. 1956); Freemantle v. United States Hoffman Mach. Corp., 151 N.Y.S.2d 856, 858 (N.Y. App. Div. 1956); Pennsylvania Gas Co. v. Secord Bros., Inc., 343 N.Y.S.2d 256, 261-62 (N.Y. Sup. Ct. 1973), *aff'd*, 357 N.Y.S.2d 702 (N.Y. App. Div. 1974); Bakal v. Burroughs Corp., 343 N.Y.S.2d 541 (N.Y. Sup. Ct. 1972). *Cf.* American Elastics, Inc. v. United States, 187 F.2d 109 (2d Cir. 1951) (no warranties attached to sale by United States of war surplus "as is").

129. *See* Moore v. Schlossman's, Inc., 161 N.Y.S.2d 213, 216 (N.Y. Mun. Ct. 1957).

130. Lynn v. Radio Ctr. Delicatessen, Inc., 9 N.Y.S.2d 110, 112 (N.Y. Mun. Ct. 1939). *Accord* Wilson v. Manhasset Ford, Inc., 209 N.Y.S.2d 210, 212 (N.Y. Dist. Ct. 1960).

131. *See* Ragonese v. Joseph Harris Co., 12 N.Y.S.2d 413 (N.Y. Sup. Ct. 1939).

132. *See* Kuester v. Paige Sales Co., 204 N.Y.S. 547, 549 (N.Y. Sup. Ct. 1924).

133. *See* J. Aron & Co. v. Sills, 206 N.Y.S. 695, 699 (N.Y. Sup. Ct. 1924), *aff'd*, 148 N.E. 717 (N.Y. 1925); Marino v. Maytag Atlantic Co., 141 N.Y.S.2d 432, 438 (N.Y. Mun. Ct. 1955). *Cf.* Stryker v. Rusch, 187 N.Y.S.2d 663, 665 (N.Y. Sup. Ct. 1959) (intent to negate implied warranties must be clear).

134. 101 N.Y.S.2d 20 (N.Y. App. Div. 1950), *reh'g denied*, 102 N.Y.S.2d 563 (N.Y. App. Div. 1951), *rev'd on other grounds*, 100 N.E.2d 149 (N.Y. 1951).

135. *Mandel*, 101 N.Y.S.2d at 21.

136. Mandel v. Liebman, 100 N.E.2d 149, 152 (N.Y. 1951).

137. *Id.*

light of the mores and business practices of the time" that it would "'shock the conscience and confound the judgment of any man of common sense.'"[138] The Court of Appeals, however, refused to construe the contract as the Appellate Division had. It concluded that the attorney was under an obligation to render services in return for his right to a percentage of the defendant's earnings and that, therefore, the contract was not unconscionable or even necessarily unequal.[139]

It was against this common-law background that § 2-302 of the UCC became effective in New York in September of 1964.[140] Section 2-302 provides that when a

> court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or . . . the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.[141]

Arguably, the section was designed to allow courts to yield to what Cardozo called "urgent or affecting" appeals "ad misericordiam"[142] without the necessity of turning, "by indirection,"[143] to "manipulation of the rules" of contract law[144] or to "interpretation of language and the like."[145] At least one court found "the conclusion . . . inescapable" that § 2-302 "simply codified the doctrine [of unconscionability], which was used by the common-law courts to invalidate contracts" that were "'so monstrous and extravagant that it would be a reproach to the administration of justice to countenance or uphold'" them.[146]

Following its enactment, lower courts quickly began to place reliance on § 2-302. For example, two cases that soon became leading ones—*Frostifresh Corp. v. Reynoso*[147] and *Jones v. Star Credit Corp.*[148]—held that excessively high prices would be unconscionable, and other cases agreed.[149] Further cases declared contracts with consumers who had limited knowledge of English,[150] contracts with provisions delaying the return of deposits,[151] contracts giving excessive rights to

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138. *Id.*
139. *See id.*
140. *See* 1962 N.Y. Laws, ch. 553.
141. N.Y. U.C.C. LAW § 2-302 (McKinney 1993).
142. Graf v. Hope Bldg. Corp., 171 N.E. 884, 886 (N.Y. 1930) (dissenting opinion).
143. N.Y. U.C.C. LAW § 2-302 annots.
144. *Id.* § 2-302 cmt. 1.
145. *Id.* § 2-302 annots.
146. *In re* Friedman, 407 N.Y.S.2d 999, 1007-08 (App. Div. 2d Dept. 1978).
147. 274 N.Y.S.2d 757 (N.Y. Dist. Ct. 1966), *rev'd on other grounds*, 281 N.Y.S.2d 964 (N.Y. App. Term 1967).
148. 298 N.Y.S.2d 264 (N.Y. Sup. Ct. 1969).
149. *See* Vom Lehn v. Astor Art Galleries, Ltd., 380 N.Y.S.2d 532, 543 (N.Y. Sup. Ct. 1976); Weidman v. Tomaselli, 365 N.Y.S.2d 681, 689-90 (N.Y. County Ct. 1975), *aff'd*, 386 N.Y.S.2d 276 (N.Y. Sup. App. Term 1975); Central Budget Corp. v. Sanchez, 279 N.Y.S.2d 391, 392 (N.Y. Civ. Ct. 1967).
150. *See* Brooklyn Union Gas Co. v. Jimeniz, 371 N.Y.S.2d 289, 291 (N.Y. Civ. Ct. 1975); Albert Merrill School v. Godoy, 357 N.Y.S.2d 378, 381-82 (N.Y. Civ. Ct. 1974); Jefferson Credit Corp. v. Marcano, 302 N.Y.S.2d 390, 393-94 (N.Y. Civ. Ct. 1969).
151. *See* Bogatz v. Case Catering Corp., 383 N.Y.S.2d 535 (N.Y. Civ. Ct. 1976); Seabrook v. Commuter Hous. Co., 338 N.Y.S.2d 67 (N.Y. Civ. Ct. 1972); Lazan v. Huntington Town House, Inc., 332 N.Y.S.2d 270 (N.Y. Dist. Ct. 1969), *aff'd*, 330 N.Y.S.2d 751 (N.Y. Sup. App. Term 1972).

creditors,[152] and contracts otherwise "placing one party at the mercy of the other" unconscionable.[153]

The Court of Appeals reacted similarly, although without always making mention of unconscionability or the UCC. Thus, it reiterated the doctrines that a contract could be avoided on the ground of "economic duress or business compulsion" when a party was "forced to agree to it by means of a wrongful threat precluding the exercise of his free will"[154] and that "a drastic provision . . . plac[ing] one party at the mercy of another . . . [would be] against the general policy of the law."[155] In addition, it invalidated limitations of warranties that were not sufficiently conspicuous[156] or that left parties without an adequate remedy for breach.[157] It also struck down attempts by contractors to limit their liability for negligence in the maintenance of buildings.[158] Penalty clauses not reflective of

152. *See* FDIC v. Frank L. Marino Corp., 425 N.Y.S.2d 34 (N.Y. App. Div. 1980); State v. Avco Fin. Serv., 418 N.Y.S.2d 52 (N.Y. App. Div. 1979), *rev'd on other grounds*, 406 N.E.2d 1075 (N.Y. 1980).

153. Colonial Roofing Corp. v. John Mee, Inc., 431 N.Y.S.2d 931, 935 (N.Y. Sup. Ct. 1980). *Cf.* City of New York v. New York Jets Football Club, Inc., 394 N.Y.S.2d 799, 805 (N.Y. Sup. Ct. 1977); *In re* Estate of Vought, 351 N.Y.S.2d 816, 822 (N.Y. Sur. Ct. 1973), *aff'd*, 360 N.Y.S.2d 199 (N.Y. App. Div. 1974). Many cases, of course, declined to find contracts or provisions thereof unconscionable. *See* County Asphalt, Inc. v. Lewis Welding & Eng'g Corp., 444 F.2d 372, 379 (2d Cir. 1971); Fleischmann Distilling Corp. v. Distillers Co., 395 F. Supp. 221, 232-33 (S.D.N.Y. 1975); Euclid Ave. Assocs. v. City of New York, 406 N.Y.S.2d 844 (N.Y. App. Div. 1978); Blake v. Biscardi, 403 N.Y.S.2d 544 (N.Y. App. Div. 1978); Rodriguez v. Nachamie, 395 N.Y.S.2d 51 (N.Y. App. Div. 1977); Grubel v. Union Mut. Life Ins. Co., 387 N.Y.S.2d 442 (N.Y. App. Div. 1976); Gross v. Russo, 364 N.Y.S.2d 184 (N.Y. App. Div. 1975); Pearson v. National Budgeting Sys., Inc., 297 N.Y.S.2d 59 (N.Y. App. Div. 1969); City of New York v. Local 333, Marine Division, Int'l Longshoremen's Ass'n, 433 N.Y.S.2d 527, 529 (N.Y. Sup. Ct. 1980), *rev'd on other grounds*, 437 N.Y.S.2d 98 (N.Y. App. Div. 1981); Wasserbauer v. Marine Midland Bank, 400 N.Y.S.2d 979, 987 (N.Y. Sup. Ct. 1977); K.D. v. Educational Testing Serv., 386 N.Y.S.2d 747 (N.Y. Sup. Ct. 1976); Zachary v. R.H. Macy & Co., 323 N.Y.S.2d 757 (N.Y. Sup. Ct. 1971), *rev'd in part on other grounds*, 332 N.Y.S.2d 425 (N.Y. App. Div. 1972), *rev'd in part on other grounds*, 293 N.E.2d 80 (N.Y. 1972); Sinkoff Beverage Co. v. Joseph Schlitz Brewing Co., 273 N.Y.S.2d 364 (N.Y. Sup. Ct. 1966); *In re* Estate of Young, 367 N.Y.S.2d 717 (N.Y. Sur. Ct. 1975); Graziano v. Tortora Agency, Inc., 359 N.Y.S.2d 489 (N.Y. Civ. Ct. 1974); Diamond v. Mutual Life Ins. Co., 347 N.Y.S.2d 907 (N.Y. Civ. Ct. 1973), *rev'd on other grounds*, 356 N.Y.S.2d 164 (N.Y. App. Term 1974); Gimbel Bros. v. Swift, 307 N.Y.S.2d 952, 954 (N.Y. Civ. Ct. 1970).

154. Austin Instrument, Inc. v. Loral Corp., 272 N.E.2d 533, 535 (N.Y. 1971). *Accord* Stewart M. Muller Constr. Co. v. New York Tel. Co., 359 N.E.2d 328 (N.Y. 1976) (dictum).

155. Fair Pavilions, Inc. v. First Nat'l City Bank, 227 N.E.2d 839 (N.Y. 1967) (dictum).

156. *See* Wilson Trading Corp. v. David Ferguson, Ltd., 244 N.E.2d 685 (N.Y. 1968). *Accord* Rite Fabrics, Inc. v. Stafford-Higgins Co., 366 F. Supp. 1, 10 (S.D.N.Y. 1973); Arnold v. New City Condominiums Corp., 433 N.Y.S.2d 196, 198 (N.Y. App Div. 1980); Mill Printing & Lithographing Corp. v. Solid Waste Management Sys., Inc., 409 N.Y.S.2d 257 (N.Y. App. Div. 1978); Victor v. Mammana, 422 N.Y.S.2d 350, 351-52 (N.Y. Sup. Ct. 1979); Dennin v. General Motors Corp., 357 N.Y.S.2d 668 (N.Y. Sup. Ct. 1974); Architectural Aluminum Corp. v. Macarr, Inc., 333 N.Y.S.2d 818, 822-23 (N.Y. Sup. Ct. 1972); Basic Adhesives, Inc. v. Robert Matzkin Co., 420 N.Y.S.2d 983, 987 (N.Y. Civ. Ct. 1979), *aff'd as modified*, 1980 WL 98464 (N.Y. Sup. App. Term Jul. 11, 1980); Minikes v. Admiral Corp., 266 N.Y.S.2d 461 (N.Y. Dist. Ct. 1966).

157. *See* Wilson Trading Corp. v. David Ferguson, Ltd., 244 N.E.2d 685, 687-89 (N.Y. 1968). *Accord* Industralease Automated & Scientific Equip. Corp. v. R.M.E. Enters., Inc., 396 N.Y.S.2d 427, 430-32 (N.Y. App. Div. 1977); Sarfati v. M.A. Hittner & Sons, Inc., 318 N.Y.S.2d 352, 354 (N.Y. App. Div. 1970), *aff'd*, 282 N.E.2d 126 (N.Y. 1972); Zicari v. Joseph Harris Co., 304 N.Y.S.2d 918, 924-25 (N.Y. App. Div. 1969) (dictum); Walsh v. Ford Motor Co., 298 N.Y.S.2d 538 (N.Y. Sup. Ct. 1969).

