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Much legal doctrine in the early years of the twentieth century continued to reflect values of the preceding century. The law regulating the conduct of businesspeople toward each other was no exception. Like so much else in early twentieth-century law, the areas of fraud, privacy, trespass, conversion, and interference with contractual relations—the doctrines considered in this article—were fashioned to impede the downward redistribution of wealth from individuals in higher-income brackets to those in classes below them, who typically were immigrants or children of immigrants.

By the end of the century, in contrast, different values had gained a foothold. In particular, judges adopted a policy of circumscribing their role in enforcing business ethics. By not enforcing doctrines that early in the century had limited a sharp entrepreneur's ability to make money at the expense of an established businessman, courts began, by the closing decades of the century, to encourage entrepreneurial freedom, to facilitate upward social mobility, and thereby to make redistribution of wealth easier. Judges did not similarly encourage those with established wealth to take advantage of the poor, however, because they adopted new doctrines that protected those without knowledge, wealth, or power from overreaching by those in an economically superior position. The result at the end of the century was a legal order that promoted an equality of sorts by tolerating redistribution from the "have's" to the "have not's" while protecting the "have not's" from redistribution in favor of the "have's."

This article examines these developments in the law of business con-

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duct, including the subjects of fraud, privacy, trespass, conversion, and interference with contractual relations, by focusing on New York judicial decisions between 1920 and 1980. I have chosen to focus on the law of a single state because such a focus makes possible a distinct kind of study in which one can examine not only leading cases known to all casebooks but also the often highly revealing secondary opinions of the state's highest court and the opinions of intermediate- and trial-court judges. This focus also facilitates the placement of doctrinal change in a broader pattern of political, intellectual, and cultural development. Hopefully, the study of a single state will produce a deeper kind of knowledge than would a rehash of the leading cases we already know.

New York provides the focus for this study because between 1920 and 1980 it was the most populous state as well as the cultural and economic leader of the nation. In its metropolitan center, in its upstate industrial cities, in its suburbs, and in its rural farmlands and environmentally protected woodlands, it contained locales similar to those in all the rest of the nation with the exception of the Deep South and the Pacific Southwest. New York was more representative of the nation as a whole than any other state, and hence the findings of this article should serve as preliminary hypotheses about the development of American law in general in the twentieth century—until other scholars, through equally detailed studies of California, Texas, Georgia, and elsewhere, prove them wrong.

In one important respect, however, New York was not typical. Throughout the first half of the twentieth century, New York culture displayed, in exaggerated form, a cleavage that cut across American life between a white, Anglo-Saxon, Protestant elite, on the one hand, and Catholic and Jewish immigrants and their descendants seeking to improve their status, on the other. From the 1930s through the 1960s, New Yorkers were also at the center of efforts to secure entry of Catholic and Jewish ethnics into the American mainstream. A primary claim of this article is that the doctrines of fraud, privacy, trespass, conversion, and interference with contractual relations under examination herein had the effect, and perhaps even the purpose, in the first half of the century of keeping Catholic and Jewish immigrants and their descendants in the

lower-income brackets. Legal doctrines on the same issues had the opposite effect in the second half of the century by facilitating the upward economic climb of ethnics, which well may have been their purpose. Because this connection between social mobility and doctrinal transformation emerges more clearly in the context of New York than in other jurisdictions, New York merits intensive study.

Part I of this article will examine the law of fraud, privacy, trespass, conversion, and interference with contractual relations as it existed during the decade of the 1920s and how it sometimes persisted for years thereafter. Part II will then turn to an analysis of newer ethical norms and other doctrinal developments that encouraged entrepreneurs to take advantage of business opportunity and thereby achieve upward economic mobility. These new norms and developments, as we shall see, had their origins at the end of the 1920s, but they did not come to full fruition until the last quarter of the century.

I. ELITIST LAW DURING THE 1920S

The early twentieth century, as one business historian has noted, was a time not of equality but of "repression along class and ethnic lines."[1] Only a "very few men in every hundred or thousand," it was said, had sufficient "industry, brains *and* thrift" to get ahead.[2] Wage workers, according to the same writer, remained employees of others because they had "not initiative enough to be employers themselves"[3]; they remained "poor" because of a "lack of brains, lack of wit to earn, thrift to save, and knowledge to use [their] savings."[4] "No man who ha[d] endeavored to carry out an enterprise," according to a turn-of-the-century sermon, could avoid being "well-nigh appalled at times by the imbecility of the average

1. STEPHEN FOX, THE MIRROR MAKERS: A HISTORY OF AMERICAN ADVERTISING AND ITS CREATORS 100 (1984).

2. CHARLES N. FAY, BUSINESS IN POLITICS: SUGGESTIONS FOR LEADERS IN AMERICAN BUSINESS 103 (1926) (emphasis in original).

3. *Id.* at 164.

4. *Id.* at 103.

man—the inability or unwillingness to concentrate on a thing and do it."[5] Indeed the "nature of man [was] so squarely built upon the doctrine of the elite that the superior few and the inferior many scarcely appear[ed] to belong to the same species."[6]

Ethnic prejudices often lay beneath the social inequality of the 1920s, which contrasted "a WASP vision of a tasteless, colorless, odorless, sweatless world" against a portrait of "[e]thnic minorities [who] cooked with vivid spices—even garlic!—and might neglect . . . deodorants, and regular bathing" and need to be shown "how to cleanse themselves."[7] There was virulent anti-Semitism, for example, on the part of prominent people such as Henry James, who expressed shock at the "Hebrew conquest of New York" that was transforming the city into a "new Jerusalem," and Henry Ford, who, during the 1920s, issued repeated warnings against the "Jewish problem"[8] and who, in 1938, accepted the Grand Cross of the German Eagle from the Nazi regime.[9] Ethnic prejudice also extended to other groups, especially the Irish and Italians, and was acknowledged even by members of minorities themselves. Consider, for example, *What Makes Sammy Run?*, a novel by Budd Schulberg about "a Jewish boy from . . . Manhattan's Lower East Side," who was "no different from the little wops and micks who cursed and fought and cheated."[10] Schulberg thought of his lead character as a boy "rocking in his cradle of hate, malnutrition, prejudice, suspicions, amorality, the an-

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5. PETER BAIDA, POOR RICHARD'S LEGACY: AMERICAN BUSINESS VALUES FROM BENJAMIN FRANKLIN TO DONALD TRUMP 241 (1990) (quoting ELBERT HUBBARD, A MESSAGE TO GARCIA AND THIRTEEN OTHER THINGS (1901)).

6. JAMES WARREN PROTHRO, THE DOLLAR DECADE: BUSINESS IDEAS IN THE 1920'S 210 (1954).

7. FOX, *supra* note 1, at 101.

8. HOWARD M. SACHAR, THE COURSE OF MODERN JEWISH HISTORY 339, 341 (1958).

9. *See* BAIDA, *supra* note 5, at 203-06.

10. RICHARD M. HUBER, THE AMERICAN IDEA OF SUCCESS 410 (1971).

archy of the poor . . . a mangy little puppy in a dog-eat-dog world."[11]

If white, Anglo-Saxon, Protestant business elites saw Catholic and Jewish business competitors as lazy, hateful, suspicious, and amoral cheats, their vision of themselves stood in marked contrast. For elites, "dishonesty and sinful behavior of any sort was considered not only ignoble but also an impractical way to make money."[12] WASPs understood that they possessed "[c]haracter . . . a stiffening of the vertebrae which . . . cause[d] them to be loyal to a trust, to act promptly, concentrate their energies, [and] do the thing."[13] They felt themselves bound by a "PHILOSOPHY OF FAIR PLAY,"[14] which Julius H. Barnes, president of the U.S. Chamber of Commerce, explained as follows:

> In America the various sports of our youth teach the principles of team play and of fair play. . . . On every baseball diamond and football field the qualities of fortitude and courage and fair play, inspired by loyalty to club or town or college, are instilled in our young men.[15]

WASPs ran their lives and businesses, they believed, in accordance with this creed of fortitude, hard work, loyalty, and fair play.[16]

The WASP elite that dominated the business and legal order of New York at the outset of the 1920s had little doubt that the legal system

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11. *Id.* (quoting BUDD SCHULBERG, WHAT MAKES SAMMY RUN? (1941)). Of course, immigrants and their descendants did not admit these accusations against them, as is evidenced by Schulberg's statement that "Sammy was not a real Jew any more." *Id.*

12. HUBER, *supra* note 10, at 99.

13. *See* BAIDA, *supra* note 5, at 241 (quoting ELBERT HUBBARD, A MESSAGE TO GARCIA AND THIRTEEN OTHER THINGS (1901)).

14. JULIUS H. BARNES, THE GENIUS OF AMERICAN BUSINESS 6-7 (1924) (emphasis in original).

15. *Id.* at 7.

16. *See generally* PROTHRO, *supra* note 6, at 79-107.

should abide by "the principles of right and justice and honesty"[17]—that is, that the law should impede any redistribution of wealth. As we next examine the law of trespass, conversion, interference with contract rights, fraud, and privacy, adherence to the policy of protecting the existing distribution of wealth will be apparent. Indeed, the early *raison d'etre* of these five areas of tort law was the protection of property and other established commercial rights.

A. *Trespass*

Common law trespass was designed explicitly to prevent redistribution of wealth, and New York at the outset of the 1920s adhered to traditional common law rules. In trespass, defendants were strictly liable, and the ordinary "rule of action in the world at large"—that "a man . . . should not be held for consequences which a reasonably attentive and careful man would not foresee"—did not apply.[18] In trespass, property rights trumped even the moral precept that a person not injure others in the pursuit of self-interest. In trespass, "the owner [was] supreme[,] [h]is house [was] his castle, and his estate his exclusive domain."[19] "No intrusion [was] so trifling as to be overlooked," or go "without remedy because it was unusual or unexpected."[20] Any "intrusion [was] at the peril of the intruder."[21] Thus, a public utility that dropped small quantities of lead onto a plaintiff's land was liable for the deaths of the plaintiff's dogs resulting from their ingestion of the lead, not on a theory of negligence, since the defendant could not reasonably foresee harm to the dogs, but on a theory of trespass to land.[22]

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17. JOHN E. EDGERTON, *Annual Address of John E. Edgerton, President of the National Association of Manufacturers, in* 1930 PROC. NAT'L ASSOC. MANUFACTURERS U.S. 15.

18. Van Alstyne v. Rochester Tel. Corp., 296 N.Y.S. 726, 731 (Rochester City Ct. 1937).

19. *Id.*

20. *Id.*

21. *Id.*

22. *See id.*

Protection of landed wealth was of such great moment that "[w]hen one citizen trespasse[d] upon the real property of another," the trespasser was required to "answer in damages for the injury committed," even when the trespasser was the state.[23] The "maxim 'de minimis non curat lex' [was] never applied to the positive and wrongful invasion of another's [real] property,"[24] and even an invasion of one-eighth of an inch would be remedied.[25] Where a trespass was "willful and unlawful," a plaintiff might even be entitled to treble damages,[26] especially if the trespass had amounted to a crime.[27]

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23. American Woolen Co. v. State, 180 N.Y.S. 759, 765 (Ct. Cl. 1920). As a general rule, damages were "measured by the annual income of the land during the time possession [was] withheld," Dime Sav. Bank v. Altman, 9 N.E.2d 778, 780 (N.Y. 1937), together with "other items of expense naturally flowing from . . . [the] trespass." Zenith Bathing Pavilion, Inc. v. Fair Oaks S.S. Corp., 207 N.Y.S. 306, 309 (1st Dep't 1925). Annual income could be calculated on the basis of "gross receipts, less expenses," *Dime Sav. Bank*, 9 N.E.2d at 781 (quoting SEDGWICK ON DAMAGES § 909), or as a fixed annual percentage of the market value of the land, *see* Summerville Fruit Farms, Inc. v. John Petrossi Co., 209 N.Y.S. 367, 368 (Sup. Ct. Monroe County 1925). If the property that had been taken had been sold, a plaintiff could alternatively recover the sale price. *See* Lamport Mfg. Supply Co. v. Reiss, 257 N.Y.S. 449, 451 (Sup. Ct. 1st Dep't 1932). A plaintiff in an appropriate case could also obtain injunctive relief. *See* Borland v. Curto, 201 N.Y.S. 236, 238 (Sup. Ct. Rensselaer County 1923).

24. Novi v. Del Prete, 202 N.Y.S. 86, 87 (Sup. Ct. Kings County 1923).

25. *See id.* at 86.

26. Marconi Realty Corp. v. Goldstein, 13 N.Y.S.2d 547, 547 (Sup. Ct. 1st Dep't 1939). Treble damages were unavailable, however, if the defendant had acted under a claim of right, *see* Roxbury Light & Power Co. v. Dimmick, 196 N.Y.S. 320, 322 (Delaware County Ct. 1922), or with the landowner's apparent consent, *see* Rock v. Belmar Contracting Co., 252 N.Y.S. 463, 468 (Sup. Ct. Washington County 1930).

27. *See* Schneider v. 44-84 Realty Corp., 7 N.Y.S.2d 305, 311 (Sup. Ct. Bronx County 1938). "The gist of a trespass, whether it be to realty or to personalty, [was] injury to possession." Oatka Cemetery Ass'n v. Cazeau, 275 N.Y.S. 355, 359 (1st Dep't 1934); *accord* Stark v. Howe Sound Co., 266 N.Y.S. 368, 373 (Sup. Ct. Chemung County 1933). Trespass could lie even in the absence of physical entry, as when an airplane flew over land, *see* Cory v. Physical Culture Hotel, Inc., 14 F. Supp. 977, 981-83 (W.D.N.Y. 1936), *aff'd*, 88 F.2d 411 (2d Cir. 1937); United States v. One Pitcairn Bi-Plane, 11 F. Supp. 24, 25-26 (W.D.N.Y. 1935), or rocks were thrown upon land as a consequence of blasting, *see* Meuser v. Louis Petrossi & Sons, Inc., 5 N.Y.S.2d 950, 951 (3d Dep't 1938), and even on behalf of a property owners' association seeking to enjoin

Trespass continued to be used throughout the century to protect rights of property owners and to resolve disputes between them.[28] Its use was also expanded to protect the property rights of employers whose land was invaded during the course of labor picketing;[29] to protect a homeowner against a utility company that forcibly entered a residence to disconnect gas and electric lines and remove meters;[30] and to protect the rights of public entities whose buildings were invaded by protesters.[31]

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picketing on the streets of a private community, *see* Sea Gate Ass'n v. Sea Gate Tenants Ass'n, 6 N.Y.S.2d 387, 389 (Sup. Ct. Kings County 1938). However, a person in possession as a mere licensee, *see* People *ex rel.* Wenck v. Fury, 219 N.Y.S. 893, 893 (2d Dep't 1927), or only in occasional possession under a deed from a person who was not the owner could not maintain trespass, *see* Adams v. Warner, 204 N.Y.S. 613, 614-15 (3d Dep't 1924).