158. *See* Rogers v. Dorchester Assocs., 300 N.E.2d 403 (N.Y. 1973); Melodee Lane Lingerie Co. v. American Dist. Tel. Co., 218 N.E.2d 661 (N.Y. 1966); Employers' Liab. Assurance Corp. v. Post & McCord, Inc., 36 N.E.2d 135, 139 (N.Y. 1941). *Accord* Krivitsky & Cohen, Inc. v. Western Union Tel. Co., 221 N.Y.S. 525 (N.Y. Mun. Ct. 1927). *Cf.* Gross v. Sweet, 400 N.E.2d 306 (N.Y. 1979) (operator of parachute center cannot disclaim liability for own negligence); Fleming v. Ponziani, 247 N.E.2d 114 (N.Y. 1969) (proponent of release has burden of proof on lack of fraud); Willard Van Dyke Prods., Inc. v. Eastman Kodak Co., 189 N.E.2d 693, 694 (N.Y. 1963) (film processor cannot exempt self from liability for negligence in absence of clear language). *But cf.* Board of Educ. v. Valden Assocs., Inc., 389 N.E.2d 798 (N.Y. 1979) (allowing landowner and contractors to apportion liability by providing for adequate insurance coverage and allowing recovery only against proceeds of insurance policies); Ciofalo v. Vic Tanney Gyms, Inc., 177 N.E.2d 925, 926 (N.Y. 1961) (gym operator may obtain exemption from liability for negligence with clear contractual language).

reasonable estimates of actual damage likewise fell prey to the Court's unconscionability jurisprudence.[159] In the end, the Court declared that the law had "developed the concept of unconscionability so as to prevent the unjust enforcement of onerous contractual terms which one party is able to impose . . . because of a significant disparity in bargaining power."[160] The Court applied the principle to permit the estate of an 85-year-old nursing home patient to recover property given to the home by the patient before her death[161] and to test separation agreements between spouses "to see to it that they are arrived at fairly and equitably" and that they are not "manifestly unfair to a spouse because of the other's overreaching."[162]

D. Promissory Estoppel

A fourth doctrine limiting freedom of contract is promissory estoppel. However, unlike unconscionability, which developed gradually prior to its codification in the UCC, promissory estoppel quickly came to as full a fruition as it ever would in New York in the leading case of *Allegheny College v. National Chautauqua County Bank*,[163] authored by Cardozo in 1927.

The case involved a written promise by one Mary Yates Johnston to give a bequest of $5,000 to Allegheny College, which the College promised to devote to a scholarship fund in her name.[164] After she had paid the first $1,000, which the College set aside as it had promised, Johnston informed the College that she would not pay the remainder of her subscription.[165] Following her death, the College brought suit for the remaining $4,000.[166] After both the trial court and the Appellate Division denied relief, the case came before the Court of Appeals, where Chief Judge Cardozo reversed and granted judgment for the College.[167]

Much of Cardozo's opinion was devoted to establishing a factual basis for a finding that Johnston's promise was binding because the College had given consideration for it.[168] But, Cardozo's effort to fit the transaction "within the mould of consideration as established by tradition"[169] was not especially successful, and he therefore turned to his alternative holding—that "there has grown up of recent days a doctrine that a substitute for consideration or an exception to its ordinary

159. *See* City of Rye v. Public Serv. Mut. Ins. Co., 315 N.E.2d 458 (N.Y. 1974).

160. Rowe v. Great Atlantic & Pacific Tea Co., 385 N.E.2d 566, 568 (N.Y. 1978). *But see* Matter of W.T. Grant Co., 4 B.R. 53, 75 (Bankr. S.D.N.Y. 1980) (when parties "deal at arm's length for their mutual benefit," they have no "duty . . . higher than the morals of the market place").

161. *See* Gordon v. Bialystoker Ctr. & Bikur Cholim, Inc., 385 N.E.2d 285 (N.Y. 1978). Of course, the courts also continued to refuse enforcement of illegal contracts. *See* John J. Kassner & Co. v. City of New York, 389 N.E.2d 99, 102 (N.Y. 1979); Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793, 797 (N.Y. 1976); Birger v. Turner, 427 N.Y.S.2d 904, 907 (N.Y. Civ. Ct. 1980) (dictum); *In re* Adoption of Brousal, 322 N.Y.S.2d 28 (N.Y. Sur. Ct. 1971); *In re* Estate of Fleischmann, 316 N.Y.S.2d 272, 277 (N.Y. Sur. Ct. 1970).

162. Christian v. Christian, 365 N.E.2d 849, 855 (N.Y. 1977).

163. 159 N.E. 173 (N.Y. 1927).

164. *Id.* at 174.

165. *Id.*

166. *Id.*

167. *Id.* at 177.

168. *See id.* at 175-76.

169. *Id.* at 175.

requirements can be found in what is styled 'a promissory estoppel.'"[170] Here, Cardozo cited two recent cases as "signposts on the road,"[171] even if not full-fledged precedents.

The earlier of the two cases, *De Cicco v. Schweizer*,[172] involved a promise by a father to pay an annuity to his daughter if she married the man to whom she was already affianced.[173] Her marriage could not be consideration for the promise, however, since she was already under a duty to perform her contract to marry and it was settled that performance of a preexisting duty could not constitute consideration.[174] Writing for the Court, Judge Cardozo circumvented this difficulty by holding that the consideration for the father's promise was not the daughter's act of marriage, but the couple's act.[175] The daughter and her husband-to-be were under no duty to complete their marriage, and thus, their act of completing it could constitute consideration for the father's promise to pay.[176] In executing this *tour de force*, Cardozo did not mention a word about promissory estoppel.

The second case cited in *Allegheny College—Siegel v. Spear & Co.*[177]—was at least slightly more on point. In *Siegel*, the defendant's agent promised to store the plaintiff's goods without compensation and, in addition, to obtain insurance on the goods.[178] The Court of Appeals found that the plaintiff's delivery of his goods to the defendant's warehouse, subsequent to the making of the promise to obtain insurance, constituted the consideration for the promise and, therefore, made it binding.[179] Promissory estoppel was again not mentioned, although the argument for the existence of consideration, unlike the argument in *De Cicco*, was so weak that promissory estoppel might have constituted a stronger ground of decision.

Cardozo failed in *Allegheny College* to cite a third recent case, one in which an estoppel had been found. The case, *Lieberman v. Templar Motor Co.*,[180] involved an initial written contract to deliver automobile parts over a period in excess of one year.[181] Later, the parties entered into an oral modification of the contract which the Court of Appeals, in an opinion by Cardozo, found binding because the parts in question had no market value and were to be delivered within less than a year from the date of the modification.[182] Cardozo added, though, that "[a]ssent to new terms of performance, even if invalid as a contract, [would] serve as an estoppel"[183] and, even more significantly, awarded damages for labor and material costs incurred in reliance on the modification.[184]

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170. *Id.* at 174-75.
171. *Id.* at 175.
172. 117 N.E. 807 (N.Y. 1917).
173. *Id.* at 808.
174. *Id.*
175. *Id.* at 809.
176. *Id.* at 810.
177. 138 N.E. 414 (N.Y. 1923).
178. *Id.* at 415.
179. *Id.* at 415-16.
180. 140 N.E. 222 (N.Y. 1923).
181. *Id.* at 222-23.
182. *Id.* at 224-25.
183. *Id.* at 224.
184. *See id.* at 225.

Directly on point was a fourth case decided prior to *Allegheny College—Russian Symphony Society v. Holstein*—[185] where the defendant, desiring to help produce the plaintiff's orchestral concerts, signed a subscription agreement promising to pay fifty dollars if the expenses of the concerts exceeded the profits.[186] In holding the subscription enforceable, the Appellate Division declared that the "decisions relating to subscription agreements, which . . . become mutually binding when accepted and acted upon, govern in the disposition of this appeal, rather than decisions relating to . . . executory contracts for the sale or purchase of goods."[187]

Cardozo, of course, did not cite the *Holstein* case in *Allegheny College*, even though he held precisely what *Holstein* had held. After declining to "attempt to say" whether the new doctrine of promissory estoppel had "made its way in this state to such an extent as to permit us to say that the general law of consideration ha[d] been modified accordingly," Cardozo concluded that "[c]ertain, at least, it is that we have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions."[188]

In the decades following *Allegheny College*, the New York courts routinely applied the doctrine of promissory estoppel in charitable subscription cases.[189] There could be little doubt that the "doctrine of estoppel ha[d] been carried to its greatest length" in such cases,[190] where judges had "been zealous to find a consideration,"[191] and that "the trend of judicial decision . . . ha[d] been towards the enforcement of charitable pledges almost as a matter of public policy."[192] At the same time, however, most judges thought that *Allegheny College* "extended the doctrine of promissory estoppel only to the law relating to charitable subscriptions" and took the view that they "should go no further."[193] Indeed, even in char-

185. 192 N.Y.S. 64 (N.Y. App. Div. 1922).

186. *Id.* at 64-65.

187. *Id.* at 65.

188. *Allegheny College*, 159 N.E. at 175.

189. *See* I. & I. Holding Corp. v. Gainsburg, 12 N.E.2d 532, 533 (N.Y. 1938); *In re* Field's Will, 204 N.Y.S.2d 947, 950 (N.Y. App. Div. 1960); *In re* Metz's Estate, 30 N.Y.S.2d 502, 505 (N.Y. App. Div. 1941); *In re* Taylor's Estate, 260 N.Y.S. 836 (N.Y. App. Div. 1932), *aff'd*, 188 N.E. 122 (N.Y. 1933); Eaton v. Reich, 250 N.Y.S. 369, 371 (N.Y. App. Div. 1931), *rev'd on other grounds*, 179 N.E. 385 (N.Y. 1932); Tioga County Gen. Hosp. v. Tidd, 298 N.Y.S. 460 (N.Y. Sup. Ct. 1937); People v. S.W. Straus & Co., 285 N.Y.S. 648, 681 (N.Y. Sup. Ct. 1936), *aff'd*, 290 N.Y.S. 423 (N.Y. App. Div. 1936); Walsh v. Fidelity & Deposit Co., 227 N.Y.S. 96 (N.Y. Sup. Ct. 1928); *In re* Kirby's Will, 240 N.Y.S.2d 214, 217-18 (N.Y. Sur. Ct. 1963); *In re* De Brabant's Estate, 95 N.Y.S.2d 324 (N.Y. Sur. Ct. 1949); *In re* Lord's Will, 25 N.Y.S.2d 747, 751-53 (N.Y. Sur. Ct. 1941); *In re* Arber's Estate, 272 N.Y.S. 684 (N.Y. Sur. Ct. 1934); *In re* Mahlstedt's Will, 250 N.Y.S. 628, 643 (N.Y. Sur. Ct. 1931), *aff'd as modified*, 254 N.Y.S. 1011 (N.Y. App. Div. 1931); *In re* Reed's Estate, 233 N.Y.S. 450 (N.Y. Sur. Ct. 1929). *See also In re* Barker's Estate, 293 N.Y.S. 199, 203 (N.Y. App. Div. 1937) (by implication), *rev'd on other grounds*, 18 N.E.2d 656 (N.Y. 1939). *But cf. In re* Taylor's Estate, 167 N.E. 434, 436-37 (N.Y. 1929) (since charitable donee took no action in response to gift, note could not be upheld under promissory estoppel); *In re* Baer's Estate, 92 N.Y.S.2d 359, 361 (N.Y. Sur. Ct. 1949) (court must determine "whether an enforceable contract . . . or merely a gift on condition" was intended).

190. *In re* Cooke's Estate, 264 N.Y.S. 336, 344 (N.Y. Sur. Ct. 1933).

191. Washington Heights Methodist Episcopal Church v. Comfort, 246 N.Y.S. 450, 452 (N.Y. Mun. Ct. 1930).

192. *In re* Estate of Lipsky, 256 N.Y.S.2d 429, 431 (N.Y. Sur. Ct. 1965). *Accord* Woodmere Academy v. Steinberg, 363 N.E.2d 1169, 1171 (N.Y. 1977); In re Borden's Will, 41 N.Y.S.2d 269, 274-75 (N.Y. Sur. Ct. 1943), *aff'd*, 47 N.Y.S.2d 120 (N.Y. App. Div. 1944).

193. Comfort v. McCorkle, 268 N.Y.S. 192, 197 (N.Y. Sup. Ct. 1933). *Accord* Swerdloff v. Mobil Oil Corp., 427 N.Y.S.2d 266, 268 (N.Y. App. Div. 1980); Healy v. Brotman, 409 N.Y.S.2d 72, 75 (N.Y. Sup. Ct. 1978); Charles E. Quincy & Co. Arbitrage Corp. v. Cities Serv. Co., 282 N.Y.S. 294, 303 (N.Y. Sup. Ct. 1935), *aff'd*, 1 N.Y.S.2d 654 (N.Y. App. Div. 1937). *See also* Tuition Plan, Inc. v. Zicari, 335 N.Y.S.2d 95, 100 (N.Y. Dist. Ct. 1972) (citing *Allegheny College* for traditional rules of consideration).

itable subscription cases, some courts found promises "binding only when a consideration [could] be shown in the way of services performed, obligations assumed, or liabilities incurred upon the request or invitation of the subscription."[194]

Only a few judges took a more expansive view that the *Allegheny College* case "indicate[d] the growth of the judicial process wherein the law enforces the reasonable expectations arising out of conduct."[195] Two trial judges actually applied promissory estoppel in commercial contexts in the five decades after *Allegheny College*,[196] while a third declared that an estoppel could not be based on a promise to act in the future, "[e]xcept in the case of a promissory estoppel used as a substitute for consideration."[197]

Meanwhile, the Court of Appeals remained reticent, and in the few cases in which it mentioned either *Allegheny College* or promissory estoppel, it offered conflicting clues about its position. For example, in *Rubin v. Dairymen's League Co-operative Ass'n*,[198] the court held that a plaintiff who worked as a marketing agent for an association's products could recover promised sales commissions even though he had never exchanged any promise in return.[199] The court also cited *Allegheny College*, but on an issue totally unrelated to promissory estoppel.[200] Thus, it did not decide the case on promissory estoppel grounds, holding instead that the plaintiff's labors constituted performance of a unilateral contract in response to the association's offer to pay.[201]

Two decades later, in *Arden v. Freydberg*,[202] the court again declined an opportunity to apply promissory estoppel in the context of a commercial case. Although three dissenting members of the court cited the *Allegheny College* case,[203] the majority was not prepared so to advance the doctrine.[204] In a situation in which an insurance agent, at the request of the defendants, had submitted a plan for insurance on their business, but where no insurance had been placed or contract reached, the four-judge majority refused to apply promissory estoppel in a fashion that "would open the door to an entirely new field of liability"[205] and subject parties to contracts to which they had never manifested any agreement.