28. Cases held, for example, that trespass could be maintained for a television camera crew's unannounced entry into a restaurant cited for health code violations, *see* LeMistral, Inc. v. Columbia Broad. Sys., 402 N.Y.S.2d 815, 816 (1st Dep't 1978), but not for underground oil pollution absent proof that the polluter acted intentionally, *see* Phillips v. Sun Oil Co., 121 N.E.2d 249, 251 (N.Y. 1954); that treble damages could not be obtained against a construction firm that intentionally excavated land adjacent to its building site, *see* Hazak, Inc. v. Robertson Goetz Bldg. Co., 46 N.E.2d 893, 894 (N.Y. 1943); that a landowner could not sue a neighbor on account of overhanging branches and trees but could cut them down, *see* Turner v. Coppola, 424 N.Y.S.2d 864, 866 (Sup. Ct. Nassau County 1980); and that the owner of a private shopping center parking lot could tow away trespassing automobiles that were parked overnight illegally, even in the midst of a blizzard, *see* Rossi v. Ventresca Bros. Constr. Co., 405 N.Y.S.2d 375, 377 (White Plains City Ct. 1978), but could not cover the windows of cars with foot-square stickers intentionally made difficult to remove, *see* Reed v. Esplanade Gardens, Inc., 403 N.Y.S.2d 416, 416 (Sup. Ct. 1st Dep't 1978).

29. *See* Marriott In-Flite Servs. v. Rosado, 333 N.Y.S.2d 114, 115 (Sup. Ct. N.Y. County 1972).

30. *See* Velardi v. Consolidated Edison Co., 313 N.Y.S.2d 194, 197 (Sup. Ct. N.Y. County 1970).

31. *See, e.g.*, Board of Higher Educ. v. Students for a Democratic Soc'y, 300 N.Y.S.2d 983, 989 (Sup. Ct. Queens County 1969) (protesting war); People v. Martinez, 250 N.Y.S.2d 28, 31 (Crim. Ct. N.Y. County 1964) (protesting against police violence). For other cases involving use of trespass, see generally *People v. Munafo*, 406 N.E.2d 780, 782 (N.Y. 1980) (whether owner of an underlying fee simple committed a trespass by standing in front of a backhoe being used by the State Power Authority to put up a transmission line along an easement across his farm), and *State v. Bishop*, 348 N.Y.S.2d

B. *Conversion*

Somewhat analogous to trespass was the tort of conversion, which dealt primarily with personal property, instead of real estate. "Conversion [was] any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein,"[32] even if the "interference" was only "very slight"[33] and did not involve a taking of "physical possession."[34] To recover in an action for

990, 998 (Sup. Ct. Suffolk County 1973) (whether owner of shoreline property committed trespass by filling a salt marsh). A final case ruled that an owner of real property on which the Thruway Authority discharged oil, sand and chemicals from a drain could not bring a common law action for trespass in federal court, but had to seek relief in the State Court of Claims. *See* Kohlasch v. New York State Thruway Auth., 460 F. Supp. 956, 959 (S.D.N.Y. 1978).

32. Meyer v. Price, 165 N.E. 814, 819 (N.Y. 1929); *accord* Casey v. Kastel, 142 N.E. 671, 673 (N.Y. 1924); Mendelson v. Boettger, 12 N.Y.S.2d 671, 673 (2d Dep't 1939); Gross v. Toder, 8 N.Y.S.2d 446, 446 (1st Dep't 1938); Melnick v. Kukla, 239 N.Y.S. 16, 18 (4th Dep't 1930); White v. Bronson, 197 N.Y.S. 583, 585 (1st Dep't 1922); *In re* DiCrocco's Estate, 12 N.Y.S.2d 276, 278 (Sur. Ct. Richmond County 1939); Bloom v. Wiener, 239 N.Y.S. 574, 577 (City Ct. Bronx County 1930).

33. Employers' Fire Ins. Co. v. Cotten, 156 N.E. 629, 630 (N.Y. 1927).

34. Suzuki v. Small, 212 N.Y.S. 589, 602 (1st Dep't 1925); *accord* Debobes v. Butterly, 205 N.Y.S. 104, 107 (1st Dep't 1924); Stickles v. Bernier, 249 N.Y.S. 430, 435 (St. Lawrence County Ct. 1931). "In the usual . . . action in conversion, there [was] a willful wrong." Meisel Tire Co. v. Ralph, 1 N.Y.S.2d 143, 147 (Rochester City Ct. 1937). Thus, conversion was held to have occurred when a bookmaker sold a Liberty bond on behalf of a gambling customer whom he suspected had stolen it, *see* United States Fidelity & Guar. Co. v. Leon, 300 N.Y.S. 331, 334 (N.Y. City Mun. Ct. 1937), when a bank cashed a check containing a restrictive endorsement, *see* Soma v. Handrulis, 14 N.E.2d 46, 49 (N.Y. 1938). *But see* Woollard v. Shaffer Stores Co., 1 N.Y.S.2d 464, 465 (3d Dep't 1938), when a seller took purchase money notes placed in escrow without complying with the escrow agreement, *see* Rollin v. Grand Store Fixture Co., 244 N.Y.S. 82, 86-87 (Sup. Ct. N.Y. County 1930); *cf.* Hinkle Iron Co. v. Kohn, 128 N.E. 113, 114 (N.Y. 1920); Hirschberg v. Bertal Textile Co., 264 N.Y.S. 215, 218 (1st Dep't 1933), when a seller resold goods it was holding on the buyer's account, *see* D'Aprile v. Turner-Looker Co., 204 N.Y.S. 566, 569 (4th Dep't 1924), *rev'd on other grounds*, 147 N.E. 15 (N.Y. 1925); *cf.* George Haiss Mfg. Co. v. Becker, 189 N.Y.S. 791, 793 (3d Dep't 1921) (dealer resold item held on manufacturer's account); *In re* Petrosemolo's Estate, 273 N.Y.S. 718, 721 (Sur. Ct. N.Y. County 1934) (dealer pledged as security for loan item held on shipper's account), when a creditor took merchandise and money from a debtor's store sev-

conversion, a plaintiff had to establish either possession or a right to immediate possession.[35]

As a general rule, not only the thief but also the "innocent holder . . . of stolen property [was] liable for conversion."[36] "A wrongful intent

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eral hours before the marshal arrived to levy execution, *see* Mateo v. Abad, 267 N.Y.S. 436, 438 (1st Dep't 1933), or when a creditor altered its security interests in property without the approval of other interested parties. *See Mendelson*, 12 N.Y.S.2d at 673. Those who converted stock certificates, as by refusing to return them to the true owner on demand, *see* Pierpoint v. Hoyt, 182 N.E. 235, 236 (N.Y. 1932), or by procuring an issuance of new certificates in their own name, *see* United States Fidelity & Guar. Co. v. Newburger, 118 N.E. 141, 143 (N.Y. 1933), were deemed to have converted the stock itself. *See* Bradley v. Roe, 13 N.Y.S.2d 693, 695 (2d Dep't 1939); Mailler v. United States Pipe & Foundry Co., 282 N.Y.S. 591, 592 (2d Dep't 1935).

35. *See* British-American Tobacco Co. v. Federal Reserve Bank, 105 F.2d 935, 936 (2d Cir. 1939); Pierpoint v. Hoyt, 182 N.E. 235, 236 (N.Y. 1932); Geneva Prod. Credit Ass'n v. C.S. Mead & Co., 290 N.Y.S. 445, 446 (4th Dep't 1936); Heinaman v. George W. Haxton & Son, Inc., 272 N.Y.S. 598, 599 (4th Dep't 1934); Rosenberg v. Lewis, 206 N.Y.S. 353, 354 (1st Dep't 1924); Vangellow v. East Side Sav. Bank, 11 N.Y.S.2d 982, 984 (Rochester City Ct. 1939); Silk v. Silk, 295 N.Y.S. 517, 519 (Sup. Ct. Kings County 1937); Mitchell v. Vande, 289 N.Y.S. 1033, 1034 (Wayne County Ct. 1936); Moskowitz v. Cohen, 286 N.Y.S. 152, 155 (N.Y. City Mun. Ct. 1936); McGreevey v. New York Cent. R.R. Co., 256 N.Y.S. 211, 213 (Sup. Ct. Onondaga County 1932); Yokoyama v. San Carlos Operating Co., 259 N.Y.S. 471, 473 (N.Y. City Mun. Ct. 1932); Rogers v. Landers, 218 N.Y.S. 98, 101 (Sup. Ct. Cayuga County 1926). Proof of a title which conferred a right to immediate possession would suffice, *see* Kaufman v. Simons Motor Sales Co., 184 N.E. 739, 740 (N.Y. 1933); Cleminshaw v. Meehan, 258 N.Y.S. 225, 228 (3d Dep't 1932); Ward v. Powers, 204 N.Y.S. 79, 80 (1st Dep't 1924), but proof of a title that did not confer a right to possession without a court judgment was not sufficient, *see* McCoy v. American Express Co., 171 N.E. 749, 750 (N.Y. 1930); Kidder v. Hesselman, 196 N.Y.S. 837, 838 (Sup. Ct. N.Y. County 1922); *cf.* Saraga v. Strauss, 203 N.Y.S. 27, 28 (1st Dep't 1924) (buyer may not sue for conversion of deposit when seller simply fails to make timely delivery of goods under contract). Thus, it was a defense to an action for conversion that a plaintiff was wrongfully in possession, *see* Hof v. Mager, 203 N.Y.S. 161, 163 (1st Dep't 1924), that a stranger other than plaintiff had a right to possession, *see* Chasnov v. Marlane Holding Co., 244 N.Y.S. 455, 461 (N.Y. City Mun. Ct. 1930), or that the plaintiff had agreed to let the chattel's owner enjoy possession, *see* Shyne v. L.R. Mack, Inc., 193 N.Y.S. 70, 71 (3d Dep't 1922); *cf.* Armstrong Rubber Co. v. Griffith, 43 F.2d 689, 692 (2d Cir. 1930) (parties negotiating over right to possession when alleged conversion occurred).

36. Gruntal v. National Sur. Co., 173 N.E. 682, 684 (N.Y. 1930).

[was] not an essential element of ... conversion."[37] Conversion, like trespass, thus had real bite as a strict liability tort designed to prevent redistribution of wealth.[38] Conversion, also like trespass, continued to be

37. *Meisel Tire Co.*, 1 N.Y.S.2d at 147 (quoting Boyce v. Brockway, 31 N.Y. 490, 493 (1865)). When a defendant was in lawful possession of chattels and had no knowledge that it was exercising dominion over them inconsistent with the true owner's rights, conversion would occur only when the true owner made a demand for their return. *See* Banque de France v. Equitable Trust Co., 33 F.2d 202, 208 (S.D.N.Y. 1929). The demand, in effect, provided notice of superior rights, and the refusal to accede to it constituted an exercise of dominion in violation of those rights. *See Employers' Fire Ins. Co.*, 156 N.E. at 630. In the absence of a demand, the tort of conversion would not exist, *see* Demarco v. Pickett Motor Sales, Inc., 251 N.Y.S. 294, 295 (4th Dep't 1931); Shea v. Chinn, 229 N.Y.S. 24, 25 (3d Dep't 1928); Decalcomanie Transfer Ornaments Co. v. Hajim, 227 N.Y.S. 647, 648 (Sup. Ct. N.Y. County 1928), unless the defendant had in some other way exercised an act of ownership inconsistent with the ownership and dominion of the true owner, *see* DelPiccolo v. Newburger, 9 N.Y.S.2d 512, 513 (1st Dep't 1939); *accord* Goebel v. Clark, 275 N.Y.S. 43, 46-47 (4th Dep't 1934); Atlas v. Moritz, 216 N.Y.S. 490, 494 (4th Dep't 1926); Chandler v. P.W. Chapman & Co., 218 N.Y.S. 604, 604 (2d Dep't 1926); Price v. Evans, 275 N.Y.S. 558, 560 (County Ct. Oneida County 1934).

38. Many of the ordinary rules of tort were applied in conversion actions, however. Custom, for example, was admissible to prove the scope of a party's power to pass title to property, *see* Green v. Wachs, 241 N.Y.S. 341, 342-43 (1st Dep't 1930), and foreign law was dispositive of the parties' rights if the conversion had occurred on foreign soil, *see* Banque de France v. Equitable Trust Co., 33 F.2d 202, 206 (S.D.N.Y. 1929); M. Salimoff & Co. v. Standard Oil Co., 186 N.E. 679, 682 (N.Y. 1933). Of course, suits brought in New York for torts that had occurred within the state were governed by New York law, unless federal legislation had preempted the field. However, if a tort had taken place outside the state, New York courts applied the substantive law of the place where the tort had occurred. *See* Curtiss v. New York Cent. R.R., 79 F.2d 91, 93 (2d Cir. 1935); Jerrell v. New York Cent. R.R., 68 F.2d 856, 857 (2d Cir. 1934); Jarrett v. Wabash Ry. Co., 57 F.2d 669, 671 (2d Cir. 1932); The Mandu, 15 F. Supp. 627, 629 (E.D.N.Y. 1936); Dougherty v. Gutenstein, 10 F. Supp. 782, 784 (S.D.N.Y. 1935); The Vestris, 53 F.2d 847, 855-56 (S.D.N.Y. 1931); Benton v. Safe Deposit Bank of Pottsville, Pa., 174 N.E. 648, 649 (N.Y. 1931); Fitzpatrick v. International Ry. Co., 169 N.E 112, 114-15 (N.Y. 1929); Travelers' Ins. Co. v. Central R.R. of N.J., 258 N.Y.S. 35, 37 (Sup. Ct. N.Y. County 1932); LaForce v. Cataract Storage Co., 295 N.Y.S. 145, 147 (Monroe County Ct. 1937). The law of the place of injury would not govern, however, if the parties had provided otherwise by contract. *See* Conklin v. Canadian-Colonial Airways, Inc., 194 N.E. 692, 693 (N.Y. 1935). The main exception to the application of foreign substantive law occurred when that law was strongly contrary to the public policy of New York, as

was the case of a Connecticut rule permitting spouses to sue each other for torts. Thus, the Connecticut rule was not applied in New York. *See* Mertz v. Mertz, 284 N.Y.S. 83, 86 (Sup. Ct. N.Y. County 1935). However, foreign law that was merely different from the law of New York, such as the Pennsylvania rule permitting recovery against the estate of a tortfeasor, would be recognized by New York. *See* Domres v. Storms, 260 N.Y.S. 335, 336 (4th Dep't 1932); *accord The Mandu*, 15 F. Supp. at 629-30. There was, as one court observed, "a growing conviction that only exceptional circumstances should lead one of the states to refuse to enforce a right acquired in another." *Domres*, 260 N.Y.S. at 338 (quoting Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 201 (N.Y. 1918)).

While New York courts generally followed the substantive law of the jurisdiction in which a tort had occurred, they remained committed to following their own rules of procedure. *See Fitzpatrick*, 169 N.E. at 114-15. As a result of this dichotomy between substance and procedure, it was often necessary to determine whether a particular rule was substantive or procedural. A leading case held that the rules allocating burden of proof of contributory negligence were a matter of substance rather than procedure, and it accordingly applied foreign law. *See id.* at 115. Another case dealing with a wrongful death held that the proper plaintiff to bring the suit should likewise be determined by foreign substantive law, and thus it dismissed a suit brought by an administrator, as was required under New York law, when foreign law gave the right to sue to the surviving spouse or heir. *See* Sapone v. New York Cent. & Hudson River R.R. Co., 225 N.Y.S. 211, 216 (Sup Ct. Monroe County 1927). When the law of another state was at issue, the party relying on it had to plead and prove it; New York courts could not take judicial notice thereof. *See* Ferguson v. Harder, 252 N.Y.S. 783, 787 (Sup. Ct. Columbia County 1931); Shaw v. Blainey, 277 N.Y.S. 466, 467 (N.Y. City Mun. Ct. 1935). However, New York courts would presume that the common law of a sister state was the same as the common law of New York, *see Shaw*, 227 N.Y.S. at 468, and accordingly a party relying on the law of another state had no need to prove it unless that law was statutory, *see* Lujan v. Lamport & Holt Line, Ltd., 208 N.Y.S. 251, 253 (N.Y. City Mun. Ct. 1924), or was different from that of New York.