The court arguably took a small step forward in the 1977 case of *Rose v. Spa Realty Associates*.[206] The issue in *Rose* was whether a written contract could be modified by a subsequent oral agreement. A unanimous court held that the

194. Ambler v. Smith, 262 N.Y.S. 208, 211 (N.Y. App. Div. 1932); *In re* Tummonds' Estate, 290 N.Y.S. 40 (N.Y. Sur. Ct. 1936).

195. *In re* Brunswick's Estate, 256 N.Y.S. 879, 886 (N.Y. Sur. Ct. 1932). *Accord* Callophone Co. v. A. Jaeckel & Co., 230 N.Y.S. 155, 157 (N.Y. Mun. Ct. 1928) (dictum).

196. *See* James King & Son, Inc. v. De Santis Constr. No. 2 Corp., 413 N.Y.S.2d 78, 81 (N.Y. Sup. Ct. 1977); Atlas v. Wood, 226 N.Y.S.2d 43, 46 (N.Y. Sup. Ct. 1962), *aff'd*, 232 N.Y.S.2d 743 (N.Y. App. Div. 1962).

197. Ayer v. Board of Educ., 330 N.Y.S.2d 465, 468 (N.Y. Sup. Ct. 1972).

198. 29 N.E.2d 458 (N.Y. 1940).

199. *Id.* at 461.

200. *See id.*

201. *Id.* at 460.

202. 174 N.E.2d 495 (N.Y. 1961).

203. *See id.* at 497.

204. *See id.* at 496-97.

205. *Id.* at 497.

206. 366 N.E.2d 1279 (N.Y. 1977).

State's controlling legislation permitted oral modification in appropriate circumstances[207] and, in the alternative, declared that under "the principle of *equitable estoppel* . . . a party to a written agreement [who] has induced another's significant and substantial reliance upon an oral modification . . . may be estopped from invoking the statute to bar proof of that oral modification."[208] In so holding, however, the court neither mentioned the doctrine of promissory estoppel nor cited the *Allegheny College* case. It also took the view in other cases that "the doctrine of equitable estoppel . . . should be applied with great caution," especially when dealing with realty.[209]

It thus appears that *Allegheny College* brought the doctrine of promissory estoppel to the fullest fruition it would achieve in New York. While a few cases made occasional attempts to extend the doctrine to commercial litigation, both the Court of Appeals and most lower court judges, apparently out of concern to protect freedom of contract, rejected those attempts. It also should be noted that Karl Llewellyn, as was typically his wont, followed New York law and included no reference to promissory estoppel in Article 2 of the UCC.

E. Other Limitations on Freedom of Contract

Two final doctrinal developments must be mentioned. The first is modification of the parole evidence rule. The second is change in the doctrine of impossibility. The significance of both developments is that they strengthened and enhanced weapons available to judges for interfering with contractual terms to which parties had agreed.

As early as the 1930s, judges in New York began to feel an "obvious . . . need" for "liberalizing the rule excluding oral testimony"[210] to interpret a clear contract explicit on its face. Judges, it appears, felt a need to further values other than enforcement of contract terms spelled out by one party. "[P]articularly in the face of high-pressure salesmanship" and of "[c]ontracts of sale . . . furnished on printed forms," it was all too easy for merchants to "safeguard" their rights "in the printed form," while consumers and others with whom they dealt relied on differing oral representations.[211] Accordingly, judges needed a device to facilitate their modification of printed forms and the like, and hence, they altered the parole evidence rule so as to permit nonmerchant parties to prove oral warranties not included in printed forms[212] or to give testimony that they had understood a release complete on its face to be merely partial in its meaning.[213]

Long before the UCC's enactment of § 2-615, providing for "[e]xcuse by [f]ailure of [p]resupposed [c]onditions," New York courts had also translated the tradi-

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207. *See id.* at 1282 (citing § 15-301 of the General Obligation Law).

208. *Id.* at 1283 (emphasis added). *Accord* Philo Smith & Co. v. Uslife Corp., 420 F. Supp. 1266, 1271-72 (S.D.N.Y. 1976), *aff'd*, 554 F.2d 34 (2d Cir. 1977); Tymon v. Linoki, 213 N.E.2d 661 (N.Y. 1965).

209. Huggins v. Castle Estates, Inc., 330 N.E.2d 48, 53 (N.Y. 1975). *Accord* 28 Mott St. Co. v. Summit Import Corp., 299 N.Y.S.2d 763, 767-68 (N.Y. Civ. Ct. 1969), *rev'd on other grounds*, 308 N.Y.S.2d 658 (N.Y. App. Term 1969), *rev'd on other grounds*, 310 N.Y.S.2d 93 (N.Y. App. Div. 1970).

210. V. Valente, Inc. v. Mascitti, 295 N.Y.S. 330, 335 (N.Y. City Ct. 1937).

211. *Id.*

212. *Id.*

213. *See* Ricketts v. Pennsylvania R.R., 153 F.2d 757 (2d Cir. 1946).

tional doctrine of impossibility of performance, which had allowed judges to void terms to which parties had agreed only in cases of "the destruction of the means of performance by an act of God, *vis major*, or by law,"[214] into the more serviceable concept of frustration of purpose, which they defined as the occurrence of "a supervening event or circumstance which was not within the contemplation of the parties."[215] The conceptual shift from impossibility to frustration gave judges a better tool with which to excuse parties from performance of contracts to which they had given their assent if performance became unusually hard.[216] It thereby further undercut classic Langdellian concepts of freedom of contract.

III. REMEDIES

In classic Langdellian contract law, the basic remedy for breach of contract was money damages in an amount equal to the "'loss directly and naturally

214. Swift v. Hale Pontiac Sales, Inc., 34 N.Y.S.2d 888, 891 (N.Y. Mun. Ct. 1942). As to acts of God and *vis major*, *see* Buccini v. Paterno Constr. Co., 170 N.E. 910, 911 (N.Y. 1930); Nitro Powder Co. v. Agency of Canadian Car & Foundry Co., 135 N.E. 507, 508 (N.Y. 1922); Segar v. King Features Syndicate, Inc., 28 N.Y.S.2d 542, 545-46 (N.Y. App. Div. 1941), *aff'd*, 43 N.E.2d 717 (N.Y. 1942); Beechwood Gun Club, Inc. v. City of Beacon, 275 N.Y.S. 249, 251 (N.Y. Sup. Ct. 1933), *aff'd*, 275 N.Y.S. 219 (N.Y. App. Div. 1934); Lion Brewery v. Loughran, 226 N.Y.S. 656, 660 (N.Y. Sup. Ct. 1928), *rev'd on other grounds*, 229 N.Y.S. 216 (N.Y. App. Div. 1928); Kirkpatrick Home for Childless Women v. Kenyon, 196 N.Y.S. 250, 252 (N.Y. Sup. Ct. 1922), *aff'd*, 199 N.Y.S. 851 (N.Y. App. Div. 1923); Transmares Corp. v. George F. Smith, Inc., 76 N.Y.S.2d 737 (N.Y. City Ct. 1947), *aff'd*, 81 N.Y.S.2d 670 (N.Y. Sup. App. Term 1948). As to impossibility by operation of law, *see* Mawhinney v. Millbrook Woolen Mills, Inc., 194 N.Y.S. 780 (N.Y. App. Div. 1922), *rev'd on other grounds*, 137 N.E. 318 (N.Y. 1922); Marrene v. Charles S. Somers Coal Co., 185 N.Y.S. 940 (N.Y. App. Div. 1921); Miller & Sons Co. v. E.M. Sergeant Co., 182 N.Y.S. 382 (N.Y. App. Div. 1920); Crown Embroidery Works v. Gordon, 180 N.Y.S. 158, 162 (N.Y. App. Div. 1920); Erdreich v. Zimmermann, 179 N.Y.S. 829, 835 (N.Y. App. Div. 1920); Martin Ross Mfg. Corp. v. Ulius, 48 N.Y.S.2d 756 (N.Y. App. Term 1944); Fratelli Pantanella, S.A. v. International Commercial Corp., 89 N.Y.S.2d 736, 737-38 (N.Y. Sup. Ct. 1949); Hamilton Rubber Mfg. Co. v. Greater New York Carpet House, Inc., 47 N.Y.S.2d 210, 211 (N.Y. Sup. Ct. 1944), *aff'd*, 53 N.Y.S.2d 954 (N.Y. App. Div. 1945); Alexewicz v. General Aniline & Film Corp., 43 N.Y.S.2d 713, 725 (N.Y. Sup. Ct. 1943); Brown v. J.P. Morgan & Co., 31 N.Y.S.2d 323, 333-34 (N.Y. Sup. Ct. 1941), *rev'd on other grounds*, 40 N.Y.S.2d 229 (N.Y. Sup. Ct. 1943); Schoelkopf v. Moerlbach Brewing Co., 184 N.Y.S. 267, 269 (N.Y. Sup. Ct. 1920), *aff'd*, 189 N.Y.S. 954 (N.Y. App. Div. 1921); Koppel v. St. Regis Paper Co., 47 N.Y.S.2d 443, 446 (N.Y. City Ct. 1944) (dictum), *rev'd on other grounds*, 56 N.Y.S.2d 790 (N.Y. App. Term 1945). As the Court of Appeals explained, "the law in force at the time the agreement [was] entered into [became] . . . part of the agreement." Dolman v. United States Trust Co., 138 N.E.2d 784, 786 (N.Y. 1956). *Accord In re* Estate of Havemeyer, 217 N.E.2d 26, 27 (N.Y. 1966); City of New York v. Interborough Rapid Transit Co., 177 N.E. 295, 299 (N.Y. 1931); People *ex rel.* City of New York v. Nixon, 128 N.E. 245 (N.Y. 1920). Thus, every contract contained "the implied condition that a change in the law may be made and the obligations of the parties varied or avoided." Bown Bros., Inc. v. Merchants' Bank of Rochester, 213 N.Y.S. 146, 151 (N.Y. App. Div. 1925), *aff'd*, 153 N.E. 493 (N.Y. 1926).

215. 119 Fifth Ave., Inc. v. Taiyo Trading Co., 73 N.Y.S.2d 774, 776 (N.Y. Sup. Ct. 1947), *aff'd*, 87 N.Y.S.2d 430 (N.Y. App. Div. 1949). *Accord* Clark v. Fitzgerald, 93 N.Y.S.2d 768, 774 (N.Y. Sup. Ct. 1949). Thus, courts held that "[p]arties may . . . by apt words bind themselves . . . on a contract impossible to perform." Fahey v. Kennedy, 243 N.Y.S. 396, 398 (N.Y. App. Div. 1930). *Accord* Hanna v. Commercial Travelers' Mut. Accident Ass'n, 197 N.Y.S. 395, 396-97 (N.Y. App. Div. 1922), *aff'd*, 142 N.E. 288 (N.Y. 1923). Such a party would not be excused by the occurrence of an event "where inference is reasonable that an express condition so providing would have been inserted in the contract had the parties so intended." Raner v. Goldberg, 155 N.E. 733, 734 (N.Y. 1927). *Cf.* Depot Constr. Corp. v. State, 224 N.E.2d 866 (N.Y. 1967) (specific risk assumed by party seeking excuse).

216. Judges did not apply their new tool with much enthusiasm, however, as they continued routinely to hold that mere "financial difficulty or economic hardship" would not excuse performance. 407 East 61st St. Garage, Inc. v. Savoy Fifth Ave. Corp., 244 N.E.2d 37, 41 (N.Y. 1968). *Accord* Pettinelli Elec. Co. v. Board of Educ., 391 N.Y.S.2d 118 (N.Y. App. Div. 1977), *aff'd*, 372 N.E.2d 799 (N.Y. 1977); Globe Crayon Co. v. Manufacturers Chem. Co., 31 N.Y.S.2d 691 (N.Y. App. Div. 1941); Standard Oil Co. v. Central Dredging Co., 233 N.Y.S. 279, 282 (N.Y. App. Div. 1929), *aff'd*, 170 N.E. 137 (N.Y. 1929); Maple Farms, Inc. v. City School Dist., 352 N.Y.S.2d 784, 788 (N.Y. Sup. Ct. 1974); John H. Reetz, Inc. v. Stackler, 201 N.Y.S.2d 54, 57 (N.Y. Sup. Ct. 1960); George Colon Contracting Corp. v. Morrison, 162 N.Y.S.2d 841, 886 (N.Y. Sup. Ct. 1954), *aff'd*, 157 N.Y.S.2d 927 (N.Y. App. Div. 1956); United States Trust Co. v. Broadwest Realty Corp., 106 N.Y.S.2d 432, 435 (N.Y. Sup. Ct. 1951); Halleran v. City of New York, 228 N.Y.S. 116, 123-24 (N.Y. Sup. Ct. 1928).

resulting, in the ordinary course of events,' from a breach,"[217] measured by the difference between contract price and market price at the time of breach.[218] Alternatively, sellers were permitted, in appropriate circumstances, to recover the contract price of the goods[219] or to resell them.[220] Finally, equity traditionally

217. Haughey v. Belmont Quadrangle Drilling Corp., 29 N.E.2d 649, 652 (N.Y. 1940) (quoting American Law Institute, Restatement of the Law of Contracts § 331). *Accord* Standard Oil Co. v. Siraco, 235 N.Y.S. 1, 4 (N.Y. App. Div. 1929); Gilman v. Broad Brook Co., 243 N.Y.S. 312, 313 (N.Y. Sup. Ct. 1930). *See also* Cornell v. T.V. Dev. Corp., 215 N.E.2d 349, 351 (N.Y. 1966) (duty to mitigate damages).

218. That is, when sellers have failed to deliver as promised, buyers received the difference between the price they promised to pay and the market cost of the replacement goods they had to obtain. *See* American Mfg. Co. v. United States Shipping Bd. Emergency Fleet Corp., 7 F.2d 565 (2d Cir. 1925); W.R. Grace & Co. v. Nagle, 275 F. 343, 346 (2d Cir. 1921); Parrott v. Allison, 48 F. Supp. 955, 959 (S.D.N.Y. 1943); Schopflocher v. Zimmerman, 148 N.E. 660, 661 (N.Y. 1925); Standard Casing Co. v. California Casing Co., 135 N.E. 834, 836 (N.Y. 1922); Kaplan v. Blitzblau, 245 N.Y.S.2d 513 (N.Y. App. Div. 1963); Da Biere v. Von Goeben, 171 N.Y.S.2d 933, 935 (N.Y. App. Div. 1958); Hawthorne Steel Corp. v. Arlington Steel Corp., 153 N.Y.S.2d 85, 88-89 (N.Y. App. Div. 1956); Mulligan v. Charles Hardy, Inc., 104 N.Y.S.2d 25 (N.Y. App. Div. 1951); Hunt v. Engels Tractor Co., 261 N.Y.S. 837 (N.Y. App. Div. 1933); John Dimon Corp. v. Federal Sugar Ref. Co., 213 N.Y.S. 106, 109 (N.Y. App. Div. 1925); S.B. Penick & Co. v. Helvetia Commercial Co., 209 N.Y.S. 202 (N.Y. App. Div. 1925); Universal Steel Export Co. v. N. & G. Taylor Co., 203 N.Y.S. 331, 332 (N.Y. App. Div. 1924), *aff'd*, 147 N.E. 209 (N.Y. 1924); Lehman v. Schapira, 201 N.Y.S. 508 (N.Y. App. Div. 1923); Walker v. Northern & Western Fin. & Trading Corp., 191 N.Y.S. 722, 724 (N.Y. App. Div. 1923); Sander Tilatitsky, Inc. v. Reymond-Hadley Co., 214 N.Y.S. 200 (N.Y. App. Term 1926); Segall v. Finlay, 213 N.Y.S. 540, 549-50 (N.Y. Sup. Ct. 1925), *aff'd*, 218 N.Y.S. 895 (N.Y. App. Div. 1926), *aff'd*, 156 N.E. 97 (N.Y. 1927); Zachos v. Kay, 78 N.Y.S.2d 836 (N.Y. City Ct. 1948). Similarly, when buyers have refused to accept goods as promised, sellers have received the difference between the price the buyers promised and the price at which the goods could be resold in the market. *See* Ruttonjee v. Frame, 142 N.E. 437 (N.Y. 1923); Perkins v. Minford, 139 N.E. 276 (N.Y. 1923); Edwards Dairy Co. v. Aiello, 99 N.Y.S.2d 183, 186 (N.Y. App. Div. 1950); A. Lenobel, Inc. v. Senif, 300 N.Y.S. 226, 230-31 (N.Y. App. Div. 1937); Franklin Sugar Ref. Co. v. Lipowicz, 221 N.Y.S. 11, 18 (N.Y. App. Div. 1927), *aff'd*, 160 N.E. 916 (N.Y. 1928); Winter v. American Aniline Prods., Inc., 198 N.Y.S. 717, 718-19 (N.Y. App. Div. 1923), *rev'd on other grounds*, 140 N.E. 561 (N.Y. 1923); Sheldon v. Argos Mercantile Corp., 185 N.Y.S. 513, 519 (N.Y. App. Div. 1920), *aff'd*, 135 N.E. 928 (N.Y. 1922); Babbitt v. Wides Motor Sales Corp., 192 N.Y.S.2d 21 (N.Y. App. Term 1959) (dictum); J. & W. Tool Co. v. Schulz, 251 N.Y.S. 509 (N.Y. App. Term 1931); American Broad.-Paramount Theatres, Inc. v. American Mfgs. Mut. Ins. Co., 265 N.Y.S.2d 76, 88 (N.Y. Sup. Ct. 1965), *aff'd*, 265 N.Y.S.2d 577 (N.Y. App. Div. 1965), *aff'd*, 218 N.E.2d 324 (N.Y. 1966); Hauck Food Prods. Co. v. B.A. Stevenson & Co., 192 N.Y.S. 42, 44 (N.Y. Sup. Ct. 1921), *rev'd on other grounds*, 197 N.Y.S. 34 (N.Y. App. Div. 1922); Guaranty Trust Co. v. Meer, 187 N.Y.S. 288 (N.Y. Sup. Ct. 1921); Chozo Yano v. Ledman, 188 N.Y.S. 764, 765 (N.Y. City Ct. 1921), *rev'd on other grounds*, 192 N.Y.S. 647 (N.Y. App. Term 1922). *See also* Buyer v. Mercury Technical Cloth & Felt Corp., 92 N.E.2d 896, 897 (N.Y. 1950) (buyer must show existence of market as a prerequisite to offering proof of market price). Note that, in leases, the lessor received the entire lost rental and not merely the difference between the contract and market rental prices. *See* Ducasse v. American Yellow Taxi Operators, Inc., 231 N.Y.S. 51, 56 (N.Y. App. Div. 1928). *Cf.* General Supply & Constr. Co. v. Goelet, 202 N.Y.S. 721, 724 (N.Y. App. Div. 1923) (measure of damages for delay in construction of building is full rental value).

219. As, for example, when buyers had actually received them, *see* Pratt Chuck Co. v. Crescent Insulated Wire & Cable Co., 33 F.2d 269, 272 (2d Cir. 1929); Frankel v. Foreman & Clark, Inc., 33 F.2d 83, 86-87 (2d Cir. 1929); G. Robison & Co. v. Kram, 187 N.Y.S. 631, 632 (N.Y. App. Div. 1921); or constructively received them, they could not be resold, *see* D'Aprile v. Turner-Looker Co., 147 N.E. 15, 16 (N.Y. 1925); Rosenberg Bros. & Co. v. F.S. Buffum Co., 137 N.E. 609, 610 (N.Y. 1922); National Cash Register Co. v. Lyon, 13 N.Y.S.2d 1 (N.Y. App. Div. 1939); Taylor v. Kurzrok, 212 N.Y.S. 133, 138 (N.Y. App. Div. 1925); Mantell v. Acker, 93 N.Y.S.2d 524 (N.Y. City Ct. 1949). *But cf.* Jno. Dunlop's Sons, Inc. v. Alpren, 212 N.Y.S. 307, 308 (N.Y. App. Div. 1925) (action for price cannot be maintained when seller has repossessed goods); Pottash v. Cleveland-Akron Bag Co., 189 N.Y.S. 375, 379 (N.Y. App. Div. 1921) (action for price cannot be maintained when title has not passed to buyer), *aff'd*, 139 N.E. 717 (N.Y. 1923); Inman v. Smythe, 232 N.Y.S. 554, 555 (N.Y. Sup. Ct. 1929) (same). Moreover, when the goods were specially manufactured for the buyers, they could not be resold to someone else. *See* May Dep't Stores Co. v. Chasin, 190 N.Y.S. 594, 595 (N.Y. App. Term 1921) (dictum). If the goods were resold, the buyer was entitled to a credit measured by the proceeds of the resale. *See* Higgins v. California Prune & Apricot Growers, Inc., 16 F.2d 190, 193 (2d Cir. 1926); Korde Corp. v. Casino Classics, Inc., 116 N.Y.S.2d 908, 910 (N.Y. App. Div. 1952). The action for the price could not be maintained if there was a market in which to resell the goods. *See* Ellison v. Republic Mfg. Corp., 296 N.Y.S. 38 (N.Y. App. Div. 1937); Hubbard v. Rockaway Lunch Co., 225 N.Y.S. 638, 643 (N.Y. Sup. Ct. 1927).

220. *See* C.D. Brown & Co. v. Darling & Co., 264 N.Y.S. 792 (N.Y. App. Div. 1933); Hyman v. Hullman, 199 N.Y.S. 366, 368 (N.Y. App. Div. 1923); Farrish Co. v. Harris Co., 204 N.Y.S. 638, 640 (N.Y. City Ct. 1924). A resale was at least "some evidence of [market] value" in the absence of any "real market." Hayes v. Durham, 185 N.Y.S. 691, 693 (N.Y. App. Div. 1921). *Accord* Farish Co. v. Madison Distr. Co., 37 F.2d 455, 457-58 (2d Cir. 1930); Duncan v. Wohl, South & Co., 195 N.Y.S. 381, 384 (N.Y. App. Div. 1922). There was often considerable debate whether a particular resale constituted adequate proof of value. *Compare* Washington Elec. Coop., Inc. v. Norry Elec. Corp., 193 F.2d 412, 415-16 (2d Cir. 1951) (sufficient proof of value), *with* Bisbee

granted specific performance of contracts for the sale of land,[221] as well as contracts for the sale of goods in cases in which money judgments provided inadequate compensation, such as those transferring "heirlooms, works of art, patents and inventions, particular shares of stock which possessed peculiar investment features,"[222] an interest in a specific business,[223] specially manufactured machine tools,[224] or scarce Bulgarian tobacco.[225] These classic remedies often failed, however, to give practical businesspeople the full amount of the benefits they expected to receive from a contract. In response to this failure, the New York courts acted in their typical fashion and altered Langdellian doctrine to fit business needs. As early as the 1920s, New York permitted a seller to recover lost profits following a contract breach if other measures of damage were inadequate to put

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Linseed Corp. v. Paragon Paint & Varnish Corp., 96 F.2d 464, 467 (2d Cir. 1938) (inadequate proof of value); Derami, Inc. v. John B. Cabot, Inc., 79 N.Y.S.2d 664, 668-70 (N.Y. App. Div. 1948) (same); Joannes Bros. Co. v. Lamborn, 235 N.Y.S. 86 (N.Y. App. Div. 1929) (same); Waumbeck Mfg. Co. v. Alfandri, 187 N.Y.S. 439 (N.Y. App. Div. 1921) (same). *Cf.* Plunkett v. Comstock-Cheney Co., 208 N.Y.S. 93, 97 (N.Y. App. Div. 1925) (seller can show value by evidence of resale price). In addition to the basic remedies outlined above, victims of a breach of contract could sometimes recover incidental and consequential damages, such as storage and transportation expenses, *see* A.B. Murray Co. v. Lidgerwood Mfg. Co., 229 N.Y.S. 664 (N.Y. Sup. Ct. 1928), *aff'd*, 233 N.Y.S. 684 (N.Y. App. Div. 1929), *aff'd*, 168 N.E. 426 (N.Y. 1929); Rodrigues v. R.H. Macy & Co., 391 N.Y.S.2d 44, 46 (N.Y. Civ. Ct. 1977); *but see* Derami, Inc. v. John B. Cabot, Inc., 98 N.Y.S.2d 34 (N.Y. App. Div. 1950); damages due to the loss of customers' good will, *see* Cramerton Mills, Inc. v. Nathan & Cohen Co., 246 N.Y.S. 259, 266-69 (N.Y. App. Div. 1930); and, for the cost of excess work done under protest, *see* Uvalde Asphalt Paving Co. v. City of New York, 188 N.Y.S. 304, 318-19 (N.Y. App. Div. 1921). But, they could not recover attorneys' fees or other legal expenses. *See* Czarnikow-Rionda Co. v. Franklin Sugar Ref. Co., 173 N.E. 913, 917-19 (N.Y. 1930); Brownie's Army & Navy Store, Inc. v. E.J. Burke, Jr., Inc., 424 N.Y.S.2d 800, 803 (N.Y. App. Div. 1980). *But see* Lamborn v. Czarnikow-Rionda Co., 225 N.Y.S. 228 (N.Y. App. Div. 1927). Another rule of the law of damages, applicable both before and after the enactment of the UCC, was that the parties could agree to a liquidated damages clause that limited or otherwise altered the ordinary measures of damages, as long as the amount provided was reasonable in light of the actual or anticipated damages. *See* Equitable Lumber Corp. v. IPA Land Dev. Corp., 344 N.E.2d 391, 394-95 (N.Y. 1976); Vanderlinde Elec. Corp. v. City of Rochester, 388 N.Y.S.2d 388, 390 (N.Y. App. Div. 1976); Truck Rent-a-Center, Inc. v. Puritan Farms 2nd Inc., 380 N.Y.S.2d 37, 40 (N.Y. App. Div. 1976), *aff'd*, 361 N.E.2d 1015 (N.Y. 1977); King Midas Mill Co. v. Montauk Wholesale Grocery Co., 276 N.Y.S. 357 (N.Y. App. Div. 1937); Associated Spinners, Inc. v. Massachusetts Textile Co., 75 N.Y.S.2d 263, 264 (N.Y. Sup. Ct. 1947). However, a liquidated damages clause would be invalidated if it gave a remedy disproportionate to actual damages, *see* Brecher v. Laikin, 430 F. Supp. 103, 106-07 (S.D.N.Y. 1977); Allen B. DuMont Lab., Inc. v. Kane, 68 N.Y.S.2d 537 (N.Y. Sup. Ct. 1946); Nu Dimensions Figure Salons v. Becerra, 340 N.Y.S.2d 268, 272 (N.Y. Civ. Ct. 1973); Weatherproof Improvement Contracting Corp. v. Kramer, 172 N.Y.S.2d 688, 691-93 (N.Y. Mun. Ct. 1956); or if the actual damages were a fixed amount different from that provided in the liquidation clause. *See* Edelstein v. Spielberger, 188 N.Y.S. 723 (N.Y. App. Div. 1921).