When a tort occurred outside the state and all parties thereto were nonresidents of New York, New York courts were "loath to take jurisdiction." Banco de la Lacuna v. Escobar, 237 N.Y.S. 267, 272 (Sup. Ct. N.Y. County 1929). Although they could "[i]n the exercise of a sound discretion . . . entertain such jurisdiction where the necessities of the case dictate," the general rule was that "considerations of policy as well as the true interests of the parties dictate the pursuit of the litigation in the home forum." *Id.*

The rule most commonly applied left issues of fact for resolution by the jury. *See* Lauth v. Pickup, 64 F.2d 115, 116 (2d Cir. 1933); Hussey v. Flanagan, 142 N.E. 594, 596 (N.Y. 1923); Thompson v. Mursten, 13 N.Y.S.2d 726, 727 (4th Dep't 1939); Logan v. Turner, 189 N.Y.S. 415, 418 (1st Dep't 1921). *But see* Warsaw Elevator Co. v. Gucker, 258 N.Y.S. 984, 984 (4th Dep't 1932); Stemples v. Schwab, 218 N.Y.S. 284, 284 (3d

deployed throughout the twentieth century in traditional sorts of cases.[39]

The owner of property that had been converted was entitled to recover damages equal to the market value of the property[40] at the time and

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Dep't 1926); Myers v. McAllister, 188 N.Y.S. 838, 839 (1st Dep't 1921); Zurlick v. Stankus, 211 N.Y.S. 342, 346 (Sup. Ct. Columbia County 1925).

39. Such as suits over the ownership of stock, *see* Cooper v. North Jersey Trust Co., 250 F. Supp. 237, 238 (S.D.N.Y. 1965); Hartford Accident & Indem. Co. v. Walston & Co., 234 N.E.2d 230, 232 (N.Y. 1967), *reh'g denied*, 238 N.E.2d 754, 754 (N.Y. 1968), suits involving commercial transactions in goods, *see* Armour & Co. v. Celic, 188 F. Supp. 700, 701 (E.D.N.Y. 1960); Fantis Foods, Inc. v. Standard Importing Co., 402 N.E.2d 122, 123 (N.Y. 1980); National Dairy Prod. Corp. v. Lawrence Am. Field Warehousing Corp., 255 N.Y.S.2d 788, 795 (1st Dep't 1965); Cutler-Hammer, Inc. v. Troy, 126 N.Y.S.2d 452, 453 (1st Dep't 1953); *cf.* Camera Mart, Inc. v. Lumbermens Mut. Cas. Co., 294 N.Y.S.2d 941, 943 (Civ. Ct. N.Y. County 1968) (suit on insurance policy), suits over the ownership of chattels found among the effects of a decedent, *see* Bradley v. Roe, 27 N.E.2d 35, 36 (N.Y. 1940); *In re* Filipiak's Estate, 321 N.Y.S.2d 973, 974 (Sur. Ct. Erie County 1971); *In re* Uris' Estate, 71 N.Y.S.2d 620, 621 (Sur. Ct. N.Y. County 1946), and suits over the rights of landlords, *see* Congregation Anshe Sefard, Inc. v. Title Guarantee & Trust Co., 50 N.E.2d 534, 534-35 (N.Y. 1943); *cf.* Finkelstein v. Johnson, 337 N.Y.S.2d 887, 888 (1st Dep't 1972) (claim by tenant that landlord removed her TV from premises), and creditors, *see* Wm. H. Wise & Co. v. Rand McNally & Co., 195 F. Supp. 621, 625 (S.D.N.Y. 1961); Korman v. R.H. Macy & Co., 142 N.Y.S.2d 455, 457 (Sup. Ct. Queens County 1955), to seize chattels. An attempt to expand trover to use it as the vehicle for litigation over intangibles, such as a bakery route, failed, however. *See* Stern v. Kaufman's Bakery, Inc., 191 N.Y.S.2d 734, 735 (Sup. Ct. Kings County 1959). Another attempt to use trover failed in *Bertolino v. Italian Line*, 414 F. Supp. 279, 285 (S.D.N.Y. 1976), where the court found insufficient evidence in support of the plaintiff's claim that defendant had misappropriated recording tapes given by plaintiff for private use only.

40. *See* Halliday v. McGraw, 192 N.Y.S. 489, 491 (Sup. Ct. Erie County 1921). However, "market value" was not "the exclusive measure" of damages, McAnarney v. Newark Fire Ins. Co., 159 N.E. 902, 903 (N.Y. 1928), and a converter would never be allowed to "escape liability simply because there [was] no market value or none of the ordinary standards for measuring the damages," MacGregor v. Watts, 5 N.Y.S.2d 525, 526 (2d Dep't 1938). When household goods were converted, for instance, the owner was not restricted to recovering "the price which could be realized by a sale in the market," but was granted "the value to him . . . [under] all circumstances and conditions considered, . . . not including, however, any sentimental or fanciful value." Lake v. Dye, 133 N.E. 448, 449 (N.Y. 1921); *accord* Weinstein v. Santini Transfer Co., 278 N.Y.S. 388, 392 (City Ct. Bronx County 1935); Taggart v. Granby, 286 N.Y.S. 382, 390-91 (Delaware County Ct. 1936). "[A]ctual value" was always the measure of damages, D. Apple-

place of the conversion.[41] "The purpose of damages" was "to give the injured party a full indemnity and no more"[42]—that is, to prevent any redistribution of wealth to, or even from, the person guilty of conversion.[43]

C. *Inducement of Breach of Contract*

A third "actionable wrong" involving commercial harm, typically between business people, was "to procure breach of an existing contract."[44] As the Second Circuit explained, "contract rights [were] property, ... [and] to induce one of the parties wrongfully to repudiate a contract [was] as distinct a wrong as "a trespass or conversion, which "injure[d] or destroy[ed] ... property."[45] The rule in New York, like the rule in other jurisdictions, provided that "if one maliciously interferes with a contract between two parties, and induces one of them to break that con-

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ton Co. v. Zeese-Wilkinson Co., 251 N.Y.S. 532, 533 (1st Dep't 1931), although a successful plaintiff was also entitled to interest on the value of the property converted, *see* L. Distillator & Son v. Smith, 249 N.Y.S. 525, 526 (N.Y. City Mun. Ct. 1931).

41. *See* Mitsubishi Shoji Kaisha, Ltd. v. Davis, 291 F. 57, 59 (2d Cir. 1923); Mallory S.S. Co. v. Mitchell, 291 F. 53, 54 (2d Cir. 1923); Filer v. Creole Syndicate, 245 N.Y.S. 367, 370 (1st Dep't 1930); *accord* German v. Snedeker, 13 N.Y.S.2d 237, 238 (1st Dep't 1939); Jeanette Doll Co. v. Cusmano, 199 N.Y.S. 751, 753 (1st Dep't 1923); *see also In re* Salmon Weed & Co., 53 F.2d 335, 342 (2d Cir. 1931) (damages equal greater of "market value of the stock at the time of the unauthorized hypothecation or the highest intermediate value of the stock between *notice* of the conversion and a reasonable time thereafter"); Satherwhite v. Harriman Nat'l Bank & Trust Co., 13 F. Supp. 493, 497 (S.D.N.Y. 1935).

42. Rapid Machine Works, Inc. v. Silberstein, 241 N.Y.S. 68, 69 (City Ct. N.Y. County 1930).

43. Thus the presumptive value of commercial paper was its face amount, B.C.S. Corp. v. Colonial Discount Co., 8 N.Y.S.2d 65, 67 (City Ct. N.Y. County 1938), and of a chattel, "[t]he price at which willing and uncompelled buyers and sellers meet," *In re* Schuyler, Chadwick & Burnham, 63 F.2d 241, 243 (2d Cir. 1933); *see also* Zeppitella v. Cappellino, 199 N.Y.S. 273, 274 (County Ct. Monroe County 1922) (replacement cost).

44. Second Nat'l Bank of Toledo v. M. Samuel & Sons, Inc., 12 F.2d 963, 967 (2d Cir. 1926).

45. *Id.*

tract, to the injury of the other, the party injured can maintain an action against the wrongdoer."[46]

Significant law developed around the doctrinal requirement of malice. By "maliciously," the courts normally did not "mean actual malice or ill will," but merely that a defendant "without legal or social justification" and with "knowledge of an existing valid contract between others, intentionally, [and] knowingly ... induce[d] one of the parties to the contract to breach it."[47] In contrast, mere "negligent interference with a contract right [was] not a basis of liability,"[48] and thus no recovery could

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46. Lamb v. S. Cheney & Son, 125 N.E. 817, 818 (N.Y. 1920); *accord* New York Trust Co. v. Island Oil & Transp. Corp., 34 F.2d 649, 652 (2d Cir. 1929); Haussmann v. Colonial Trust Co., 23 F. Supp. 213, 214 (S.D.N.Y. 1938); Sklarsky v. Great Atlantic & Pacific Tea Co., 47 F.2d 662, 665 (S.D.N.Y. 1931); General Out Door Adver. Co. v. Hamilton, 278 N.Y.S. 226, 227 (Sup. Ct. N.Y. County 1935). This was "a general rule applicable to all contracts" and not merely to some special sort of contract, such as "contracts relating to services." Campbell v. Gates, 141 N.E. 914, 915 (N.Y. 1923). Upon proper proof of facts, litigants thus had a right to recover damages against third parties who had induced breach of all sorts of contracts, including contracts for the payment of brokerage fees, *see* Axelrad v. 77 Park Ave. Corp., 234 N.Y.S. 27, 31 (1st Dep't 1929); Weinberg v. Irwinessie Holding Corp., 232 N.Y.S. 443, 444-47 (2d Dep't 1929); Hornstein v. Podwitz, 173 N.E. 674, 675 (N.Y. 1930); *cf.* Clinchy v. Grandview Dairy, Inc., 13 N.Y.S.2d 114, 115 (1st Dep't 1939), contracts to convey real estate to a plaintiff, *see* Hansen v. Humphrey, 218 N.Y.S. 197, 199 (3d Dep't 1926) (dictum), contracts to supply a plaintiff with products needed for resale in its business, *see* Atbrook Serv. Corp. v. Sinclair Ref. Co., 268 N.Y.S. 830, 830-32 (1st Dep't 1934); Goodman Bros., Inc. v. Ashton, 208 N.Y.S. 83, 84 (1st Dep't 1925) (dictum), contracts to market a product exclusively, *see* Gonzales v. Kentucky Derby Co., 189 N.Y.S. 783, 786 (2d Dep't 1921), and contracts to lease space in a commercial facility, *see* Elk St. Mkt. Corp. v. Rothenberg, 251 N.Y.S. 259, 264 (4th Dep't 1931); *see also* Jay Bee Apparel Stores, Inc. v. 563-565 Main St. Realty Corp., 223 N.Y.S. 537, 541-42 (Sup. Ct. Erie County 1927) (right of tenant to benefits of lease damaged by conduct of co-tenant in driving shoppers away). Suit could also be brought to bar a defendant from soliciting customers on a list obtained from an unfaithful employee of the plaintiff. *See* Conviser v. J.C. Brownstone & Co., 205 N.Y.S. 82, 88 (2d Dep't 1924).

47. Hornstein v. Podwitz, 173 N.E. 674, 675 (N.Y. 1930); *accord* Sidney Blumenthal & Co. v. United States, 30 F.2d 247, 249 (2d Cir. 1929).

48. Lamport v. 4175 Broadway, Inc., 6 F. Supp. 923, 924 (S.D.N.Y. 1934); *cf.* Bencoe Exporting & Importing Co. v. Erie City Iron Works, 280 F. 690, 691 (2d Cir. 1922)

be had, not even for significant business losses when, for example, a motion picture distributor shipped films by "mistake" in violation of a plaintiff's exclusive territorial rights.[49]

With the narrow exception of cases dealing with labor unions and efforts at labor organization, the New York courts did not treat the probability of obtaining an agreement[50] or an agreement that was terminable at will as a valid contract.[51] In cases such as these, where there was only a potential agreement or prospect of an agreement, no cause of action existed unless actual malice or ill will could be shown.[52] Likewise, suit for interference with contract rights would not lie if for some other reason a plaintiff lacked an enforceable contract right.[53]

However, the principle of preventing redistribution of wealth led to the development of radically different rules in cases involving labor unions and efforts at labor organization. Markedly different law applied, for example, in the hotly contested[54] 1920 case of *Michaels v. Hillman*,[55] which arose out of organizational efforts of the Amalgamated Clothing

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49. *See* Glucksmann v. Gillespie, 204 N.Y.S. 354, 356 (1st Dep't 1924).

50. *See* Union Car Adv. Co. v. Collier, 189 N.E. 463, 469 (N.Y. 1934); Harnick v. Avrum Realty Corp., 288 N.Y.S. 256, 259 (1st Dep't 1936); *cf.* Burke v. Richmond, 228 N.Y.S. 172, 173-74 (Sup. Ct. Niagara County 1928) (party who was not lowest bidder may not restrain public entity from entering into contract with another).

51. *See* VanWyck v. Mannino, 9 N.Y.S.2d 684, 686-87 (2d Dep't 1939); Biber Bros. News Co. v. New York Evening Post, Inc., 258 N.Y.S. 31, 33-34 (Sup. Ct. Westchester County 1932); *cf.* Arnold v. Burgess, 272 N.Y.S. 534, 535-38 (1st Dep't 1934) (engineers who had customarily worked for members of association could not complain when association changed its rules so that members no longer needed to employ them).

52. *See Sidney Blumenthal & Co.*, 30 F.2d at 249.

53. *See* Williams v. Adams, 295 N.Y.S. 86, 92 (1st Dep't 1937); DuRoy & LeMaistre, Inc. v. Gillmore, 284 N.Y.S. 385, 391 (1st Dep't 1935); J. Walter Thompson Co. v. Winchell, 278 N.Y.S. 781, 784-85 (1st Dep't 1935); King v. Krischner Mfg. Co., 222 N.Y.S. 66, 69 (1st Dep't 1927); Garcia Sugars Corp. v. New York Coffee & Sugar Exch., Inc., 7 N.Y.S.2d 532, 534-35 (Sup. Ct. N.Y. County 1938).

54. *See generally* Michaels v. Hillman, 183 N.Y.S. 195, 195-207 (Sup. Ct. Monroe County 1920) (the importance of the case to the union was evidenced by the union's representation by Felix Frankfurter).

55. *See id.*

Workers. Employers, according to the *Michaels* court, "had the right to endeavor to keep their factory nonunion, . . . which included the right to request their employe[es] not to join an outside organization, and to discharge them for doing so."[56] Employees, of course, had the right to strike or otherwise refuse to work, since the "right to discharge and the right to quit work" were "reciprocal."[57] But the employees and their union, the court added, could not "prevent" an employer "from filling with others the places of those who left, and to cause those who remained at work to leave the plaintiffs' employ."[58] Any such acts would interfere with an employer's right to enter into and enjoy the benefit of contracts, as well as with "[t]he right to work" enjoyed by other workers.[59] Attempts by unions to interfere "savor[ed] of a species of domination which [did] not inspire confidence in the . . . ultimate purposes" of unions and which called for the courts to "protect the general public . . . from exaction and oppression."[60] "The law," as the *Michaels* court concluded, was "opposed to all monopolies, whether of labor or capital," since "economic . . . despotism ha[d] no more consideration for the general good than a political despotism, and [was] an undue barrier to the exercise of personal liberty and freedom of action, the development of industries, and reasonable competition in life."[61]

Cases decided within the next several months were consistent with *Michaels*. One case, for example, declared unlawful any "conspiracy to injure a person's business, by preventing persons from entering his employment by threats and intimidation."[62] It continued that any "purpose of an organization or combination of workingmen . . . to hamper or restrict" . . . "freedom" in the citizen to pursue his lawful trade or calling

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56. *Id.* at 197.