221. *See* Ballen v. Potter, 167 N.E. 424, 425-26 (N.Y. 1929) (dictum); Harris v. Shorall, 130 N.E. 572 (N.Y. 1921); Schifferdecker v. Busch, 225 N.Y.S. 106 (N.Y. Sup. Ct. 1927). But, specific performance would not be granted if the plaintiff had not fully performed, *see* Grace v. Nappa, 389 N.E.2d 107, 110 (N.Y. 1979); Audrey-Grace Corp. v. Entroc Realty Corp., 38 N.E.2d 476, 477 (N.Y. 1941); Poggioli v. Liebegott, 354 N.Y.S.2d 57, 61-62 (N.Y. Sup. Ct. 1974); or if some defense or other equity existed in the defendant's favor. *See* Gracie Square Realty Corp. v. Choice Realty Corp., 113 N.E.2d 416, 421 (N.Y. 1953) (statute of frauds); City of New York v. New York Cent. R.R., 9 N.E.2d 931, 934 (N.Y. 1937) (laches); Hammer v. Michael, 154 N.E. 305, 306-07 (N.Y. 1926) (misrepresentation by plaintiff); Saperstein v. Mechanics' & Farmers' Sav. Bank of Albany, 126 N.E. 708, 709 (N.Y. 1920) (defendant no longer had title); Richards v. Levy, 338 N.Y.S.2d 929, 931 (N.Y. App. Div. 1972) (plaintiffs lacked clean hands).

222. Glick v. Beer, 33 N.Y.S.2d 833, 834 (N.Y. App. Div. 1942).

223. *See* Monclova v. Arnett, 143 N.E.2d 375 (N.Y. 1957).

224. *See* Dexter Bishop Co. v. B. Redmond & Son, Inc., 396 N.Y.S.2d 652 (N.Y. App. Div. 1977); Doherty v. Aaron Mach. Co., 214 N.Y.S.2d 536 (N.Y. Sup. Ct. 1961).

225. *See* Glick v. Beer, 33 N.Y.S.2d 833 (N.Y. App. Div. 1942). *But see* Division of Triple T Serv., Inc. v. Mobil Oil Corp., 304 N.Y.S.2d 191 (N.Y. Sup. Ct. 1969) (refusal to grant specific performance of distributorship agreement), *aff'd*, 311 N.Y.S.2d 961 (N.Y. App. Div. 1970). Equity would also grant rescission of a contract if it would be unjust to hold a plaintiff thereto and the plaintiff was prepared to restore the defendant to the status quo. *See* E.T.C. Corp. v. Title Guarantee & Trust Co., 2 N.E.2d 284 (N.Y. 1936); Junius Constr. Co. v. Cohen, 178 N.E. 672 (N.Y. 1931); Marr v. Tumulty, 175 N.E. 356 (N.Y. 1931); Waldman Produce, Inc. v. Frigidaire Corp., 284 N.Y.S. 167 (N.Y. App. Term 1935); Emerson v. Associated Gas & Elec. Co., 266 N.Y.S. 265 (N.Y. Sup. Ct. 1933).

the seller in as good a position as performance would have done.[226] When Karl Llewellyn drafted Article 2 of the UCC, he codified this lost profit remedy with a provision stating that, if ordinary remedies were "inadequate to put the seller in as good a position as performance would have done," then the seller could recover "the profit (including reasonable overhead) which the seller would have made from full performance by the buyer."[227]

Llewellyn's Code also added some other new remedies. For example, it gave buyers a remedy comparable to the seller's right to resell in the form of "cover," or the right to buy substitute goods in case of nondelivery.[228] Another change wrought by the UCC was to give judges greater "leeway in receiving evidence of

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226. For cases allowing sellers to recoup lost profits, *see* Parrott v. Allison, 145 F.2d 415, 417-18 (2d Cir. 1944); Baxter v. Lustberg, 200 N.Y.S. 125, 131 (N.Y. App. Div. 1923); Pierson & Co. v. Nederlandsch-Indische Maatschappij Tot Voortzetting der Zaken van der Linde & Teves en R.S. Stokvis & Zonen, Ltd., 196 N.Y.S. 587, 589 (N.Y. App. Div. 1922) (dictum); Foster v. De Paolo, 188 N.Y.S. 746 (N.Y. Sup. Ct. 1921), *rev'd on other grounds*, 194 N.Y.S. 934 (N.Y. Sup. Ct. 1922). *See also* Wasserman v. Broadalbin Knitting Co., 58 N.Y.S.2d 597, 600 (N.Y. App. Div. 1945), *aff'd*, 72 N.E.2d 11 (N.Y. 1947); Washburne v. Property Owners' Coop. Ass'n, 205 N.Y.S. 36, 37 (N.Y. App. Div. 1924), *aff'd*, 148 N.E. 749 (N.Y. 1925); James Talcott, Inc. v. Marshall Field & Co., 15 N.Y.S.2d 846 (N.Y. Sup. Ct. 1939), *aff'd*, 17 N.Y.S.2d 1020 (N.Y. App. Div. 1940); D. Mackintosh & Sons Co. v. Spinell, 210 N.Y.S. 54, 57 (N.Y. Sup. Ct. 1925). Buyers were also permitted to recover lost profits if the seller could have contemplated them. *See* Murarka v. Bachrack Bros., 215 F.2d 547, 554 (2d Cir. 1954); Emerman v. Cohen, 199 F.2d 857, 858 (2d Cir. 1952); For Children, Inc. v. Graphics Int'l, Inc., 352 F. Supp. 1280, 1285 (S.D.N.Y. 1972); Orester v. Dayton Rubber Mfg. Co., 126 N.E. 510, 512 (N.Y. 1920); Mignon v. Tuller Fabrics Corp., 148 N.Y.S.2d 605, 607 (N.Y. App. Div. 1956); Acunto v. Schmidt-Dauber Co., 202 N.Y.S. 1, 3 (N.Y. App. Div. 1923); Agress Nut & Seed Co. v. Sargiss, 129 N.Y.S.2d 626 (N.Y. App. Term 1953); Log Cabin Rest, Inc. v. Alpine Wine & Liquor Corp., 178 N.Y.S.2d 521, 524 (N.Y. Sup. Ct. 1958); Bonwit Teller & Co. v. Frank Staub Furs, Inc., 143 N.Y.S.2d 801, 803 (N.Y. Sup. Ct. 1955). *Cf.* Murphy v. Lischitz, 49 N.Y.S.2d 439, 441-42 (N.Y. Sup. Ct. 1944) (buyer permitted to recover excess profit made by seller as result of breach), *aff'd*, 52 N.Y.S.2d 943 (N.Y. App. Div. 1945), *aff'd*, 63 N.E.2d 26 (N.Y. 1945). Of course, the reason for allowing recovery of lost profits was that contract law gives parties their expectation damages, which are supposed to put them "in as good condition as [they] would have occupied" if the contract had been performed. Menzel v. List, 246 N.E.2d 742, 745 (N.Y. 1969). *See also* Proctor & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp., 213 N.E.2d 873, 878-79 (N.Y. 1965); Winter v. American Aniline Prods., Inc., 140 N.E. 561, 562 (N.Y. 1923). However, juries could not be left "'at liberty to mulct defendants upon speculation,'" and thus, proof of damages had to "be reasonably certain and definite in amount and not speculative or problematical or resting on conjecture." Roussos v. Christoff, 230 N.Y.S. 185, 186 (N.Y. App. Div. 1928) (quoting Cantor v. Tattersal's of N.Y., 34 N.Y.S. 96 (N.Y. C.P. 1895)). *Accord* Readex Microprint Corp. v. General Aniline & Film Corp., 74 N.Y.S.2d 613, 618 (N.Y. Sup. Ct. 1947). *But see* Kaufman v. Gordon, 197 N.Y.S.2d 1013, 1022 (N.Y. Sup. Ct. 1960) ("Damages need not be proved with absolute certainty and mathematical accuracy."), *aff'd*, 208 N.Y.S.2d 807 (N.Y. App. Div. 1960), *aff'd*, 177 N.E.2d 54 (N.Y. 1961). Accordingly, many cases denied recovery of lost profits as too speculative or otherwise inappropriate. *See* Armstrong Rubber Co. v. Griffith, 43 F.2d 689, 690-91 (2d Cir. 1930); Werfel v. United States, 83 F. Supp. 507, 509 (S.D.N.Y. 1948); Biothermal Process Corp. v. Cohu & Co., 126 N.Y.S.2d 1, 6 (N.Y. App. Div. 1953), *aff'd*, 124 N.E.2d 323 (N.Y. 1954); A.O. Andersen Trading Co. v. Brody, 199 N.Y.S. 128, 129 (N.Y. App. Div. 1923); Neverfail Lighter Co. v. Blum, 194 N.Y.S. 24, 27 (N.Y. App. Div. 1922); Chajet Design Group, Inc. v. Warner/Lauren Ltd., 431 N.Y.S.2d 275, 278 (N.Y. Sup. Ct. 1980); Harbor Hill Lithographing Corp. v. Dittler Bros., Inc., 348 N.Y.S.2d 920, 924 (N.Y. Sup. Ct. 1973); Bronx County Appliance Corp. v. Brecher, 113 N.Y.S.2d 622, 626 (N.Y. Mun. Ct. 1952). *Cf.* Holden v. Efficient Craftsman Corp., 138 N.E. 85, 86 (N.Y. 1923) (no lien exists for lost profits).

227. UCC § 2-708 (1977). Using this provision, the Court of Appeals in *Neri v. Retail Marine Corp.*, 285 N.E.2d 311 (N.Y. 1972), allowed a boat dealer, who resold a boat to a new buyer following the contract buyer's repudiation of the contract, to recover the profits it would have made from the contract sale on the theory that, in the absence of breach, it would have sold two boats and thereby made a profit on the first transaction — a profit irretrievably lost by the buyer's breach.

228. *See* U.C.C. § 2-712. *See also* G.A. Thompson & Co. v. Wendell J. Miller Mortgage Co., 457 F. Supp. 996, 999 (S.D.N.Y. 1978); Robert Mfg. Co. v. South Bay Corp., 368 N.Y.S.2d 413, 416-17 (N.Y. Sup. Ct. 1975).

prices current in other comparable markets or at other times comparable to the one in question."[229]

The most important pro-business change in remedial law had nothing to do, however, with the UCC. It occurred much earlier, as a result of a statute authorizing the remedy of arbitration.

The New York courts opened the decade of the 1920s with a strong, common-law based hostility toward arbitration. As the Court of Appeals explained in a January, 1920 opinion, "[p]arties cannot undertake by an independent covenant of a contract to provide for an adjustment of differences arising in its performance by arbitration, to the exclusion of the courts."[230] The lower courts agreed that it had "always been the established law of this state that agreements in advance to oust its courts of jurisdiction are a nullity, and entirely illegal and void"[231] in that they "deprived" litigants "of their constitutional rights to seek redress in the courts."[232]

In 1920, however, the legislature enacted the Arbitration Law,[233] which "declare[d] a new public policy, and abrogate[d] an ancient rule"[234] by thereafter making agreements to arbitrate binding. In an opinion by Judge Benjamin N. Cardozo, reversing the Appellate Division, First Department, the Court of Appeals not only sustained the Law's constitutionality, but also applied it retroactively to contracts made before the Law's passage in regard to arbitration sought after its passage. Cardozo concluded:

> We think there is no departure from constitutional restrictions in this legislative declaration of the public policy of the state. The ancient rule . . . was followed with frequent protest, in deference to early precedents. Its hold even upon the common law was hesitating and feeble. We are now asked to declare it so imbedded in the very foundations of our jurisprudence and the structure of our courts that nothing less than an amendment of the Constitution is competent to change it. We will not go so far. The judges might have changed the rule themselves if they had abandoned some early precedents, as at times they seemed inclined to do . . . . No one would have suspected that in so doing they were undermining a jurisdiction which the Constitution had charged them with a duty to preserve. Not different is the effect of like changes when wrought by legislation.[235]

Despite this bold statement by Cardozo, lower courts nonetheless gave a strained construction to the 1920 legislation. One line of cases, for example,

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229. *See* U.C.C. § 2-723, official comment (1977). After the UCC's adoption, New York judges became more willing to weigh resale evidence positively. *See* Buchsteiner Prestige Corp. v. Abraham & Strauss, 433 N.Y.S.2d 972 (N.Y. App. Term 1980); B & R Textile Corp. v. Paul Rothman Indus. Ltd., 420 N.Y.S.2d 609 (N.Y. Civ. Ct. 1979), *aff'd*, 1979 WL 30097 (N.Y. App. Term Dec. 7, 1979). *But see* Bache & Co., Inc. v. International Controls Corp., 339 F. Supp. 341, 352-53 (S.D.N.Y. 1972), *aff'd*, 469 F.2d 696 (2d Cir. 1972).