57. *Id.* at 198.

58. *Id.* at 199.

59. *Id.* at 200.

60. *Id.* at 202.

61. *Id.*

62. Grand Shoe Co., Inc. v. Children's Shoe Workers Union, 187 N.Y.S. 886, 888 (Sup. Ct. Kings County 1920).

would be "against the spirit of our government and the nature of our Constitution."[63] "[N]o organization or combination of workingmen ha[d] the right to debar any individual or group of workers from employment," and every employer had "the right to employ whom it sees fit" and to "make membership in . . . unions . . . a bar to employment in its factory . . . even if it thereby makes collective bargaining impossible."[64] A final case went even further and held unions "responsible for all lawlessness growing out of strikes which they could have avoided by reasonable discipline imposed upon their members" and every member thereof "responsible for the acts of the others, and particularly for the acts of any officer."[65]

Labor unions derived little benefit from the fact that these expansive doctrines prohibiting interference with merely prospective contract rights applied to "combination[s] of employers" as well as those of employees "who by coercive measures seek to break contracts between employer and employee."[66] Employers in most industries had no need to enter into combinations with each other or to use other mechanisms essential to carrying on union activity. Formalistic statements that "the law does not have one rule for the employer and another for the employee" meant nothing when judges were speaking of a rule that, in fact, harmed employees significantly, but did nothing to hurt employers.[67] Even though each case involving interference with contract rights was "to be decided upon the same principles of law, impartially applied to the facts of the case, irrespective of the personality of the litigants,"[68] expansive rules prohibiting interference with a wide range of existing or prospective contracts conferred vast power upon entities like manufacturing firms possessing valuable contract rights, and little power on factory workers

63. *Id.*

64. *Id.* at 889.

65. United Traction Co. v. Droogan, 189 N.Y.S. 39, 41-42 (Sup. Ct. Albany County 1921).

66. Schlesinger v. Quinto, 194 N.Y.S. 401, 409 (1st Dep't 1922).

67. *Id.*

68. *Id.*

whose only right was to labor for a pittance.

In contrast, courts were unwilling to extend doctrine in employment contract cases where labor unions were not involved and hence there was no danger of redistribution of wealth between social classes. As Judge Learned Hand wrote, "it has never been thought actionable to take away another's employee, when the defendant wants to use him in his own business, however much the plaintiff may suffer."[69] An employee "was free to resign . . . at will," and it was "difficult to see how servants could get the full value of their services on any other terms."[70] Based on this reasoning, the Second Circuit held that it was legitimate for a corporation to entice away an officer of a competitor.[71]

Likewise, the courts would not extend doctrine in non-employment cases, where extension also was not called for to protect existing wealth distribution. For example, a party to a contract with a bankrupt corporation was not permitted to sue the bankrupt corporation's president at whose instance the contract had been breached.[72] Nor would the state courts permit inducement of breach suits to be brought in noncommercial cases. Thus, parents, friends, and even rivals were not liable for inducing breach of a contract to marry,[73] since "before entering upon that status," parties "should not be hindered in securing information and advice from all sources."[74] Moreover, allowing such suits would "invite a deluge of

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69. Restaurant Assoc. Indus. v. Anheuser-Busch, Inc., 422 F. Supp. 1105-11 (S.D.N.Y. 1976).

70. Harley & Lund Corp. v. Murray Rubber Co., 31 F.2d 932, 934 (2d Cir. 1929).

71. *See id.*

72. *See* Osgood v. Talmadge, 45 F.2d 696, 697 (2d Cir. 1930). *But cf.* Reiner v. North Am. Newspaper Alliance, 181 N.E. 561, 562-63 (N.Y. 1932) (refusing to allow news reporter to recover money promised him in return for fraudulently violating another reporter's exclusive news rights).

73. *See* Ryther v. Lefferts, 250 N.Y.S. 699, 702 (1st Dep't 1931); Fredenburg v. Fredenburg, 288 N.Y.S. 377, 380 (Sup. Ct. N.Y. County 1936) (dictum); Stiffler v. Boehm, 206 N.Y.S. 187, 187 (Sup. Ct. N.Y. County 1924); Guida v. Pontrelli, 186 N.Y.S. 147, 149 (Sup. Ct. Kings County 1921) (dictum).

74. *Ryther*, 250 N.Y.S. at 701 (1st Dep't 1931).

like litigation."[75] This second concern about "open[ing] our courts to a flood of litigation that would inundate them" also provided the basis for not allowing suit for interference with relationship by a child against a man who had enticed his mother to leave her home and family with whom she "had lived happily . . . for twenty-two years."[76]

Other sorts of policy judgments induced courts to "leave the parties where it found them" in marriage contract litigation.[77] One court, for example, refused to aid a woman in collecting $100,000 she had been promised by one man if she breached her contract to marry another,[78] while another court dismissed a complaint alleging a conspiracy between plaintiff's fiancée and a pretended medium to cause her to marry "a titled but otherwise unsatisfactory husband" on assurances that he would die within six weeks.[79] The court's reasoning was that plaintiff's "pretended unconsummated marriage . . . was as much an immoral act . . . as any act[s] of misrepresentation . . . by the defendants" and thus had to "be taken into consideration before any legal sanction may be given to plaintiff's claims."[80]

Subtle policy judgments that the law concerning inducement of breach of contract should be expanded or contracted, as needed, to preserve the existing distribution of wealth also played a role in occasional commercial cases. Thus, in *Knapp v. Penfield*[81] the court allowed "an elderly lady . . . of high social position, great wealth, and culture," who had advanced $250,000 to finance a Broadway production, to demand that the producers fire a Miss America contest winner from the lead role. The court held that although the Miss America winner was "[c]oncededly

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75. *Stiffler*, 206 N.Y.S. at 188 (Sup. Ct. N.Y. County 1924).

76. Morrow v. Yannantuono, 273 N.Y.S. 912, 913-14 (Sup. Ct. Westchester County 1934).

77. Attridge v. Pembroke, 256 N.Y.S. 257, 261 (4th Dep't 1932) (dictum).

78. *See id.* at 259-61.

79. Popielawski v. Gimbel, 256 N.Y.S. 761, 762 (1st Dep't 1932).

80. *Id.*

81. 256 N.Y.S. 41, 42-44 (Sup. Ct. N.Y. County 1932).

. . . fair of face, form, and figure,"[82] she "was not equal to singing the theme song or dancing as the heroine's part was originally cast." The court found that the socialite's "investment" was "thus seriously impaired and jeopardized" and declared that persons like the socialite "acting for the protection of contract rights of their own which are of an equal or superior interest to another's contractual rights may invade the latter with impunity."[83]

Indeed, lower courts sometimes allowed even defendants who acted with "a malicious motive" to invade contract rights of others if their invasion did not threaten the redistribution of wealth. Thus, in *Beardsley v. Kilmer*,[84] a defendant who acted to "get even"[85] for published statements made about him by the plaintiff was permitted to open a rival newspaper, to induce plaintiff's employees to leave their jobs and go to work for the defendant, and ultimately to drive the plaintiff's newspaper out of business. The explanation for this result was "that the right of competition [was] self-justification always" in "a land of opportunity, as well as of free competition in business," even though, as one dissenter noted, the effect of the case would be to allow "a man who is wealthy enough and malicious enough to shut the door of opportunity to the object of his hatred by rivaling him in business, with no other aim in view than his destruction."[86]

The case that best revealed the flexibility of policy judgment was *Kelly v. Central Hanover Bank & Trust Co.*,[87] which was an attempt by

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82. *Id.* at 42.

83. *Id.* at 43-44.

84. 193 N.Y.S. 285 (3d Dep't 1922).

85. *Id.* at 286 (quoting statement by Willis S. Kilmer to Guy W. Beardsley (1903)).

86. *Id.* at 289-90 (Hinman, J., dissenting); *accord* Carroll Bldg. Corp. v. Louis Greenberg Plumbing Supplies, Inc., 214 N.Y.S. 42, 44 (2d Dep't 1926); Almirall & Co. v. McClement, 202 N.Y.S. 139, 147 (1st Dep't 1923); Brown v. Metropolitan News Co., 267 N.Y.S. 623, 626 (Sup. Ct. Bronx County 1933); *In re* Curtiss' Will, 250 N.Y.S. 146, 150 (Sur. Ct. Steuben County 1931); *see also* Morgan v. Morgan, 221 N.Y.S. 117, 118 (1st Dep't 1927) (no cause of action against witness maliciously giving false testimony).

87. 11 F. Supp. 497, 500 (S.D.N.Y. 1935).

debenture holders of the bankrupt Insull Utility Investments, Inc., to obtain equitable relief against five New York banks and the General Electric Company. These entities had accepted the debentures as security for loans made to Insull in violation of restrictions contained in the debentures.[88] The court agreed that the transaction constituted a breach of the debenture holders' contract rights with Insull in which General Electric and the New York banks had participated, but it also found that the six defendants had not intentionally induced the breach. This finding brought the court to the issue of whether to "create a liability in equity, based on a knowing participation in, though not the inducing of a breach of contract when, for that breach, the remedy at law against the promisor is inadequate, because of its insolvency."[89]

Plaintiffs urged that "intentional interference with another's contractual rights . . . [was] a moral wrong" for which "equity should grant relief even though in so doing it establishe[d] a higher standard of fair dealing toward strangers than ha[d] been recognized in actions at law."[90] Nonetheless, the court, "find[ing] no compelling reason for relieving the debenture holders at the expense of General Electric," refused to extend doctrine in the fashion sought by plaintiffs.[91] Needless to say, the court disapproved "of the issuance and sale to the general public of debentures which might be thought to afford but which actually fail to give any real protection to the purchasers."[92] In its view, "these and other practices, so freely indulged in . . . during the so-called era of prosperity, undoubtedly call[ed] for correction and prevention."[93] But, "legislation, state and federal," was the appropriate vehicle "to meet the evil," not the redistribution of wealth from a creditor who was "unwilling to rely on" Insull's "unsecured promise" to one who had been willing.[94]

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88. *See id.* at 500-02.
89. *Id.* at 513.
90. *Id.*
91. *Id.* at 514.
92. *Id.*
93. *Id.*
94. *Id.*

D. *Fraud*

The real difficulty with the practices of Insull and others "during the so-called era of prosperity" prior to 1929 was that they amounted to something akin to fraud—a subject that was the source of an immense number of reported cases during the 1920s and 1930s. "The law [did] not suffer deceit to be practiced by any trick or device,"[95] and accordingly it outlawed fraud, which it defined as any "breach of . . . trust[] or confidence[] justly reposed"[96] or "as the gain of an advantage to another's detriment by deceitful or unfair means."[97] Consistent with this definition of fraud as a species of illegitimate redistribution, courts held that a plaintiff seeking to recover for fraud had to prove that a defendant "knowingly made false representations as to material facts which deceived her and induced [a] payment when otherwise it would not have been made."[98] Stated differently, the five "requisite[s] necessary to constitute the cause of action [for fraud] . . . [were] representations, falsity, scienter, deception and injury."[99] Significant case law developed around each of the five

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95. Thorn v. Austin Silver Mining Co., 12 N.Y.S.2d 675, 678 (Sup. Ct. N.Y. County 1939).

96. *In re* Gellis' Estate, 252 N.Y.S. 725, 733 (Sur. Ct. Kings County 1931) (quoting Richardson v. Trimble, 38 Hun 409, 416 (1st Dep't 1886) (quoting 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 187, at 201 (Fred B. Rothman & Co. 1988) (Melville E. Bigelow ed., 13th ed. 1886) (punctuation omitted in original))).

97. *In re* DiCrocco's Estate, 12 N.Y.S.2d 276, 278 (Sur. Ct. Richmond County 1939); *accord Gellis' Estate*, 252 N.Y.S. at 733.

98. Conde v. Towner, 15 N.Y.S.2d 265, 266 (3d Dep't 1939).

99. *Id.* (quoting Arthur v. Groswold, 55 N.Y. 400, 410 (1874)); *accord* Ford Motor Co. v. Dexter, 51 F.2d 258, 260 (S.D.N.Y. 1931), *rev'd on other grounds*, 56 F.2d 760 (2d Cir. 1932); Seneca Wire & Mfg. Co. v. A.B. Leach & Co., 159 N.E. 700, 702 (N.Y. 1928); Karscher v. Dewald, 284 N.Y.S. 213, 214 (1st Dep't 1935); Smith v. Onondaga Pottery Co., 300 N.Y.S. 298, 301-02 (Sup. Ct. Onondaga County 1937); Fahnestock v. Clark Henry Corp., 272 N.Y.S. 49, 58 (Sup. Ct. Kings County 1934); Hull v. Cohen, 252 N.Y.S. 153, 157 (Sup. Ct. Monroe County 1931); Continental Ins. Co. v. Mercadante, 212 N.Y.S. 756, 758 (Sup. Ct. N.Y. County 1925); Hobaica v. Byrne, 205 N.Y.S. 7, 9-10 (Sup. Ct. Oneida County 1924); McClester v. F-I-F Plan Corp., 12 N.Y.S.2d 307, 310 (N.Y. City Mun. Ct. 1939); Yaswen v. Pollock, 280 N.Y.S. 512, 518 (N.Y. City Mun. Ct. 1934).

requirements.

To be actionable, fraudulent representations had to "consist of statements as to existing facts rather than expressions of opinion[,] . . . promises of things to be done or performed in the future,"[100] or "dealer's talk."[101] "Disappointed hopes," according to the New York Court of Appeals, could "not [be] the basis of legal liability"[102] because, "[i]f they

100. Electric Paint & Varnish Co. v. Binghamton Woven Wire Spring Co., 236 N.Y.S. 337, 338 (Sup. Ct. Broome County 1929); *accord Yaswen*, 280 N.Y.S. at 518.