230. Saratoga State Waters Corp. v. Pratt, 125 N.E. 834, 838 (N.Y. 1920), *rev'd on other grounds*, 130 N.E. 288 (N.Y. 1921).

231. Berkovitz v. Arbib & Houlberg, Inc., 183 N.Y.S. 304, 306 (N.Y. App. Div. 1920), *rev'd on other grounds*, 130 N.E. 288 (N.Y. 1921).

232. General Silk Importing Co. v. Gerseta Corp., 194 N.Y.S. 15, 20 (N.Y. App. Div. 1922), *aff'd*, 138 N.E. 427 (N.Y. 1922).

233. 1920 N.Y. Laws, ch. 275.

234. Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288, 289 (N.Y. 1921).

235. *Id.* at 276. *But see* Hudson Trading Co. v. Durand, 185 N.Y.S. 187, 190 (N.Y. App. Div. 1920).

held that any "alleged contract to arbitrate, which is disputed, will be subjected to strict construction,"[236] while another held that an arbitration clause would not bar an equity court from granting specific performance of the contract.[237] Of course, parties who mutually agreed could always waive arbitration and, instead, bring their dispute to the courts.[238] In general, though, the Court of Appeals, through the 1920s and 1930s, required anyone who had "become a party to a contract for the arbitration of future differences" to "live up to his engagement according to its spirit" and not "to wrest it from its purpose and turn it into a shallow form by taking refuge in a disingenuous silence or in subtle and adroit evasions."[239]

Thereafter, arbitration became a routine part of New York contract law, as the courts recognized that to "permit an action at law after the parties have agreed to submit any dispute . . . would be to set at naught the underlying policy which has shaped the growth of arbitration law in this State."[240] Accordingly, the courts settled down to deal with a series of procedural issues,[241] the most important of which concerned waiver,[242] whether the parties had, in fact, agreed to arbitration,[243] the appointment and proceedings of the arbitrators,[244] the scope of the issues submitted to them,[245] and the time period within which arbitration could be

236. *See General Silk Importing Co.*, 194 N.Y.S. at 20. *Accord In re* General Silk Importing Co., 189 N.Y.S. 391, 395 (N.Y. App. Div. 1921). For other cases holding disputes not properly subject to arbitration, *see* Lew Morris Demolition Co. v. George F. Driscoll Co., 7 N.E.2d 252 (N.Y. 1937); Brescia Const. Co. v. Walart Const. Co., 190 N.E. 484, 486-87 (N.Y. 1934); Checker Cab Mfg. Corp. v. Heller, 149 N.E. 333 (N.Y. 1925); Young v. Crescent Dev. Co., 148 N.E. 510 (N.Y. 1925); *In re* Fletcher, 143 N.E. 248 (N.Y. 1924); Priore v. Schermerhorn, 142 N.E. 337 (N.Y. 1923).

237. *See* Hydraulic Power Co. v. Pettebone-Cataract Paper Co., 191 N.Y.S. 12, 16-17 (N.Y. App. Div. 1921). *Accord* Harry Hastings Attractions v. Howard, 196 N.Y.S. 228 (N.Y. Sup. Ct. 1922). *But see* Buxton v. Mallery, 157 N.E. 259 (N.Y. 1927).

238. Zimmerman v. Cohen, 139 N.E. 764, 765-66 (N.Y. 1923). *Accord* Nagy v. Arcas Brass & Iron Co., 150 N.E. 614 (N.Y. 1926); George L. Hiltl Co. v. Bishoff, 197 N.Y.S. 617 (N.Y. Sup. Ct. 1922), *rev'd on other grounds*, 198 N.Y.S. 915 (N.Y. Sup. Ct. 1923). *But see* Haupt v. Rose, 191 N.E. 853 (N.Y. 1934) (no waiver found). Of course, a party who agreed without being contractually bound to accept arbitration could not later disclaim the award. *See* Louis Michel, Inc. v. Whitecourt Constr. Co., 189 N.E. 767, 769-70 (N.Y. 1934).

239. Newburger v, Lubell, 178 N.E. 669, 670 (N.Y. 1931). *Accord* Newburger v. Lubell, 177 N.E. 424 (N.Y. 1931); Gilbert v. Burnstine, 174 N.E. 706 (N.Y. 1931); Marchant v. Mead-Morrison Mfg. Co., 169 N.E. 386 (N.Y. 1929); *In re* Kelley, 147 N.E. 363 (N.Y. 1925); Hosiery Mfrs.' Corp. v. Goldston, 143 N.E. 779 (N.Y. 1924); *In re* S.M. Goldberg Enters., Inc., 225 N.Y.S. 513 (N.Y. Sup. Ct. 1927), *aff'd*, 225 N.Y.S. 909 (N.Y. App. Div. 1927).

240. River Brand Rice Mills, Inc. v. Latrobe Brewing Co., 110 N.E.2d 545, 547 (N.Y. 1953). *Accord* Gantt v. Felipe y Carlos Hurtado & Cia., 79 N.E.2d 815, 818 (N.Y. 1948); American Reserve Ins. Co. v. China Ins. Co., 79 N.E.2d 425, 427 (N.Y. 1948).

241. *See* Symphony Fabrics Corp. v. Bernson Silk Mills, Inc., 190 N.E.2d 418 (N.Y. 1963) (consolidation of separate arbitration proceedings); S.M. Wolff Co. v. Tulkoff, 174 N.E.2d 478 (N.Y. 1961) (stay of arbitration granted when related proceedings pending before federal administrative agency).

242. *See* De Sapio v. Kohlmeyer, 321 N.E.2d 770 (N.Y. 1974).

243. *See* Crawford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 319 N.E.2d 408 (N.Y. 1974); Helen Whiting, Inc. v. Trojan Textile Corp., 121 N.E.2d 367 (N.Y. 1954); Riverdale Fabrics Corp. v. Tillinghast-Stiles Co., 118 N.E.2d 104 (N.Y. 1954); Level Export Corp. v. Wolz, Aiken & Co., 111 N.E.2d 218 (N.Y. 1953); Albrecht Chem. Co. v. Anderson Trading Corp., 84 N.E.2d 625 (N.Y. 1949); *In re* Kramer & Uchitelle, Inc., 43 N.E.2d 493 (N.Y. 1942); *In re* Kahn's Application, 32 N.E.2d 534 (N.Y. 1940); Ernest J. Michel & Co. v. Anabasis Trade, Inc., 422 N.Y.S.2d 79 (N.Y. App. Div. 1979), *aff'd*, 409 N.E.2d 933 (N.Y. 1980); Miner v. Walden, 422 N.Y.S.2d 335 (N.Y. Sup. Ct. 1979); Stein, Hall & Co. v. Nestle-Le Mur Co., 177 N.Y.S.2d 603 (N.Y. Sup. Ct. 1958).

244. *See In re* Delmar Box Co., 127 N.E.2d 808, 811 (N.Y. 1955); Lipschutz v. Gutwirth, 106 N.E.2d 8 (N.Y. 1952); *In re* Buffalo & E. Ry., 165 N.E. 291 (N.Y. 1929); E. Arthur Tutein, Inc. v. Hudson Valley Coke & Prods. Corp., 162 N.E. 592 (N.Y. 1928).

245. *See* Allied Van Lines, Inc. v. Hollander Express & Van Co., 272 N.E.2d 70 (N.Y. 1971); G.E. Howard & Co. v. Daley, 265 N.E.2d 747 (N.Y. 1970); ITT Avis, Inc. v. Tuttle, 261 N.E.2d 395 (N.Y. 1970); Dimson v. Elghanayan, 227 N.E.2d 10 (N.Y. 1967); Wilaka Constr. Co. v. New York City Hous. Auth., 216 N.E.2d 696 (N.Y. 1966); Long Island Lumber Co. v. Martin, 207 N.E.2d 190 (N.Y.1965); Carey v. Westinghouse Elec. Corp., 184 N.E.2d 298 (N.Y.1962), *rev'd on other grounds*, 375 U.S. 261 (1964); Associated Metals & Minerals

brought and objections interposed.[246] As it addressed these questions, the Court of Appeals continued to focus on the "very broad limits of arbitrability"[247] and on the "settled" rule that "arbitration may be had as to all issues arising subsequent to the making of the contract."[248] The court also declared that "[a]rbitrators are not bound by rules of law and their decisions are essentially final."[249] One case even held an American business to its agreement with an agency of the Soviet government to have disputes arbitrated in Russia,[250] while another court invalidated a provision allowing one, but not both, of the parties the option of litigating, rather than arbitrating, disputes.[251]

IV. CONCLUSION

When we look back over the changes in contract law reported in the pages above, it seems clear that businesspeople were the beneficiaries of most of them. This is especially true of the changes in remedial law, such as the authorization of arbitration, which helped businesspeople obtain the value of the contracts that they had made with other businesspeople. But, it was also true of other doctrinal changes. Although judges sometimes deployed the doctrine of unconscionability to protect the weak at the expense of the strong—consumers, for example, at the

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Corp. v. Kemikalija, 178 N.E.2d 715 (N.Y. 1961); Milton L. Ehrlich, Inc. v. Unit Frame & Floor Corp., 157 N.E.2d 495 (N.Y. 1959); Potoker v. Brooklyn Eagle, Inc., 141 N.E.2d 841 (N.Y. 1957); Baker v. Board of Educ., 132 N.E.2d 837 (N.Y. 1956); Bohlinger v. National Cash Register Co., 114 N.E.2d 31 (N.Y. 1953); Utility Laundry Serv., Inc. v. Sklar, 90 N.E.2d 178 (N.Y. 1949); Western Union Tel. Co. v. American Communications Ass'n, 86 N.E.2d 162 (N.Y. 1949); Behrens v. Feuerring, 71 N.E.2d 454 (N.Y. 1947); Lipman v. Haeuser Shellac Co., 43 N.E.2d 817 (N.Y. 1942); *In re* Exeter Mfg. Co., 5 N.Y.S.2d 438 (N.Y. App. Div. 1938); Metro-Goldwyn-Mayer Distrib. Corp. v. Dewitt Dev. Corp., 269 N.Y.S. 104 (N.Y. Sup. Ct. 1931), *aff'd*, 273 N.Y.S. 444 (N.Y. App. Div. 1934).

246. *See* Sears, Roebuck & Co. v. Enco Assocs., Inc., 372 N.E.2d 555, 557 (N.Y. 1977); Denihan v. Denihan, 313 N.E.2d 759 (N.Y. 1974); Aetna Life & Cas. Co. v. Stekardis, 313 N.E.2d 53 (N.Y. 1974); Knickerbocker Ins. Co. v. Gilbert, 268 N.E.2d 758 (N.Y. 1971); City Trade & Indus., Ltd. v. New Cent. Jute Mills Co., 250 N.E.2d 52 (N.Y. 1969); DeLuca v. Motor Vehicle Accident Indemnification Corp., 215 N.E.2d 482 (N.Y. 1966); Broadway-Fortieth St. Corp. v. President and Directors of Manhattan Co., 71 N.E.2d 451 (N.Y. 1947); Hesslein & Co. v. Greenfield, 22 N.E.2d 149 (N.Y. 1939); Schafran & Finkel, Inc. v. M. Lowenstein & Sons, 19 N.E.2d 1005 (N.Y. 1939).

247. Blum Folding Paper Box Co. v. Friedlander, 261 N.E.2d 382, 383 (N.Y. 1970). *Accord* Lehigh Valley Indus., Inc. v. Armtex, Inc., 384 N.Y.S.2d 837, 838 (N.Y. App. Div. 1976). *But see In re* Stern, 33 N.E.2d 689 (N.Y. 1941).

248. Terminal Auxiliar Maritima v. Winkler Credit Corp., 160 N.E.2d 526, 529 (N.Y. 1959). *Accord* Schachter v. Lester Witte & Co., 364 N.E.2d 840 (N.Y. 1977); Glekel v. Gluck, 281 N.E.2d 171 (N.Y. 1972); National Equip. Rental Ltd. v. American Pecco Corp., 269 N.E.2d 37 (N.Y. 1971); Methodist Church of Babylon v. Glen-Rich Constr. Corp., 267 N.E.2d 88 (N.Y. 1971); Bronston v. Glassman, 176 N.E.2d 570 (N.Y. 1961); Exercycle Corp. v. Maratta, 174 N.E.2d 463, 465 (N.Y. 1961); DeLillo Constr. Co. v. Lizza & Sons, Inc., 164 N.E.2d 95 (N.Y. 1959); Paloma Frocks, Inc. v. Shamokin Sportswear Corp., 147 N.E.2d 779 (N.Y. 1958). *But see* Marlene Indus. Corp. v. Carnac Textiles, Inc., 380 N.E.2d 239 (N.Y. 1978); Rosenbaum v. American Surety Co., 183 N.E.2d 667 (N.Y. 1962); Wrap-Vertiser Corp. v. Plotnick, 143 N.E.2d 366 (N.Y. 1957); *In re* Burkin, 136 N.E.2d 862 (N.Y. 1956); Princeton Rayon Corp. v. Gayley Mill Corp., 127 N.E.2d 729 (N.Y. 1955); American Rail & Steel Co. v. India Supply Mission, 127 N.E.2d 562 (N.Y. 1955); Alpert v. Admiration Knitwear Co., 105 N.E.2d 561 (N.Y. 1952); Tunis Mfg. Corp. v. Allen Knitting Mills, Inc., 386 N.Y.S.2d 911 (N.Y. Sup. Ct. 1976).

249. Aimcee Wholesale Corp. v. Tomar Prods., Inc., 237 N.E.2d 223, 225 (N.Y. 1968). *Accord In re* Sprinzen, 389 N.E.2d 456, 458 (N.Y. 1979); Hirsch v. Hirsch, 333 N.E.2d 371, 373-74 (N.Y. 1975); Raisler Corp. v. New York City Hous. Auth., 298 N.E.2d 91, 94-95 (N.Y. 1973); Weinrott v. Carp, 298 N.E.2d 42, 44 (N.Y. 1973); De Laurentiis v. Cinematografica de las Americas, 174 N.E.2d 736 (N.Y. 1961).

250. Amtorg Trading Corp. v. Camden Fibre Mills, Inc., 109 N.E.2d 606 (N.Y. 1952).

251. Cored Panels, Inc. v. Meinhard Commercial Corp., 420 N.Y.S.2d 731 (N.Y. App. Div. 1979).

expense of merchants—the other doctrines that changed between 1920 and 1960 typically emerged in cases between businesspeople, where they functioned to help one businessperson at the expense of another. Rules permitting judges to fill in terms omitted from contracts usually furthered businesspeople's actual expectations, while relaxation of the parole evidence rule and the doctrine of impossibility enabled judges to adjust contract terms to altered practical realities on the ground. The doctrine of substantial performance was, of course, a boon to the construction industry, while promissory estoppel, if applied to commercial transactions, favored business litigants as much as anyone. Even as limited by the Court of Appeals to charitable subscriptions, promissory estoppel usually favored corporate charities at the expense of individual charitable givers.

New York, of course, is a leading industrial and business state, and hence, it is not surprising that its courts modified contract doctrine to fit business needs. What is surprising is the early time in which New York acted. According to the received wisdom, the UCC, adopted by states in the third quarter of the twentieth century, was the principal vehicle that "simplif[ied], clarif[ied], and modernize[d] the law governing commercial transactions."[252] This Article shows, however, that the changes transforming New York law from classic Langdellian doctrine, focusing on freedom of contract, to modern, utilitarian "machinery for expansion of commercial practices"[253] occurred some three decades earlier.

In order to appreciate the reasons underlying contract law's early shift in New York to a more pro-business orientation, it is necessary to focus on the values associated with freedom of contract that provided the foundation for the classic Langdellian model. Essentially, they were the values of small-town America, where men who had repetitive transactions with each other worked out long-term relationships on an individualized, face-to-face basis. Performing one's promises was essential in such a context—men who got a reputation for breaking promises and hence, for being untrustworthy, would find themselves subject to censure by their peers and unable either to enter into new contracts or to convince local juries that they had acted properly in carrying out old ones.

Small-town America was not the world of Benjamin N. Cardozo or Karl N. Llewellyn, however, or of other key judges, such as Henry J. Friendly, Stanley H. Fuld, Irving Lehman, and Edward Weinfeld, all of whom played a central role in the transformation of New York's law of contract. Their world was New York City. In a political cataclysm in the 1922 elections, which elevated Alfred E. Smith to the governorship, liberal forces centered in the City seized control of the state from the small-town, conservative forces that had dominated it through most of the nineteenth century, and, for the next seventy-two years, New York, unlike most of the rest of the nation, was led by progressive, primarily Democratic, governors.[254]

252. U.C.C. § 1-102(2)(a) (1977).

253. *Id.* § 1-102, official comment.

254. Only two Republicans—the liberals, Thomas E. Dewey and Nelson A. Rockefeller—were able to win the gubernatorial election during the seventy-two year period, after twenty straight years of Democratic rule.

Indeed, during the 1920s, New York, initially under Alfred E. Smith, created the liberal New Deal coalition. Building on a base of immigrants and their descendents, who "rightly look[ed] upon him as their mouthpiece" and felt "for the first time that . . . [they had] access to power and honours,"[255] Smith was able, in 1922, to assemble the Catholic, Jewish, and liberal patrician coalition that he and his two successors, Franklin D. Roosevelt and Herbert H. Lehman, personified and that kept them and the Democratic Party in power in New York until 1942 and in the nation until 1952.[256] Even in losing his bid for the Presidency in 1928, Smith proved so attractive to the urban masses that, for the first time in history, the Democratic Party won a plurality of the votes in the nation's twelve largest cities.[257]

Roosevelt and Lehman continued Smith's practice of courting the urban, lower-class vote. Roosevelt, as everyone will recall, placed his "faith . . . in the forgotten man at the bottom of the economic pyramid."[258] Lehman similarly spoke on behalf of the urban, immigrant class when he urged that "group isolation" was "no longer . . . possible in a well ordered body politic"[259] and firmly "insisted that freedom and liberty, political and economic self-determination must never tolerate artificial barriers of race, creed, color, sex or geography."[260] Politics and law thereupon became a battleground between conservatism and liberalism, with conservatives developing "a discriminating defense of the [existing] social order against change and reform,"[261] while liberals "push[ed] actively for reform, and dr[e]w particular support from the disinherited, dislocated and disgruntled."[262]

In the context of contract law, conservatism was represented by the classic, Langdellian freedom-of-contract paradigm, adequately suited as it was to the needs of the small-town, upstate economy. The liberals, we must remember, were not opposed to the idea of contract, to free enterprise, or to accumulating wealth; they could not possibly have been, given that present in their coalition were men, such as Franklin Roosevelt, the squire from Harvard and Hyde Park, Herbert and Irving Lehman, sons of one of the founders of the Lehman Brothers brokerage firm, and Henry Friendly, the Harvard-trained lawyer who had spent his practice career representing Pan American Airways. What liberals needed was contract law that would permit people who were not neighbors, who did not attend church together, and who could not engage in face-to-face dealings to enter into commercial transactions with each other. They needed a body of contract doctrine that would enable people who were separated from each other by long distances and cultural pluralism to interact through documents, the meaning of which was not dependent upon norms drawn from only one of the cultures.

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255. ANDRE SIEGFRIED, AMERICA COMES OF AGE (1927) (quoted in MATTHEW JOSEPHSON & HANNAH JOSEPHSON, AL SMITH: HERO OF THE CITIES v (1969)).

256. *See* NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, BEYOND THE MELTING POT: THE NEGROES, PUERTO RICANS, JEWS, ITALIANS, AND IRISH OF NEW YORK CITY 169 (1963).

257. *See* JOSEPHSON & JOSEPHSON, *supra* note 224, at 399.

258. Franklin D. Roosevelt, National Radio Address, April 7, 1932 (quoted in FRANK FRIEDEL, FRANKLIN D. ROOSEVELT: THE TRIUMPH 261 (1956)).

259. Herbert H. Lehman, Speech at St. Bonaventure College (1934) (quoted in ALLAN NEVINS, HERBERT H. LEHMAN AND HIS ERA 155 (1963)).

260. George Meany, *Foreword* to ROBERT P. INGALLS, HERBERT H. LEHMAN AND NEW YORK'S LITTLE NEW DEAL vii (1975).

261. CLINTON ROSSITER, CONSERVATISM IN AMERICA 12 (1955).

262. *Id.* at 15.

Ultimately, the UCC would provide that doctrine, but until the legislature put the Code into effect in 1964, the New York judiciary set about to provide the needed doctrine by means of the common law.

In essence, then, the history of contract law in twentieth-century New York traces the demise of classical Langdellian doctrine suited to the values of small-town America. In its place, New York judges substituted the mores of an increasingly urban America, where relationships were more routinized and disputes had to be resolved by recourse to objective commercial criteria, rather than to jurors' knowledge of their neighbors' credibility. What requires emphasis is that businesspeople made money under both systems and that the twentieth-century transformation of contract law did not represent a shift from ethical or moral to utilitarian or efficiency values. On the contrary, the transformation reflected no more than a shift away from rules for moneymaking in a rural context to rules for making money in an urban context. As such, the fact that the transformation occurred in New York at a time earlier than it did nationally makes perfect sense—rural law was transformed by the judiciary into urban law at approximately the same point in time that a new, urban coalition took political control of the state from its traditional rural governors.

Judges in many of the other forty-nine states, as has already been suggested, did not keep pace with the judges of New York. In mid-twentieth-century America, many states remained predominantly rural. Langdellian contract doctrine continued to serve these jurisdictions adequately. This persistence of Langdellian doctrine created a problem, however, for the national, and increasingly global, businesses located in New York and other major cities—businesses which needed uniform commercial doctrine with which to navigate an increasingly pluralistic world.

This desired uniformity was provided by the American Law Institute and the Commissioners on Uniform State Laws through the vehicle of the UCC, the drafting of which began in the 1940s. Like most legislation, the UCC did not create new law out of whole cloth. Article 2, at least, was not the brilliant creation of its head draftsman, Karl Llewellyn, or of his drafting committee. Instead, Article 2 merely codified the same doctrine which judges confronting the same problem as the Code's drafters—how to construct workable contract rules for a culturally pluralistic economy—had elaborated in the workshop of New York.

In short, as America has changed during the twentieth century from a largely rural, homogenous culture to a predominantly urban, pluralistic one, contract law has changed with it. Initially, legal change was elaborated by judges in common-law fashions in jurisdictions, like New York, where cultural change occurred early in the century. Then, as the rest of the nation followed culturally in the wake of New York, legislation emerged to clarify the resulting chaos and to augment and codify the new rules of commerce to which the courts had given birth.

CONSTITUTIONAL FIDELITY[1]

Matthew S. Steffey[2]

As we are reminded with each inauguration, when the President-elect places one hand on the Bible and raises the other before the Chief Justice of the United States, Article II requires the President "to solemnly swear" that he will "preserve, protect and defend the Constitution of the United States."[3] Indeed, a similar sworn duty is a universal feature of government service: Article VI of the Constitution requires all governmental officers, state and federal, to take an oath to "support th[e] Constitution."[4] Thursday, January 7, 1999, provided a moment of especially high Constitutional drama as Chief Justice William Rehnquist asked each Senator to swear, before God Almighty, to "do impartial justice according to the Constitution."[5]

How does one discharge such a solemn obligation[6] and demonstrate fidelity to her oath and to the Constitution? The first step, naturally, is to determine what the Constitution *means*, often a matter of great complexity — and great practical importance, too. In taking the oath, does one swear fidelity to a Constitution that embraces our status as the world's only military superpower or one that presupposes no standing army?[7] One that allows the dollar to serve as the world's currency or one that bans paper money?[8] One that guarantees the liberty to worship or one that countenances State control of religion?[9]

My thesis is that any serious effort towards fidelity requires the interpreter to give the Constitution its best meaning after thoughtfully considering the full range of interpretive possibilities. To do this, all six sources for Constitutional interpretation must be brought to bear: arguments based on Constitutional text; relevant history — notably including the intent of the framers; precedent — judicial and otherwise; the structure of our Constitutional government — especially the implications of federalism and separation of powers; the political and economic consequences of a given interpretation; and our American commitment to liberty.[10] These six sources of Constitutional interpretation date to the founding.

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1. This paper was delivered on January 28, 1999, as the 1999 Butler, Snow, O'Mara, Stevens & Cannada Lecture.

2. Professor of Law, Mississippi College School of Law. B.A., University of South Florida; J.D., Florida State University; LL.M., Columbia University. I would like to thank the law firm of Butler, Snow, O'Mara, Stevens & Cannada for their generous support. I would also like to thank Judy Johnson and Mark Modak-Truran for their helpful and frank comments on the ideas presented here.

3. *See* U.S. CONST. art. II, § 1, cl. 8.

4. *See* U.S. CONST. art. VI, cl. 3.

5. *See* Rule XXIV, *Rules and Manual of the Senate*, S. Res. 479, 99-2 (1986).

6. The impeachment of President Clinton surely teaches that oath-taking is neither a trivial nor a purely symbolic matter. Both Articles of Impeachment lodged against him centered around dishonest conduct in the face of a sworn duty to tell the truth.

7. *See* U.S. CONST. art. I, § 8, cls. 12, 13 (contemplating that Congress shall have occasion, from time to time, to "raise and support armies," as opposed to permanently "provide and maintain a Navy").

8. *See* U.S. CONST. art. 1, § 8, cl. 5 (granting Congress the power merely to "coin" money).

9. *See infra* notes 22-24.

10. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

They have been used from 1787 to the present day, from the Chief Justiceship of John Marshall to that of William Rehnquist. In fact, they are organic, embedded features of the interpretive process.[11] To attempt to answer complex Constitutional questions by, instead, ignoring this reality and considering only a narrow range of interpretive sources is frequently impossible and, indeed, absurd.

The Senate impeachment trial of President Clinton illustrates how the text and the intent of the framers are necessary — but ultimately insufficient — interpretative sources. The Senate has the "sole power" to convict and remove the President from office[12] for "Treason, Bribery, or other high Crimes and Misdemeanors."[13] Does perjury or obstruction of justice regarding an extramarital sexual affair (if proven) meet this standard? If we look *only* to the text or the framers' understanding, we simply cannot answer the question. Valid arguments can certainly be made either way.