101. Bareham & McFarland, Inc. v. Kane, 240 N.Y.S. 123, 126 (4th Dep't 1930). Representations, for example, that certain land or stock had a "true and actual value," O'Hara v. Derschug, 272 N.Y.S. 189, 192 (4th Dep't 1934) (quoting plaintiff's complaint); *see also* Goess v. Lucinda Shops, Inc., 93 F.2d 449, 451 (2d Cir. 1937); Carney v. Morrison, 228 N.Y.S. 308, 312 (1st Dep't 1928), or that a mortgage was "good security," Benz v. Kaderbeck, 272 N.Y.S. 558, 561 (4th Dep't 1934), were held to be opinions, although statements that a firm had "only [specified] outstanding agreements," Coon v. Ikeler, 212 N.Y.S. 330, 333 (2d Dep't 1925), that a particular utility classification would enable a business to save money, *see* Stern Bros., Inc. v. New York Edison Co., 296 N.Y.S. 857, 859 (1st Dep't 1937), or that a business was " 'financially responsible and fully capable of carrying out . . . [its] obligations' . . . was not the utterance of a mere opinion or prophesy [sic]," Duncan v. Stoneham, 170 N.E. 571, 571 (N.Y. 1930) (per curiam) (quoting letter from appellants Charles A. Stonham and Ross E. Robertson to plaintiff John Duncan). Representations about New York law were opinions, *see* DeFranco v. Shedden, 295 N.Y.S. 370, 371 (2d Dep't 1937); Lefferts v. Lefferts, 276 N.Y.S 809, 812 (1st Dep't 1935); C.I.T. Corp. v. Daley, 257 N.Y.S. 163, 164 (Sup. Ct. N.Y. County 1932); Bodenstein v. Singer, 209 N.Y.S. 748, 749 (Sup. Ct. N.Y. County 1925), although statements about the law of other jurisdictions were facts, *see In re* Miller's Will, 295 N.Y.S. 943, 957-58 (Sur. Ct. Kings County 1937), as were statements about the nonexistence of easements over land in New York, *see* Acunto v. Wiggins, 279 N.Y.S. 568, 568 (2d Dep't 1935); Acunto v. Wiggins, 252 N.Y.S. 844, 844 (2d Dep't 1931). The courts were divided over whether a representation as to safety made by a defendant who knew of the existence of danger was a fact or opinion. *Compare* Daurizio v. Merchants' Despatch Transp. Co., 274 N.Y.S. 174, 181 (Sup. Ct. Monroe County 1934) (declining to find fraud because the cause of action for fraud was redundant to the cause of action for negligence), *with* Macomber v. Wilkinson, 6 N.Y.S.2d 608, 613 (Rochester City Ct. 1938) (interpreting the pleading liberally to state sufficient facts to sustain an action for fraud). As one judge observed, "[n]o hard and fast rule [could] be laid down as to what constitute[d] a fraudulent representation in any particular case," with the "result, of necessity, depend[ing] upon the peculiar circumstances and conditions involved." *Bareham & McFarland, Inc.*, 240 N.Y.S. at 127.

102. Adams v. Clark, 146 N.E. 642, 644 (N.Y. 1925).

were, no one, without making himself liable for damages, could innocently and in good faith say that he would advance money in aid of an . . . enterprise. . . ."[103] Therefore, considerations connected with the smooth operation of business constrained the judiciary's capacity to provide maximum protection of the existing distribution of wealth.

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103. *Id.* Thus, promises to repay money, *see* Trieper v. Bulkley & Horton Co., 197 N.Y.S. 88, 89 (2d Dep't 1922); Hadley v. Thompson, 12 N.Y.S.2d 258, 259 (Sup. Ct. N.Y. County 1939), to refrain from entering a judgment, *see* Herzberg v. Farmers' Nat'l Bank, 276 N.Y.S. 510, 512 (3d Dep't 1935), to extend a lease, *see* Polscik v. Korff, 180 N.Y.S. 401, 402 (1st Dep't 1920), to complete a contract within a specified time, *see* Crossways Apartment Corp. v. Amante, 210 N.Y.S. 346, 352-53 (1st Dep't 1925), to put an automobile "in first-class running order," John N. Benedict Co. v. McKeage, 195 N.Y.S. 228, 229 (3d Dep't 1922) (quoting testimony of Willis D. Sweet to statement made by defendant Guillaume R. McKeage), and to give dower to a wife, *see* Browning v. Browning, 243 N.Y.S. 322, 326 (Sup. Ct. N.Y. County 1930), without more, were not fraudulent. "The fraudulent breach of a contract [did] not give rise to an action for fraud." Drydock Knitting Mills, Inc. v. Queens Mach. Corp., 2 N.Y.S.2d 717, 718 (2d Dep't 1938). However, it was "well settled that a declaration of a present intention, false when made, to perform an act in the future, constitute[d] a false representation of an existing fact" and thus amounted to a predicate for an action of fraud. Pease & Elliman, Inc. v. Wegeman, 229 N.Y.S. 398, 400 (1st Dep't 1928); *accord* Knickerbocker Merchandising Co. v. United States, 13 F.2d 544, 545-46 (2d Cir. 1926); Fowler-Curtis Co. v. Dean, 196 N.Y.S. 750, 754 (3d Dep't 1922) (Kellogg, J., concurring); Eichorn v. Serlis & Co., 192 N.Y.S. 797, 798 (1st Dep't 1922); Fahnestock v. Clark Henry Corp., 272 N.Y.S. 49, 58 (Sup. Ct. Kings County 1934). Thus, promises to pay or return money, *see* Columbian Laundry v. Hencken, 196 N.Y.S. 523, 526-27 (1st Dep't 1922), to provide financing, *see* Moore v. Abbey, 210 N.Y.S. 766, 767 (4th Dep't 1925), to refrain from entering a judgment, *see* McMullen v. Michigan Home Furnishing Corp., 232 N.Y.S. 124, 125 (1st Dep't 1928), to reconvey property after foreclosure upon the execution of a new mortgage, *see* Lipkind v. Ward, 8 N.Y.S.2d 832, 835 (3d Dep't 1939); Eagle v. Cherney, 1 N.Y.S.2d 513, 514 (3d Dep't 1938); *cf.* Weiner v. Jones, 279 N.Y.S. 799, 800 (4th Dep't 1935) (reversing lower court's finding of fraud via giving worthless check to sheriff to induce him not to levy execution, on the grounds that the extent of the fraud was not proven), to act in some specified manner in regard to a lease, *see* Slonemsky v. Zevin, 267 N.Y.S. 589, 591 (1st Dep't 1933); Scaroon Manor Operating Corp. v. W.P. & L. Realty Corp., 241 N.Y.S. 229, 231 (Sup. Ct. N.Y. County 1930); Belmont-Hughes Realty Corp. v. Denison, 219 N.Y.S. 216, 216-17 (Sup. Ct. N.Y. County 1926), and to make improvements to real property in return for a third mortgage, *see* Penner v. Weissblatt, 239 N.Y.S. 241, 243 (N.Y. City Ct. Bronx County 1930), when made with an intention not to perform them, did amount to fraud.

In order for a misrepresentation of fact to be actionable, it also had to fulfill the second requirement of falsity.[104] "The gist" of fraud was "producing a false impression upon the mind of the other party."[105] Even a person who was "entitled to keep silent" was "bound to disclose the whole truth" if that person "volunteer[ed] any information at all"; "a partial statement [would be] a fraudulent concealment . . . if it [gave] a false color to the whole. . . ."[106] For example, an accountant who prepared a balance sheet could not "escape all liability by insisting that the balance sheet . . . reflect[ed] the condition of the books . . . correctly," when it "did not correctly reflect the condition of the company . . . ."[107] Likewise, a bank had a duty "to speak carefully" in response to any inquiry about a customer's account when it "undertook to speak at all."[108] Indeed, one court went as far as to hold that the "doctrine of caveat emptor [did] not apply" and that a seller was under a duty to disclose facts "peculiarly

104. *See* Cooper v. Weissblatt, 277 N.Y.S. 709, 713 (2d Dep't 1935); Abel v. Paterno, 274 N.Y.S. 749, 754 (Sup. Ct. N.Y. County 1934), *rev'd on other grounds*, 281 N.Y.S. 58 (1st Dep't 1935); *cf.* Vesell v. Reisfield, 273 N.Y.S. 778, 780 (N.Y. City Mun. Ct. 1934) (requirement of "delictum").

105. Noved Realty Corp. v. A.A.P. Co., 293 N.Y.S. 336, 341 (1st Dep't 1937) (quoting Stewart v. Wyoming Cattle Ranche [sic] Co., 128 U.S. 383, 388 (1888)). It was "unimportant whether the means of accomplishing it [were] words or acts of the defendant[s]," *id.* (second alteration in original), such as a notary public's taking of a false acknowledgment, *see* Kainz v. Goldsmith, 246 N.Y.S. 582, 584 (1st Dep't 1930), or the defendant's "concealment or suppression of material facts," he was under a duty to disclose, *Noved Realty*, 293 N.Y.S. at 341 (quoting Stewart v. Wyoming Cattle Ranch Co., 128 U.S. 383, 388 (1888)). *But see* James Mills Orchards Corp. v. Frank, 244 N.Y.S. 473, 482 (Sup. Ct. N.Y. County 1930); President and Dirs. of Manhattan Co. v. Tunick, 237 N.Y.S. 230, 234 (Sup. Ct. N.Y. County 1929) (holding no fraud occurs when defendant conceals facts which he has no duty to disclose).

106. Costello v. Costello, 279 N.Y.S. 303, 310 (Sup. Ct. Kings County 1934) (quoting 1 BLACK ON RESCISSION AND CANCELLATION § 63); *cf.* The Kalfarli, 277 F. 391, 400-01 (2d Cir. 1921) (holding that a person introduced as agent has a duty to disclose fact when he ceases to act as agent).

107. State St. Trust Co. v. Ernst, 15 N.E.2d 416, 419 (N.Y. 1938).

108. Anchor Lumber Corp. v. Manufacturer's Trust Co., 272 N.Y.S. 610, 610 (2d Dep't 1934); *cf.* First Citizens Bank & Trust Co. v. Sherman's Estate, 294 N.Y.S. 131, 139 (4th Dep't 1937) (holding that bank has duty to disclose to one undertaking to become surety).

within his knowledge" whenever a "purchaser [did] not have equal information."[109]

The third requirement of scienter or "fraudulent intent [was] the gist" of fraud,[110] and, absent proof of scienter, there could be no recovery.[111] Normally proof of scienter required the showing of "a willful purpose resorted to with intent to deprive another of his legal rights"[112] or of "some act, consciously or purposely done, which [was] inconsistent with an honest purpose."[113] This requirement of intent meant that, in transfer-

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109. Hall v. Grays, 238 N.Y.S. 67, 69-70 (3d Dep't 1929).

110. Ritz Carlton Apartments, Inc. v. Fried, 232 N.Y.S. 519, 520 (N.Y. City Mun. Ct. 1929); *accord* O'Connor v. Ludlam, 92 F.2d 50, 53-54 (2d Cir. 1937).

111. *See* Banner v. Lyon & Healy, Inc., 293 N.Y.S. 236, 238 (1st Dep't 1937); Clark v. Standard Rock Asphalt Corp., 253 N.Y.S. 730, 733 (1st Dep't 1931); Stoller v. Block Realty Co., 227 N.Y.S. 731, 732 (1st Dep't 1928).

112. People v. Photocolor Corp., 281 N.Y.S. 130, 136 (Sup. Ct. N.Y. County 1935) (quoting Reno v. Bull, 226 N.Y. 546, 551 (1919), *reargument denied*, 227 N.Y. 591 (1919)); *accord* VanSwall v. Derschug, 257 N.Y.S. 206, 207 (4th Dep't 1932); Bulkley v. Rouken Glen, Inc., 226 N.Y.S. 544, 550 (2d Dep't 1928); Deyo v. Hudson, 181 N.Y.S. 846, 849 (3d Dep't 1920); Coppo v. Coppo, 297 N.Y.S. 744, 750 (Sup. Ct. Dutchess County 1937); *In re* Solomon's Estate, 287 N.Y.S. 814, 819 (Sur. Ct. Kings County 1936); Chaddock v. Chaddock, 226 N.Y.S. 152, 156-57 (Sup. Ct. Onondaga County 1927). A defendant could be liable for fraud even though "he [did] not intend to defraud any particular person, and [did] not realize the exact consequences that [would] flow from his act." Habeeb v. Daas, 181 N.Y.S. 392, 394 (Sup. Ct. Kings County 1920).

113. Brockton Shoe Mfg. Co. v. Schenkman, 261 N.Y.S. 740, 741 (1st Dep't 1932). The scienter requirement could also be met by "the pretense of knowledge when knowledge there [was] none," Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931); *accord* Church v. Wickwire, 247 N.Y.S. 100, 106-07 (1st Dep't 1931); Owens v. Waterhouse, 233 N.Y.S. 535, 538 (4th Dep't 1929), or by a "representation made recklessly, heedless of its truth or falsity," Thompson v. Thompson, 235 N.Y.S. 617, 621 (Sup. Ct. N.Y. County 1929), *rev'd on other grounds*, 250 N.Y.S. 433 (1st Dep't 1931); *accord* Bentel v. United States, 13 F.2d 327, 329 (2d Cir. 1926); *Ultramares Corp.*, 174 N.E. at 448-49; First Nat. Bank v. Level Club, Inc., 272 N.Y.S. 273, 284 (1st Dep't 1934); *see also* Doyle v. Chatham & Phenix Nat. Bank, 171 N.E. 574, 577-78 (N.Y. 1930), *reh'g denied*, 173 N.E. 860 (N.Y. 1930) (holding that holder could not recover damages for fraud from trustee certifying bonds, where there was no intent to defraud, but recognizing that there could be liability for damages resulting from negligent words). Even a representation that was "innocent in its inception" would satisfy the scienter requirement if it later "[lost] its innocent character." Dodds v. McColgan, 235 N.Y.S. 492,

ring money from one entrepreneur to another, courts would merely be returning the money to its true owner from whom it had been wrongfully misappropriated.

The fourth element "essential to constitute a fraud [was] that the means used should be successful in deceiving."[114] "To maintain an action in fraud," a plaintiff had to "prove she relied upon the fraudulent statements"[115] of a sort that would mislead a reasonable person—that the fraudulent statements were "material."[116] However, it was "no excuse for a culpable misrepresentation that [the] means of probing it were at hand"[117] and that a plaintiff was contributorily negligent for failing to

499 (Sup. Ct. N.Y. County 1929), *aff'd*, 241 N.Y.S. 584 (1st Dep't 1930). But a merely negligent representation would never suffice in the absence of an affirmative duty to give correct information. *See* Courteen Seed Co. v. Hong Kong & Shanghai Banking Corp., 157 N.E. 272, 274 (N.Y. 1927), *reargument denied*, 159 N.E. 641 (N.Y. 1927).

114. Goldstein v. Equitable Life Assurance Soc'y, 289 N.Y.S. 1064, 1067 (City Ct. N.Y. County 1936) (quoting HANOVER ON THE LAW OF HORSES 156 (2d ed. 1875)); *accord* Green v. Victor Talking Mach. Co., 24 F.2d 378, 380 (2d Cir. 1928); Continental Ins. Co. v. Mercadante, 225 N.Y.S. 488, 494 (1st Dep't 1927).

115. Agatowski v. Novinsky, 208 N.Y.S. 514, 518 (N.Y. City Mun. Ct. 1925); *accord* Fireman's Fund Ins. Co. v. Leventhal, 197 N.Y.S. 851, 851 (1st Dep't 1923); Gould v. Flato, 10 N.Y.S.2d 361, 366 (Sup. Ct. N.Y. County 1938).

116. Day v. Horton, 225 N.Y.S. 358, 359 (3d Dep't 1927); *accord* Odell v. Barnaby, 191 N.Y.S. 941, 941 (2d Dep't 1921); Commercial Credit Corp. v. Third & Lafayette Sts. Garage, 228 N.Y.S. 166, 170 (Sup. Ct. Erie County 1928). Thus, a plaintiff who acted prior to a misrepresentation, *see* Sindeband v. Stone & Webster Eng'g Corp., 269 N.Y.S. 732, 732-33 (1st Dep't 1934); Pacific Bank v. Worth, 226 N.Y.S. 184, 187-88 (1st Dep't 1927); *cf.* Alexander v. Quality Leather Goods Corp., 269 N.Y.S. 499, 503 (Sup. Ct. N.Y. County 1934) (holding that purchaser of stock after fraud not liable to other victims of fraud), or simply performed an act "she was bound to do," Herrmann v. Glens Falls Indem. Co., 7 N.Y.S.2d 392, 392 (2d Dep't 1938); *cf.* Dwelle-Kaiser Co. v. Aetna Cas. & Sur. Co., 150 N.E. 517, 518-19 (N.Y. 1926) (holding that failure to disclose insolvency during pendency of work did not constitute fraud), could not claim fraud. Likewise, a plaintiff who acquiesced in an alleged fraud, as by purchasing a car with an engine that he had heard knocking, *see* P. & M. Motor Car Co. v. Paris, 185 N.Y.S. 835, 836 (1st Dep't 1921), was held to waive any claim of fraud. *See* Stewart v. Edgecomb, 6 N.Y.S.2d 563, 565 (Sup. Ct. Broome County 1938); Hoffman v. Crittenden, 248 N.Y.S. 373, 374-75 (Sup. Ct. Monroe County 1931).

117. Albert v. Title Guarantee & Trust Co., 14 N.E.2d 625, 626 (N.Y. 1938); *accord* Eufemia v. Moan, 206 N.Y.S. 185, 186 (2d Dep't 1923) (per curiam).

pursue them.[118] "When the parties [did] not have equal means of knowledge, it [was] immaterial that the victim, if more suspicious, could have discovered the cheat."[119]

The fifth and final element of any cause of action for fraud was damage. It was "essential . . . [to] show that the damage was caused by the fraud alleged."[120] Thus, a woman who was cut by fragments of a safety-glass windshield that broke in an automobile collision could not recover for her injuries on the basis of excessive representations made about the glass's safety, since she could not prove that she would have bought a safer windshield—because nothing safer was available at that time—or that she would not have taken the trip on which her injury occurred if she had known the true facts about the glass. The "proximate cause" of her injuries "was the collision," and the "only loss due to reliance on the defendant's representations was the $10" extra paid for the safety glass rather than for the regular glass windshield.[121] Similarly, a director of a bank could not maintain a fraud claim against the bank for falsely informing him that its shares were more valuable than they actually were.[122] The court reasoned that "the bank owed no . . . duty to its direc-

118. *See* Angerosa v. White Co., 290 N.Y.S. 204, 211 (4th Dep't 1936); Yedlin v. Rubin, 220 N.Y.S. 545, 548 (2d Dep't 1927); Insurance Co. of North America v. Whitlock, 214 N.Y.S. 697, 704 (1st Dep't 1926); Vihart v. Broadway Dev. Corp., 188 N.Y.S. 475, 476 (1st Dep't 1921); People v. S.W. Straus & Co., 285 N.Y.S. 648, 672 (Sup. Ct. Kings County 1936). *But see* Doorly v. Gleeson & Dolan Dev. Corp., 10 N.Y.S.2d 309, 310 (1st Dep't 1939).

119. Falter v. United States, 23 F.2d 420, 424 (2d Cir. 1928). Obviously the distinction between waiver of fraud and knowledge of facts that would make a party merely contributorily negligent in not making further inquiry was "too uncertain and variable to be compressed within a formula" and had to "be determined by the trier of the facts in the light of all the circumstances." Walter v. Laidlaw, 162 N.E. 580, 581 (N.Y. 1928).

120. Stern v. Andrew, 291 N.Y.S. 333, 335 (1st Dep't 1936); *accord* Williams v. Sawyer Bros., Inc., 45 F.2d 700, 702-03 (2d Cir. 1930); Kraus v. General Motors Corp., 27 F. Supp. 537, 540 (S.D.N.Y. 1939); McVea v. George, 210 N.Y.S. 742, 743 (4th Dep't 1925); Weiner v. Fine, 189 N.Y.S. 164, 165 (1st Dep't 1921); Hermann v. Hart, 183 N.Y.S. 220, 222 (1st Dep't 1920); *In re* St. John's Estate, 296 N.Y.S. 613, 621 (Sur. Ct. Kings County 1937).

121. Rachlin v. Libby-Owens-Ford Glass Co., 96 F.2d 597, 600 (2d Cir. 1938).

122. *See* Goess v. Ehret, 85 F.2d 109, 110 (2d Cir. 1936).

tors" to inform them of its financial condition; "so far as there was any [duty], it ran in the opposite direction."[123] Directors might "often enough [be] dummies" with no real role in corporate management, but when they "choose to assume positions of trust and responsibility" they could not later have "the effrontery to make [their] neglect the basis of a claim against [their] victim."[124] Such dummy directors were the cause of their own injury.

Fraud could "not be presumed" or "based merely on suspicion, conjecture, or doubtful inference."[125] A party claiming fraud had to "aver, fully and explicitly," all five elements "constituting the alleged fraud,"[126] and all five elements thereafter had to "be established by clear and convincing factual proof."[127] These rules were somewhat relaxed, however,

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123. *Id.*

124. *Id.*

125. Lowendahl v. Baltimore & O.R.R., 287 N.Y.S. 62, 76 (1st Dep't 1936); *accord* Winters v. Municipal Capital Corp., 26 F. Supp. 330, 333 (E.D.N.Y. 1939); Titterington v. Colvin, 1 N.E.2d 116, 116 (N.Y. 1936); Winter v. Anderson, 275 N.Y.S. 373, 379 (4th Dep't 1934); Waggoner v. Jageacks, 272 N.Y.S. 182, 186 (4th Dep't 1934); Pitcher v. Sutton, 264 N.Y.S. 488, 490 (4th Dep't 1933); Steinberg v. New York Life Ins. Co., 264 N.Y.S. 399, 402 (3d Dep't 1933); Burstein v. Cohen, 188 N.Y.S. 812, 812 (1st Dep't 1921); Metropolitan Commercial Corp. v. Larkin Co., 4 N.Y.S.2d 326, 333 (Sup. Ct. Erie County 1936); Woolson v. Waite, 286 N.Y.S. 619, 623-24 (Sup. Ct. Oswego County 1935); 154 West Fourteenth Street Co. v. D.A. Schulte, Inc., 202 N.Y.S. 737, 743-44 (Sup. Ct. N.Y. County 1923); Hopfan v. Knauth, 282 N.Y.S. 219, 224 (N.Y. City Mun. Ct. 1935); *In re* Timko's Will, 270 N.Y.S. 323, 327 (Sur. Ct. Kings County 1934); Kamaran v. Sidney Garage, Inc., 244 N.Y.S. 337, 340 (N.Y. City Mun. Ct. 1930).

126. Finsilver v. Still, 269 N.Y.S. 9, 11 (1st Dep't 1934) (quoting Butler v. Viele, 44 Barb. 166, 169 (General Term Monroe Co. 1864)). Pleadings were held sufficient in *Paris v. Smith*, 270 F. 65, 67 (2d Cir. 1920), *Abrams v. Roseth Corp.*, 292 N.Y.S. 445, 445 (1st Dep't 1937), *Ruckstuhl, v. Healy*, 225 N.Y.S. 570, 583 (1st Dep't 1927), *Cross v. Sylvia Silk Co.*, 225 N.Y.S. 552, 554 (1st Dep't 1927), and *McConkey Realty Corp. v. Wildermuth*, 212 N.Y.S. 216, 217 (4th Dep't 1925), but insufficient in *Belding Hemingway Co. v. Slater Mills, Inc.*, 289 N.Y.S. 1062, 1063 (1st Dep't 1936), *Popper v. Korn*, 218 N.Y.S. 631, 632 (2d Dep't 1926), and *Hilgers v. Gosselin*, 179 N.Y.S. 703, 704 (1st Dep't 1920).

127. *Lowendahl*, 287 N.Y.S. at 76; *accord* Union Switch & Signal Co. v. Day, 16 F.2d 4, 6 (2d Cir. 1926); *In re* Locust Bldg. Co., 299 F. 756, 765-77 (2d Cir. 1924); Lynch v. Gibson, 3 N.Y.S.2d 672, 675 (1st Dep't 1938); Wilmerding v. O'Brien, 268

"in cases where a fiduciary relation exist[ed] between the parties to a transaction."[128] When one party was "a dominant and controlling force over the other" and "the superior party" thereby "obtain[ed] a possible benefit, equity raise[d] a presumption against the validity of the proceeding, and cast . . . upon such party the burden of proving its honesty and integrity."[129]

N.Y.S. 206, 212 (Sup. Ct. N.Y. County 1933); Harmon Nat'l Real Estate Corp. v. Swanson, 277 N.Y.S. 254, 257 (N.Y. City Mun. Ct. 1935); *In re* Decker's Estate, 268 N.Y.S. 280, 286 (Sur. Ct. Chenango County 1933). "Where evidence [was] equally as consistent with innocence as with wrongdoing, the innocent construction [had to] be adopted." Ochenkowski v. Dunaj, 251 N.Y.S. 589, 591 (3d Dep't 1931); *see also* Balboa Realty County v. Brenglass Realty Corp., 264 N.Y.S. 287, 289 (Sup. Ct. Bronx County 1932); Utterback-Gleason Co. v. Standard Acc. [sic] Ins. Co., 179 N.Y.S. 836, 842 (Sup. Ct. Albany County 1920). Of course, "the burden of proving fraud [was] upon the person asserting it." *In re* Folmsbee's Estate, 268 N.Y.S. 309, 310 (Sur. Ct. Saratoga County 1933); *accord* Lynch v. Gibson, 3 N.Y.S.2d 672, 677 (1st Dep't 1938); Polachek v. New York Life Ins. Co., 263 N.Y.S. 230, 236 (Sup. Ct. N.Y. County 1933); Smith v. Vara, 241 N.Y.S. 202, 210 (County Ct. Erie County 1930); Hotaling v. A.B. Leach & Co., 214 N.Y.S. 452, 457 (N.Y. City Mun. Ct. 1926).

128. Frick v. Cone, 290 N.Y.S. 592, 602 (Sup. Ct Genesse County 1936), *aff'd*, 298 N.Y.S. 173 (4th Dep't 1937).

129. *In re* Smith's Estate, 276 N.Y.S. 646, 652 (4th Dep't 1935); *accord In re* Marine Trust Co., 281 N.Y.S 553, 556-57 (Sup. Ct. Erie County 1935); *Polachek*, 263 N.Y.S. at 236; *In re* Hearn's Will, 285 N.Y.S. 935, 942 (Sur. Ct. Kings County 1936). *See also* Titterington v. Colvin, 1 N.E. 116, 116 (N.Y. 1936). Before such a shift of the burden of proof would occur, the party claiming fraud was required to prove the existence of a fiduciary relationship. *See In re* Donnelly's Estate, 283 N.Y.S. 609, 613 (Sur. Ct. Kings County 1935). Evidence of fraud typically raised a question of fact for a jury. *See* Chernuchin v. Kalmanoff, 292 N.Y.S. 71, 71 (2d Dep't 1936); Pruszynski v. Nowy Swiat Pub. Co., 290 N.Y.S. 457, 457-58 (2d Dep't 1936); Dutcher v. Decker, 289 N.Y.S. 21, 22 (3d Dep't 1936); Titterington v. Colvin, 278 N.Y.S. 944, 945 (2d Dep't 1935); Berlin Const. Co. v. Hoops, 183 N.Y.S. 121, 124 (1st Dep't 1920). Most jury verdicts were upheld when challenged, *see e.g., Prescott v. O'Donohue*, 130 N.E. 914, 914 (N.Y. 1921); *William H. Haws Clay Prods. Co. v. Smith*, 289 N.Y.S. 61, 62 (3d Dep't 1936); *City of New York v. Flatto*, 284 N.Y.S. 199, 203-04 (1st Dep't 1935); *Urdang v. Posner*, 222 N.Y.S. 396 (1st Dep't 1927); *cf. Manfacturers' Finance Corp. v. George W. Wood*, Inc., 221 N.Y.S. 387, 388-89 (1st Dep't 1927); *Trojanorsky v. Boccafogli*, 212 N.Y.S. 89, 94 (1st Dep't 1925); *Antonacchio v. Consolidated Foreign Exch. Corp.*, 197 N.Y.S. 150, 155 (1st Dep't 1922), for cases which reversed decisions of trial judges to dismiss suits by plaintiffs prior to submission to the jury. For cases upholding the fact-finding powers

A victim of fraud had alternative remedies, which where either to "rescind the contract absolutely and . . . recover the consideration parted with,"[130] or to "retain what he has received and bring an action at law to recover the damages sustained."[131] The victim, however, could "not do

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of trial judges when they were sitting in lieu of juries, see *Payne v. Scholnick*, 12 N.Y.S.2d 242, 242 (4th Dep't 1939); *Williamson v. Casa-Eguia*, 234 N.Y.S. 449, 450-53 (4th Dep't 1929); *People v. S.W. Strauss & Co.*, 282 N.Y.S. 972, 981 (Sup. Ct. Kings County 1935). There were some cases in which verdicts were set aside. *See Smith v. Cohen*, 175 N.E. 361, 362 (N.Y. 1931); *Kreitzman v. Indemnity Ins. Co.*, 15 N.Y.S.2d 25, 26 (1st Dep't 1939); *Cacicedo v. McAteer*, 221 N.Y.S. 60, 63 (1st Dep't 1927); *Remington Arms Co. v. Cotton*, 180 N.Y.S. 486. 494 (1st Dep't 1920); *Taylor v. Manning*, 179 N.Y.S. 827, 829 (2d Dep't 1920); *Levy v. Horsfall*, 179 N.Y.S. 564, 566 (1st Dep't 1920); *cf. Hildebrand v. Franklin-Wright Co.*, 295 N.Y.S. 653, 654 (3d Dep't 1937); *Green v. Krongold*, 248 N.Y.S. 760, 761 (2d Dep't 1931); *Allen v. Pellegrino*, 9 N.Y.S.2d 945, 946-47 (1st Dep't 1939); *Soilson v. Nemeth*, 184 N.Y.S. 627, 628 (1st Dep't 1920); and *Blumberg v. Romer*, 5 N.Y.S.2d 352 (Chenango County Ct. 1938), for cases reversing fact findings. Other issues arising in fraud cases included the legal relationship of principals and agents, *see Saville v. Sweet*, 254 N.Y.S. 768, 770-71 (1st Dep't 1932); *Granite Bond & Mortgage Corp. v. Hutchins*, 233 N.Y.S. 404, 405-06 (4th Dep't 1929); *Fay v. Moehlenpah*, 242 N.Y.S. 618, 620 (Sup. Ct. N.Y. County 1930); *Gruas v. Fortoul Film Corp.*, 182 N.Y.S. 28, 29-30 (Sup. Ct. N.Y. County 1920); the validity of releases obtained by fraud, *see Stoeve v. Schinasi*, 258 N.Y.S. 145, 146-47 (1st Dep't 1932); and the effect upon fraud suits by spouses of legislation abolishing civil actions for alienation of affections, seduction, and breach of contract to marry, *see Snyder v. Snyder*, 14 N.Y.S.2d 815, 816 (Sup. Ct. Bronx County 1939).

130. A plaintiff who elected to rescind for fraud would recover back any consideration that had been paid, plus interest, but could not recover any incidental damages. *See* Weigel v. Cook, 142 N.E. 444, 446 (N.Y. 1923). Consequential damages, on the other hand, were recoverable, and thus a produce merchant who was fraudulently sold refrigeration equipment could both rescind the contract of sale and recover the value of its spoiled produce. *See* Waldman Produce, Inc. v. Frigidaire Corp., 284 N.Y.S. 167, 171 (2d Dep't 1935). Moreover, in an action for rescission brought in equity, if it appeared that "rescission ha[d] become impossible, as distinguished from improper," the chancellor could "grant money damages . . . in order to prevent a failure of justice." First Nat'l Bank v. Level Club, Inc., 4 N.Y.S.2d 734, 740 (1st Dep't 1938); *cf.* Scopano v. United States Gypsum Co., 3 N.Y.S.2d 300, 302 (Sup. Ct. Genesee County 1938) (damage claim may be joined in equity action to set aside judgment procured by fraud); *accord* Fitzgerald v. McFadden, 88 F.2d 639, 644 (2d Cir. 1937). As to recovery of interest, *see* Demms v. Blanchard, 270 N.Y.S. 700, 702-03 (Sup. Ct. N.Y. County 1934).