First, resort to history is absolutely necessary to understand the clause at all. It is apparent that "misdemeanor" cannot have been used in the modern sense of trivial crime. Otherwise, the clause would nonsensically read "Treason, Bribery, or other high Crimes or Trivial Matters."

Indeed, consideration of the text initially leads to the conclusion that treason and bribery involve betrayal of the powers and duties of the Presidency almost *categorically* different than lying about or attempting to thwart an investigation into an extramarital affair. There seems to be no evidence that President Clinton abused his official powers to retard the investigation (as by ordering the IRS or FBI to harass his accusers).

On the other hand, the language seems purposely elastic. Surely the Senate is meant to have discretion in interpreting the clause. Accordingly, it is entirely conceivable that purely personal resistance to lawful authority could, in some circumstances, be so inconsistent with the President's sworn duty to faithfully execute the law that a reasonable Senate might legitimately remove him.[14] But such a conclusion must *necessarily* rest on considerations other than the text or the framers' understanding of it. The Senate must also consider the structure of our Constitutional government, the political or economic consequences of a decision to convict or acquit, and the effect of a conviction or acquittal on our American commitment to liberty.

The question of whether the Senate should remove President Clinton from office demonstrates that complex Constitutional questions simply cannot be answered without consulting the full range of interpretive sources. Nonetheless, many have tried to adopt an interpretive approach more limited than one which considers all arguments, those based on text, *and* history, *and* precedent, *and* structure, *and* economic and political consequences, *and* our American commitment to liberty. The most common limiting method is to try and confine the

11. *See id.*
12. *See* U.S. CONST. art. I, § 3, cls. 6, 7.
13. *See* U.S. CONST. art. II, § 4.
14. *See* CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK (1974).

interpretive inquiry to a conversation about what the framers took or may have taken Constitutional text to mean. But doing so risks error, and even absurdity.

Consider Chief Justice Taney's opinion in the *Dred Scott* case, which invalidated the Missouri Compromise, pushed the country toward the brink of Civil War, and concluded that persons of African decent were not and could never be citizens of the United States.[15] In reaching this final conclusion, Taney reasoned:

> No one, we presume, supposes that any change in public opinion or feeling . . . should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted . . . . It is not only the same in words, but the same in meaning . . . . Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.[16]

Thus, in Taney's view, the only legitimate insights are those drawn from the text, as originally understood. Yet, Taney's justification for this conclusion is based on neither the text of the Constitution nor the intent of those who framed and ratified it. The text says nothing about how it should be read, and there is little evidence that the framers thought that their expectations would govern.[17] Rather, it proceeds from structural concerns: Taney's conception of the role of the judiciary. A fuller consideration of structural or prudential matters, though, might have led Taney to an attitude of restraint, instead of activism, which might have led to a happier place in history. As Justice Scalia has observed:

> There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer and staring straight out. There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case – its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation – burning on his mind.[18]

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15. Dred Scott v. Sanford, 60 U.S. 393 (1857).
16. *Id.* at 426.
17. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).
18. Planned Parenthood v. Casey, 505 U.S. 833, 1001-02 (1992) (Scalia, J., dissenting).

When your only tool is a hammer, everything looks like a nail. Indeed, the desire for a limited approach to Constitutional interpretation led former Attorney General Edwin Meese to explain *Brown v. Board of Education* in the following way in an address to the Federalist Society:

> When the Supreme Court, in *Brown*, sounded the death knell for official segregation in the country, it earned all the plaudits it received. But the Supreme Court in that case was not giving new life to old words, or adapting a "living," "flexible" Constitution to new reality. It was restoring the original principle of the Constitution to constitutional law. The *Brown* Court was correcting the damage done 50 years earlier, when in *Plessy* an earlier Supreme Court had disregarded the *clear intent of the Framers of the civil war amendments to eliminate the legal degradation of blacks*, and had contrived a theory of the Constitution to support the charade of "separate but equal"' discrimination.[19]

Meese's extraordinary assertion is that *Brown* can be explained by simple reference to the intent of the framers of the 14th Amendment: in Meese's view, *Plessy* wrongly read the framers' intent and allowed segregation; *Brown* correctly read the framers' intent and forbade it. But, of course, it is not that easy. The *Brown* court itself found the historical record "inconclusive,"[20] and, surely, the very *easiest* opinion for the *Brown* Court to write would be one which rested the outcome on text and history, one which said that *Plessy* simply misunderstood the historical record. What, then, would lead Meese to make such a claim? The concurrence of two things: (1) a desire to uphold the result in *Brown*; and (2) an unbending commitment to justify *Brown* and all other Constitutional conclusions only by reference to the framers' understanding of the text.

A close look at *Brown* and *Plessy* paints a different picture. In setting out the doctrine of separate but equal, the *Plessy* Court reasoned that:

> If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals . . . . Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.[21]

By the time *Brown* was decided, our nation had embraced a very different, very activist view of government. How could a government of minimum wage laws, child labor laws, social security, and countless other social welfare measures be completely incapable of addressing the problem of segregation.[22] The *Brown* Court realized this. They wrote:

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19. THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION (1986) 36-38 (1986) (speech to the Washington, D.C. Federalist Society) (emphasis added).

20. Brown v. Board of Education, 347 U.S. 483, 489 (1954).

21. Plessy v. Ferguson, 163 U.S. 537, 544, 551-552 (1896).

22. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

> In approaching the problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation . . . .
>
> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society . . . . Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[23]

It was not the Court's understanding of the framers' intent that had changed. It was not the reality of segregation that had changed. It was not even the Court's moral resolve that explains the change. Rather, it was the Court's changed conception of what government could do about segregation that made the difference: the *Plessy* Court viewed government as powerless concerning racial attitudes, while the *Brown* Court viewed government as a principal instrument for inculcating cultural values.

The *Wallace v. Jaffree* case provides what may be the paradigmatic example of the absurd Constitutional universe inhabited by those with interpretive tunnel vision. *Wallace v. Jaffree* involved a challenge in federal court to three Alabama school prayer laws. At a hearing on the plaintiff's request for a preliminary injunction, Chief Judge William Brevard Hand found the "moment of silence" statute constitutional, but entered a preliminary injunction against the other two statutes. While the trial on the merits did not change Judge Hand's understanding of the statutes, what he considered newly discovered historical evidence convinced him that the First Amendment did not apply to Alabama *at all* and, thus, the State could establish an official religion if it should so choose.[24] The Supreme Court reversed, naturally, holding that Alabama, no less than the Congress, must respect the religious liberty of its citizens.[25]

For my present purposes, most interesting is Judge Hand's opinion, where he confronted the fidelity question head on. A section of Judge Hand's opinion, entitled "proper interpretive perspective," sets forth his thesis.

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23. *Brown*, 347 U.S. at 492-93.

24. Jaffree v. Board of School Commissioners of Mobile County, 554 F. Supp. 1104, 1128 (1983).

25. Wallace v. Jaffree, 472 U.S. 38 (1985). Quoting Justice Jackson's famous words, the Court held that Alabama, no less than the Congress, must respect the basic truth that "'[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'" *Id.* at 55 (quoting West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943)).

> The interpretation of the Constitution can be approached from two vantages. First, the Court can attempt to ascertain the intent of the adopters, and after ascertaining that attempt apply the Constitution as the adopters intended it to be applied. Second, the Court can treat the Constitution as a living document, chameleon-like in its complexion, which changes to suit the needs of the times and the whims of the interpreters. In the opinion of this Court, the only proper approach is to interpret the Constitution as its drafters and adopters intended . . . .
>
> What is a court to do when faced with a direct challenge to settled precedent? . . . [A] rigid adherence to stare decisis "would leave the resolution of every issue in constitutional law permanently at the mercy of the first Court to face the issue . . . ."
>
> This Court's review of the relevant legislative history surrounding the adoption of both the first amendment and of the fourteenth amendment, together with the plain language of those amendments, leaves no doubt that those amendments were not intended to forbid religious prayers in the schools which the states and their political subdivisions mandate.[26]

Judge Hand's lack of institutional and historical perspective is apparent. It is a paradoxical notion of judicial restraint that drives a district judge to ignore decades of Supreme Court precedent against the settled expectations of nearly all Americans. At a doctrinal level, *stare decisis* addresses the deference a court owes its own decisions, not the binding effect of long settled Supreme Court precedent on a District Court.[27] More fundamentally, the complex question of the meaning of the 14th Amendment simply cannot be settled by reference to its famously vague and broad text[28] or the ambiguous and conflicting historical record surrounding it. Rather, one must draw on our nation's nearly one hundred and thirty years of experience since the ratification of the reconstruction Amendments, and the full range of interpretive sources. Judge Hand's interpretive straight-jacket precluded any chance that he could properly situate his task in relation to other Constitutional actors, contemporary and historic, with a role in defining our nation's commitment to religious freedom. His interpretive approach literally foreclosed any evaluation of the Constitutional achievements of Americans since reconstruction.

Perhaps the most notable failure of the Taney-Meese-Hand method is that it precludes consideration of the Constitutional achievements of other actors, past

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26. *Jaffree*, 554 F. Supp. at 1126-28.
27. *Wallace*, 472 U.S. 45 at n.26.
28. *See* U.S. CONST. amend. XIV, § 1, which reads:
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

and present, and thereby impoverishes our Constitutional history.[29] The amputation of history is precisely what is problematic with Justice Thomas's views on federal authority. Consider his concurring opinion in the case of *Lopez v. United States* (which, in 1995, for the first time in over 60 years, held that Congress exceeded its legislative power under the Commerce Clause). Justice Thomas argued that, beginning in the 1930s, the Supreme Court has strayed far from the framers' understanding of Congressional authority and that the Court ought to return to something approaching a 19th century view. In asking for others to heed his call, Thomas seemed eager to return to the original understanding, but noted that:

> Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years.[30]

Thus, Justice Thomas invites us not to evaluate the Constitutional achievements of this century, but to treat them as irrelevancies.

What might cause Justice Thomas to want to enforce a 19th century view of federal power and thereby stake out territory as a revolutionary infidel? It certainly cannot be a commitment to judicial restraint; leading a charge to dismantle the federal government does not come from a limited and restrained judiciary. Justice Thomas's interpretive methodology could well call into question the validity of our standing army, the dollar, the modern administrative state, the application of the Bill of Rights to the States, and laws on subjects ranging from child labor to sexual harassment. Perhaps it is a desire to simplify Constitutional questions and avoid the complex issues raised by our Constitutional history and practice. Perhaps it is simply ideology. But, fidelity to the full array of sources for Constitutional interpretation is often important precisely because it can help discipline the interpreter's biases and prejudices and promote proper institutional and historical perspective.

To be sure, faithful interpretation can be hard and personally distressing work. Justices O'Connor, Kennedy, and Souter recognized this as they decided whether to overrule *Roe v. Wade*. Whatever one thinks about the merit of their conclusion on the abortion question, they were manifestly committed to faithful process. Their joint opinion explained their duty in these terms:

> It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. But of course this Court has never accepted that view.

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29. See BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).
30. United States v. Lopez, 514 U.S. 549, 601 at n.8 (1995) (Thomas, J., concurring)

> It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia.*
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> The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office.
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> * * *
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> Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter . . . .[31]
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> We do not need to say [how] each of us, had we been Members of the [*Roe*] Court . . . , would have [decided that case]. The matter is not before us in the first instance, and coming as it does after nearly 20 years of litigation in *Roe*'s wake we are satisfied that the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding.[32]

To return briefly to where I began, consider again the task before the Senate during the impeachment trial of President Clinton. Faithful execution of such a duty requires a lot of hard work and resort to all six sources of Constitutional interpretation.

First, Senators should engage the text. They should ask "how great or small is the similarity between the President's alleged misconduct and treason or bribery?"

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31. Planned Parenthood v. Casey, 505 U.S. 833, 847-50 (1992) (opinion of Justices O'Connor, Kennedy, and Souter).

32. *Id.* at 871.

Second, Senators should examine history. They should review the federalist papers and other evidence of the framers' intent and ask "is the President's alleged misconduct like the kind of official malfeasance the framers considered impeachable?"

Third, Senators should evaluate precedent. With regard to the precedent for impeaching a President, they should ask "whether removing President Clinton from office would be like the failed, and essentially political, effort to remove President Andrew Johnson?" In regard to the precedent for impeaching federal judges, they should ask "should the Senate be more or less reluctant to remove the President than a federal judge?" "Does the fact that Article III states that judges serve 'during good behavior' provide a different standard?" "Does it matter that judges are appointed for life, not elected for a term, and the President will leave office in two years anyway?"

Fourth, Senators should consider the effects of a decision to convict or acquit on the structure of our Constitutional system of government. They should ask "would removing the president by a strongly partisan vote move us undesirably closer to a parliamentary system?" Conversely, "will failing to remove President Clinton intolerably damage the office of President?"

Fifth, Senators must account for the political and economic consequences of their decision. They should ask "does the continued, strong, popular support for the President make impeachment a usurpation of democratic principles?" Or, alternatively, "would accounting for the polls undermine the republican, representative responsibilities of the Senate?"

Sixth, and finally, given that President Clinton is accused of dishonesty concerning consensual sexual conduct, Senators should consider the effect of the Independent Counsel's investigation and the impeachment proceedings on our historic commitment to liberty. They should ask "do the methods of the office of independent counsel threaten the private realm of family life which the state cannot enter?"

Failure to consider all interpretive sources means that fidelity to the Constitution is replaced with fidelity to a particular result. And the process of Constitutional interpretation is consequently replaced with an exercise of mere power.