131. Sager v. Friedman, 1 N.E.2d 971, 973 (N.Y. 1936); *accord* Weber v. Wittmer Co., 12 F. Supp. 884, 885 (W.D.N.Y. 1935); Equitable Life Assur. Soc. [sic: abbreviated

in original] v. Kushman, 296 N.Y.S. 143, 145 (1st Dep't 1937); Inman v. Credit Discount Corp., 245 N.Y.S. 273, 276 (1st Dep't 1930); Commercial Credit Corp. v. Third & La Fayette Sts. Garage, Inc., 234 N.Y.S. 463, 465 (4th Dep't 1929); Bennett v. Burch-Buell Motor Corp., 224 N.Y.S. 666 (4th Dep't 1927); Wood v. Hill, 212 N.Y.S. 550, 555 (1st Dep't 1925); Bettinger v. Montgomery, 210 N.Y.S. 320, 330-31 (Sup. Ct. Erie County 1925); Stumpf v. Wells, 197 N.Y.S. 389, 390-91 (Sup. Ct. Monroe County 1922); Riegel v. Franzel, 191 N.Y.S. 126, 127 (Sup. Ct. Seneca County 1921). A plaintiff who sought damages could recover "the actual pecuniary loss sustained as a direct result of the wrong," which "[o]rdinarily" was "the difference between the amount paid and the value of the article received," Hotaling v. A.B. Leach & Co., 159 N.E. 870, 871 (N.Y. 1928); *accord*, Seaboard Terminal & Refrigeration Co. v. Droste, 80 F.2d 95, 96 (2d Cir. 1935); Stelwagon Mfg. Co. v. Elvidge, 30 F.2d 285, 287 (2d Cir. 1929); Cowart v. Lang, 298 N.Y.S. 875, 875 (4th Dep't 1937); Majestic Export Co. v. Katz & Greenfield, Inc., 288 N.Y.S. 941, 941 (1st Dep't 1936); Deutsch v. Roy, 268 N.Y.S. 606, 615 (1st Dep't 1934); Commercial Credit Corp. v. Wells, 240 N.Y.S. 139, 144 (4th Dep't 1930); Nelvan Constr. Corp. v. Sanka Realty Corp., 236 N.Y.S. 87, 88 (1st Dep't 1929); Graetz v. Smith, 211 N.Y.S. 577, 578 (2d Dep't 1924); Clinckett v. Casseres, 200 N.Y.S. 178, 181 (2d Dep't 1923); Askin v. Lewin, 251 N.Y.S. 405, 407 (Sup. Ct. N.Y. County 1931); Reinhardt v. Horace L. Day Co., 213 N.Y.S. 130, 131 (Sup. Ct. N.Y. County 1925), as of the time of the time of the transaction rather than what the article would have been worth in the future if the representations had been true, *see* Abel v. Paterno, 281 N.Y.S. 58, 65 (1st Dep't 1935); Gainsburg v. Bachrack, 270 N.Y.S. 727, 733-34 (1st Dep't 1934). *But see* Singleton v. Harriman, 272 N.Y.S. 905, 906 (Sup. Ct. N.Y. County 1933) (allowing recovery of difference between sum paid and value at time fraud discovered). Lost "profits which . . . could [have] been made on contract with third parties" were not recoverable. Foster v. DiPaolo, 140 N.E. 220, 220 (N.Y. 1923); *accord* Sager v. Friedman, 1 N.E.2d 971, 974 (N.Y. 1936); De Vaughn v. Frank E. McGray Co., 226 N.Y.S. 474, 476 (4th Dep't 1928); McClester v. F-I-F Plan Corp., 12 N.Y.S.2d 307, 311 (N.Y. City Mun. Ct. 1939). But damages could "not be fixed by arbitrary rule," and sometimes other kinds of damages, such as consequential damages like those for personal injury, flowed from a fraud. *Hotaling*, 159 N.E. at 873; *see also* Beach v. Bongartz, 191 N.Y.S. 336, 337 (1st Dep't 1921) (a damage remedy was tailored to the specific facts of the case); Tulloch v. Haselo, 218 N.Y.S. 139, 141 (3d Dep't 1926) (dicta indicating that damages for personal injury were recoverable). Similarly, a party who was fraudulently induced to retain stock was permitted to recover the difference in value between the original purchase price and the price on the date of the discovery of the fraud, *see* Kaufmann v. Delafield, 229 N.Y.S. 545, 546 (1st Dep't 1928), while a party who retained stock for which "there was no market" and hence no market value was permitted to recover damages assessed by a jury on the basis of "the history of the . . . Company, its properties, development, and results, [and] the changes in its financial position and prospects, as the same from time to time developed, until it finally fell into the hands of a receiver," Crandall v. A.B. Leach & Co., 223 N.Y.S. 127, 130-31 (4th Dep't 1927); *accord* Page v. Clark, 195 N.Y.S. 529, 530

both," and it was "thoroughly established that an assertion of a rescission [was] nullified by the subsequent acceptance of benefits growing out of a contract." Nor was it possible "by words [to] cancel his contract and then continue to assert rights and benefits under it."[132]

E. *Privacy*

A fifth cause of action that was typically of a commercial nature was for invasion of privacy. Under the law of New York, no right of privacy existed except to the limited extent provided by Sections 50 and 51 of the

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(Sup. Ct. Cayuga County 1922). In the case of a woman who sued her husband for fraud on account of his misrepresentations as to his health, the Court of Appeals ruled that "pecuniary loss [was] by no means the limit of damage" and that the plaintiff could recover for "humiliation, disgrace, and mental anguish," as well as for being "deprived of the society, comfort, and attention of a well man," with the total award resting "largely in the discretion of the jury." Leventhal v. Liberman, 186 N.E. 675, 677 (N.Y. 1933). *But see* Rosenfeld v. Rosenfeld, 2 N.Y.S.2d 107, 110 (N.Y. City Mun. Ct. 1937), which permitted a separated wife to recover from her deceased husband's son arrearages of alimony only in the amount of the difference between what had been paid and what had been owed.

Civil arrest was permitted in an action for damages, but not in a suit for rescission. *See* Walker v. Sanford, 214 N.Y.S. 202, 203 (Sup. Ct. N.Y. County 1926). A party could also plead fraud by way of defense or through a counterclaim for damages. *See* Galloway v. Wolfe, 249 N.Y.S. 608, 610 (1st Dep't 1931). A person seeking damages or asserting fraud as a defense was not required to allege an offer to restore what had been received, as did a person seeking rescission. *See* Roulston v. Warner, 234 N.Y.S. 643, 644 (Sup. Ct. N.Y. County 1929).

132. Brennan v. National Equitable Inv. Co., 160 N.E. 924, 924-25 (N.Y. 1928); *accord* Merry Realty Co. v. Shamokin & Hollis Real Estate Co., 130 N.E. 306, 309 (N.Y. 1921); General Valuations Co. v. City of Niagara Falls, 1 N.Y.S.2d 880, 883 (4th Dep't 1938); Thompson v. Thompson, 250 N.Y.S. 433, 438 (1st Dep't 1931); Trowbridge v. Oehmsen, 202 N.Y.S. 833, 839 (2d Dep't 1924). It was possible, however, to join an action for damages to an action to recover the price, *see* Handman Silk Corp. v. Wilon, 278 N.Y.S. 507 (2d Dep't 1935), since both were consistent with an affirmation of the contract. Once made, an election of remedies was normally "final," Clark v. Kirby, 153 N.E. 79, 81 (N.Y. 1926), and waived any remedies which were not elected. *See* Silvestri v. Associated Gas & Elec. Corp., 268 N.Y.S. 763, 765 (4th Dep't 1934); *accord* Armstrong v. Herman, 241 N.Y.S. 282, 288 (1st Dep't 1930); J.C. Turner Lumber Co. v. Lacey, 191 N.Y.S. 774, 776-77 (1st Dep't 1922).

New York Civil Rights Law,[133] which did not protect personal privacy, but merely prohibited commercial exploitation of an individual's name or likeness.

Section 50 was a criminal provision that made a person who, without consent, used "the name, portrait or picture of any living person" for "trade" or "advertising purposes" guilty of a misdemeanor,[134] while Section 51 gave civil remedies in the form of injunctive relief and an action for damages to the person injured.[135] The two sections were "remedial statute[s] . . . designed to stop the merchandising . . . of a portrait of a person who occupies a position in which there is a monetary value by publicizing the [sic] same."[136] As such, they were to be given "a liberal rather than a pinched construction"—"not [as] an alien intruder in the house of the common law, but [as] a guest to be welcomed and made at home there, as a new and powerful aid in the accomplishment of its appointed task of accommodating the law to social needs."[137] However,

133. *See* Kimmerle v. New York Evening Journal, Inc., 186 N.E. 217, 217-18 (N.Y. 1933); Bunnell v. Keystone Varnish Co., 5 N.Y.S.2d 415, 415 (2d Dep't 1938); Martin v. New Metro. Fiction, Inc., 248 N.Y.S. 359, 361 (Sup. Ct. Rensselaer County 1931).

134. N.Y. CIV. RIGHTS LAW § 50 (McKinney 1992).

135. *See id.* § 51.

136. Kline v. Robert M. McBride & Co., 11 N.Y.S.2d 674, 682 (Sup. Ct. N.Y. County 1939).

137. Jackson v. Consumer Publications, Inc., 10 N.Y.S.2d 691, 693 (Sup. Ct. N.Y. County 1939). The courts often did apply Sections 50 and 51 liberally in pursuit of their remedial goals. Thus, they upheld suits by an individual for unauthorized use of his picture in a cartoon, *see* McNulty v. Press Pub. Co., 241 N.Y.S. 29, 32 (Sup. Ct. N.Y. County 1930), by an actress for unauthorized use of her picture in a locket sold in the defendant's store, *see* Lane v. F.W. Woolworth Co., 11 N.Y.S.2d 199, 201 (Sup. Ct. N.Y. County 1939), by a painter for unauthorized use of his name to advertise an embroidery of his painting, *see* Neyland v. Home Pattern Co., 65 F.2d 363, 363, 365 (2d Cir. 1933), by a socialite for unauthorized use of photographs taken at a social event in her home, *see* Holmes v. Underwood & Underwood, Inc., 233 N.Y.S. 153, 153 (1st Dep't 1929), and by a boxer for use of his name over 100 times in an allegedly fictional account about boxing, *see* Krieger v. Popular Publications, Inc., 3 N.Y.S.2d 480, 482 (Sup. Ct. N.Y. County 1938). In two cases suits were upheld upon publication of pictures of seminude women. *See* Myers v. Afro-American Pub. Co., 5 N.Y.S.2d 223, 223-24 (Sup. Ct. N.Y. County 1938); Semler v. Ultem Publications, Inc., 9 N.Y.S.2d 319, 320 (City Ct. N.Y. County

efforts to extend the reach of the statute beyond the merchandising of an individual's personality failed early on. Thus, an actor who complained that a movie he made was edited and reconstructed in ways other than that originally contemplated received no relief.[138] Likewise, the statute was read narrowly in a case that held that a course of conduct leading a defendant to believe it had permission to use a person's name could be pleaded in mitigation of damages even though it would not constitute a complete defense.[139]

II. BUSINESS EFFICIENCY, FREEDOM OF OPPORTUNITY, AND UPWARD MOBILITY

Protection of established wealth through doctrines of trespass, conversion, fraud, privacy, and tortious interference with contract, however, came at a price. The law regulating business conduct, as it stood at the outset of the 1920s, often interfered with business efficiency, freedom of opportunity, and ultimately upward social mobility. According to Judge Harold J. Hinman's dissent in the 1922 case of *Beardsley v. Kilmer*,[140] America was supposed to be:

> a land of opportunity, as well as of free competition in business, and it becomes pro tanto a land of oppression, where we lay down the fixed principle that a man who is wealthy enough and malicious enough can shut the door of opportunity to the object of his hatred by rivaling him in business, with no other aim in view than his destruction, and be held to be in the exercise of his legal rights in so doing. Such an act of unmixed malice ought to

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1938). In another case, the court held that a plaintiff's gratuitous license to use her name and portrait to advertise the defendant's perfume was revocable at will. *See* Garden v. Parfumerie Rigaud, Inc., 271 N.Y.S. 187, 189 (Sup. Ct. N.Y. County 1933).

138. *See* Fairbanks v. Winik, 198 N.Y.S. 299, 299-300 (Sup. Ct. N.Y. County 1922).

139. *See* Hammond v. Crowell Pub. Co., 1 N.Y.S.2d 728, 729 (1st Dep't 1938).

140. 193 N.Y.S. 285, 290 (3d Dep't 1922) (dissenting opinion).

be . . . contrary to the prevailing public morality.[141]

Judge Hinman expressed his belief that the law would change, and in a matter of years, change did begin to occur.

The engine that drove the change was the ascension to the bench of individuals from the Catholic and Jewish immigrant groups against whom traditional anti-redistribution doctrines had been primarily aimed. Consider, for example, the New York Court of Appeals, with its complement of seven judges. At the beginning of 1920, all the judges on the court elected to full fourteen-year terms, with the single exception of Benjamin N. Cardozo, were Protestants. A second Jew, Irving Lehman, joined the court for a full term at the beginning of 1924, and then a Catholic, John F. O'Brien, joined the court permanently in 1927. As a result, by the end of the decade, three of the seven judges on the New York Court of Appeals were either Catholic or Jewish.[142] Thereafter, at least three, and sometimes a majority, of the judges of the seven-member court were either Catholics or Jews. As members of these religious minorities came to wield substantial power within the judiciary, legal doctrine in borderline cases slowly changed, and courts became more sensitive to the need for business efficiency, freedom of opportunity, and ultimately upward mobility for the children of immigrants.

Privacy was one of the first areas of law in which courts began to focus less on protecting established wealth and more on the competing value of business efficiency. In order not to impede legitimate business activities, the New York Civil Rights Law was interpreted narrowly. As early as the late 1920s, the lower courts ruled that the law did not prohibit publication in a work of nonfiction of "matters dealing incidentally

141. *Id.* at 290 (dissenting opinion).

142. 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. 1-2 (1943-1968) (which gives judges' general backgrounds). For Judge Crane's religious affiliation, see *F.E. Crane, 78, Dies: Led State Jurists,* N.Y. TIMES, Nov. 22, 1947, at 15.

with specific persons and concerning things of current interest,"[143] even "in connection with advertising or trade."[144] "[E]very unauthorized use of a name or picture in connection with trade or advertising [did] not imply a violation of the statute," which was not "intend[ed] to stop the dissemination of 'news' as a business in itself or as adjunct to the sale of advertising."[145] "Were it otherwise, many lines of business would have to be abandoned."[146] Thus, the unauthorized publication of a photograph of a Hindu mystic to illustrate a news article or of a semi-educational or "feature" article was not actionable.[147] Additionally, an actress who had assumed the stage name of Aunt Jemima was not allowed to sue Log Cabin Products for its use of the Aunt Jemima trademark under a licensing agreement with the trademark's owner, Quaker Oats Company.[148] The courts also read the statute narrowly when they refused to allow suit by an obese woman photographed in a newsreel while exercising in a gym,[149] and by an attorney, Frank M. Swacker, whose surname was used in a work of fiction.[150]

Concerns for business efficiency and freedom of opportunity became manifest in the New York Court of Appeals by the early 1930s. Considerations designed to protect the smooth operation of business, for example, limited the judiciary's willingness to hold innocent entities strictly liable in conversion. Thus, in the 1932 case of *Clarke v. Public National Bank & Trust Co.*,[151] the New York Court of Appeals declined to hold a

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143. Kline v. Robert M. McBride & Co., 11 N.Y.S.2d 674, 679 (Sup. Ct. N.Y. County 1939).

144. Damron v. Doubleday, Doran & Co., 231 N.Y.S. 444, 446 (Sup. Ct. N.Y. County 1928).

145. *Id.*

146. *Id.*

147. *See* Lahiri v. Daily Mirror, Inc., 295 N.Y.S. 382, 390 (Sup. Ct. N.Y. County 1937).

148. *See* Gardella v. Log Cabin Prods. Co., 89 F.2d 891, 894 (2d Cir. 1937).

149. *See* Sweenek v. Pathe News, Inc., 16 F. Supp. 746, 748 (E.D.N.Y. 1936).

150. *See* Swacker v. Wright, 277 N.Y.S. 296, 298 (Sup. Ct. Nassau County 1935); *accord* Davis v. R.K.O. Radio Pictures, Inc., 16 F. Supp. 195, 196 (S.D.N.Y. 1936).

151. 181 N.E. 574, 575 (N.Y. 1932).

bank liable for a fiduciary's conversion of funds simply because it permitted the fiduciary to deposit in an individual account checks drawn to him in his fiduciary capacity. The Court reasoned that, in the absence of clear notice to the contrary, the bank had the right to presume that the fiduciary would not misuse the funds, with Judge Lehman observing that "[t]he transactions of banking in a great financial center are not to be clogged, and their pace slackened, by overburdensome restrictions."[152]

The 1922 *Beardsley* dissent of Judge Hinman, declaring that the wealthy and malicious should not be able to shut the door of opportunity to the poor, was also vindicated by the New York Court of Appeals in 1932, in the case of *Al Raschid v. News Syndicate Co.*[153] The plaintiff in *Al Raschid* alleged that the defendant maliciously gave false information to immigration officials, which caused them to bring deportation proceedings against him on seven occasions. (The defendant's rights as a native-born citizen were ultimately vindicated.) Prior to *Al Raschid*, the lower courts had struggled with the impact of motive in rendering conduct lawful or unlawful. It was always clear that "one who act[ed] honestly" and without negligence was "free from liability";[154] the debatable issue was whether bad motive transformed otherwise innocent acts into tortious ones. On this question, lower courts initially held that lawful acts committed out of malice were not actionable.[155] These holdings had been

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152. *Id.* (quoting Whiting v. Hudson Trust Co., 138 N.E. 33, 37 (N.Y. 1923). Nonetheless, a bank remained a proper party defendant against which proof of notice could properly be introduced. *See* Land Mark Corp. v. Manufacturers' Trust Co., 262 N.Y.S. 709, 711 (2d Dep't 1933). Of course, ancient rules of negotiable instruments law had protected banks in many sorts of transactions. For example, a bank could "not commit a wrong in the acceptance of the check unless it had notice, either actual or sufficient to put it upon inquiry," that the check was wrongfully issued. Mutual Trust Co. v. Merchants' Nat'l Bank, 141 N.E. 922, 923 (N.Y. 1923); *cf.* Hoyt v. Wright, 261 N.Y.S. 131, 133 (1st Dep't 1932) (customer's receipt of excess payment on closure of brokerage account held not to constitute conversion).

153. 191 N.E. 713, 714 (N.Y. 1934).

154. *In re* Spencer Kellogg & Sons, Inc., 52 F.2d 129, 135 (2d Cir. 1931).

155. *See* Carroll Bldg. Corp. v. Louis Greenberg Plumbing Supplies, Inc., 214 N.Y.S. 42, 44 (2d Dep't 1926); Almirall & Co. v. McClement, 202 N.Y.S. 139, 147 (1st Dep't 1923); Brown v. Metropolitan News Co., 267 N.Y.S. 623, 626 (Sup. Ct. Bronx

followed by the appellate division in *Al Raschid*,[156] which had dismissed the plaintiff's complaint. The New York Court of Appeals, in contrast, reversed and ruled unanimously that "a lawful act done solely out of malice and ill will to injure another may be actionable" and directed that plaintiff be permitted to plead the specifics of his case.[157]

Most importantly, perhaps, the court cited with approval a Minnesota case imposing liability on a defendant who had "set up a barber shop for the sole purpose of injuring the plaintiff's business and driving him out of it—the wrongdoer being wealthy and not interested in the business itself—and diverting customers from the plaintiff solely for the accomplishment of his malevolent purpose."[158] This Minnesota case was directly contrary to the *Beardsley* case, which had allowed a wealthy individual to drive a less affluent antagonist out of business and had produced Judge's Hinman's dissenting plea for greater freedom of opportunity for the downtrodden.

Nonetheless, the *Al Raschid* case represented a mixed development. On the one hand, the case restrained the malevolence of wealthy individuals bent on the destruction of their inferiors. On the other hand, *Al Raschid* created the possibility of judicial interference in business rivalries where losers claimed that winners had acted for malicious rather than legitimate business reasons. Judges then had to pass upon the claims. On the assumption that, during the decade of the 1920s, it was the rich who were seeking to restrain competition from upwardly mobile underlings, *Al Raschid* was a pro-competitive decision. However, it also had the capacity to become anti-competitive if business entities used it to obtain frequent judicial inquiries into their rivals' activities.

In any event, *Al Raschid* applied only to cases where a defendant had a culpable state of mind. Absent culpability, "[t]he principles of free

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County 1933); *In re* Curtiss' Will, 250 N.Y.S. 146, 150 (Sur. Ct. Steuben County 1931); *see also* Morgan v. Morgan, 221 N.Y.S. 117, 118 (1st Dep't 1927) (no cause of action against witness maliciously giving false testimony).

156. 267 N.Y.S. 221, 225 (1st Dep't 1933).

157. Gillis v. Georgas, 225 N.Y.S.2d 164, 166 (Sup. Ct. Kings County 1962).

158. Raschid v. News Syndicate Co., 191 N.E. 713, 714 (N.Y. 1934).

competition justif[ied] a man in getting business for himself."[159] Thus, it was "the prerogative of any business man, with or without reason, to continue or discontinue in business, to change, alter or modify the nature of his business as he sees fit," even though "willing workers" would be "rendered idle and unhappy" and the closure "was done deliberately to avoid a labor dispute."[160] There was enough self-interest in such a closure to preclude a finding of malice, and in the absence of malice, "the question of the legality" of the act was "alone involved," and "the law [was] indifferent to the result thereof."[161]

Likewise, a labor union would not be said to have acted maliciously and would be left free to interfere with and impose hardship upon businessmen, consumers, and nonunion employees as long as "the purpose of such interference [was] solely to advance the interest of the members of the union."[162] To hold a defendant liable absent some sort of culpability "would be a harsh result, and contrary to the general doctrine of torts,"[163] which, at its root, remained tied to a property-protective paradigm that required an individual to disgorge wealth to a victim of injury only if moral fault could be pinned on the individual.

A. *Fraud*

Throughout the twentieth century, the law of New York relating to

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159. Du-Art Film Labs, Inc. v. Consolidated Film Indus., Inc., 15 F. Supp. 689, 690 (S.D.N.Y. 1936).

160. Mittman & Co. v. Sirota, 111 N.Y.S.2d 100, 102 (Sup. Ct. N.Y. County 1952).

161. Paul v. Mencher, 7 N.Y.S.2d 821, 822 (Sup. Ct. N.Y. County 1937).

162. O'Keefe v. Local 463 of United Ass'n of Plumbers and Gasfitters, 14 N.E.2d 77, 80 (N.Y. 1938); *see also* Bucko v. Murray, 11 N.Y.S.2d 402, 404 (Sup. Ct. N.Y. County 1939) (trial court held labor unions incapable as a matter of law of acting "in bad faith or through malice or ill will nor may they be actuated by malice or a desire to injure employees, whether the latter be members of the union or not").

163. Barry v. Hughes, 103 F.2d 427, 427 (2d Cir. 1939). *But see* Federal Sugar Refining Co. v. United States Sugar Equalization Bd, Inc., 268 F. 575, 585 (S.D.N.Y. 1920) (defendant was held liable in tort for wrongful conduct ordered by an executive officer of the federal government).

business conduct has retained its concern with protection of property, and, as a result, it has manifested substantial stability. In connection with the law of fraud, for example, concern that wealth transfers could be legitimate only when made with full disclosure and free consent provided little motivation for expanding fraud doctrine in the second half of the century. Doctrine therefore remained quite stable through the 1970s, as innumerable cases recited or focused on one or more of "the classic elements of false representation, *scienter*, materiality, expectation of reliance and damage that go to make up [the] fraud."[164] Other classic rules were also reiterated.[165]

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164. Bankers Trust Co. v. J.V. Dowler & Co., 390 N.E.2d 766, 771 (N.Y.1979); *accord, e.g.*, Hong Kong Export Credit Insur. Corp. v. Dun & Bradstreet, 414 F. Supp. 153, 158-59 (S.D.N.Y. 1975); Jo Ann Homes at Bellmore, Inc. v. Dworetz, 250 N.E.2d 214, 217 (N.Y.1969); Channel Master Corp. v. Aluminium Ltd. Sales, Inc., 151 N.E.2d 833, 835 (N.Y. 1958); Automatic Truck Loader Corp. v. City of New York, 57 N.Y.S.2d 295, 299 (Sup. Ct. N.Y. County 1945); Hoffman v. Ryan, 422 N.Y.S.2d 288, 290 (Civil Ct. N.Y. County 1979); Mionie v. 341 Grand Street Corp., 74 N.Y.S.2d 69, 70 (Civil Ct. N.Y. County 1947).

165. Thus, the courts continued to hold that while no fraud action would lie for falsely obtaining a judgment, suit could be brought for obtaining a judgment as part of a larger fraudulent scheme. *See* Newin Corp. v. Hartford Accident & Indem. Co., 333 N.E.2d 163, 166 (N.Y. 1975); Photo-Marker Corp. v. Penn-Keystone Realty Corp., 243 N.Y.S.2d 461, 462 (1st Dep't 1963); Burbrooke Mfg. Co. v. St. George Textile Corp., 129 N.Y.S.2d 588, 589 (1st Dep't 1954). Another old rule was that "[m]ere promissory statements as to what will be done in the future [were] not actionable," unless the "promise was actually made with a preconceived and undisclosed intention of not performing it." Sabo v. Delman, 143 N.E.2d 906, 907-08 (N.Y.1957); *accord* Government of India v. Cargill, Inc., 445 F. Supp. 714, 719 (S.D.N.Y. 1978); Plum Tree, Inc. v. N.K. Winston Corp., 351 F. Supp. 80, 85 (S.D.N.Y. 1972); Keers & Co. v. American Steel & Pump Corp., 234 F. Supp. 201, 203 (S.D.N.Y. 1964); Lanzi v. Brooks, 373 N.E.2d 278, 279 (N.Y. 1977); Rudman v. Cowles Communications, Inc., 30 N.Y.2d 1, 9 (N.Y. 1972); Steinberg v. Universal Machinenfabrik GMBH, 264 N.Y.S.2d 757, 760 (2d Dep't 1965); Seidman v. Bandes, 74 N.Y.S.2d 883, 886 (Sup. Ct. Queens County 1947). Thus, a person who passed a check with insufficient funds was guilty of fraud. *See* A. Sam & Sons Produce Co. v. Campese, 217 N.Y.S.2d 275, 275 (4th Dep't 1961); Cudahy Packing Co. v. Dorfman, 120 N.Y.S.2d 460, 460 (1st Dep't 1952); Lippman Packing Co. v. Rose, 120 N.Y.S.2d 461, 465 (N.Y. City Mun. Ct. 1953). Similarly, pure opinions were not actionable, but opinions became a basis for fraud if they were part of a mixed statement of fact and opinion if they were represented as sincere when, in reality, they were not. *See*

In addition, the judiciary refused, in a number of areas, to extend the reach of the doctrine. One such area involved fraud claims between spouses, and fraud claims in other familial matters.[166] By the late 1960s

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George Backer Management Corp. v. Acme Quilting Co., 385 N.E.2d 1062, 1066-67 (N.Y. 1978); National Conversion Corp. v. Cedar Bldg. Corp., 246 N.E.2d 351, 354-55 (N.Y. 1969); Gross v. State Cooperage Export Crating & Shipping Co., 299 N.Y.S.2d 773, 774 (2d Dep't 1969). "Declarations made with reckless indifference for the truth [were] viewed in the same light" as fraudulent. United States v. Amrep Corp., 560 F.2d 539, 543 (2d Cir. 1977); *accord* Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 46 (2d Cir. 1978); *In re* Investors Funding Corp. of New York Securities Litigation, 523 F. Supp. 533, 545 (S.D.N.Y. 1980); Chiodo v. Garramone, 175 N.Y.S.2d 490, 492 (Sup. Ct. Onondaga County. 1958); Duro Sportswear, Inc. v. Cogen, 131 N.Y.S.2d 20, 25 (Sup. Ct. N.Y. County 1954); People v. Block & Kleaver, Inc., 427 N.Y.S.2d 133, 140 (Monroe County Ct. 1980); Levin v. Zeeman, 94 N.Y.S.2d 441, 444 (City Ct. N.Y. County 1949). *But see* Hill v. Sharples Corp., 247 F.2d 405, 409 (2d Cir. 1957) (no fraud liability if defendant's belief in truth of statements was not "clearly unreasonable"). Three other classic rules were that a plaintiff had to plead fraud with particularity, see Lynn v. Valentine, 19 F.R.D. 250, 254 (S.D.N.Y. 1956); C.I.T. Financial Corp. v. Sachs, 10 F.R.D. 397, 398 (S.D.N.Y. 1950), that fraud had to be proved by clear and convincing evidence, *see* Ajax Hardware Mfg. Corp. v. Industrial Plants Corp., 569 F.2d 181, 186 (2d Cir. 1977); Woods v. Barnes, 84 F. Supp. 155, 158 (N.D.N.Y. 1949); Pierce v. Richard Ellis & Co., 310 N.Y.S.2d 266, 269 (Civ. Ct. N.Y. County 1970), and that, if successful, a plaintiff was entitled alternatively to rescission or damages. *See* Fitzgerald v. Title Guarantee & Trust Co., 49 N.E.2d 489, 491-92 (N.Y. 1943); Goldsmith v. National Container Corp., 40 N.E.2d 242, 244 (N.Y. 1942); Clearview Assocs., Inc. v. Clearview Gardens First Corp., 168 N.Y.S.2d 432, 441 (Sup. Ct. Queens County 1957).

166. It was established law during the 1940's that a spouse who had been induced by false representations to enter into marriage could maintain an action for fraud. *See* Benintendi v. Benintendi, 72 N.Y.S.2d 843, 844 (Sup. Ct. Kings County 1947); Amsterdam v. Amsterdam, 56 N.Y.S.2d 19, 22 (Sup. Ct. N.Y. County 1945); Cohen v. Kahn, 28 N.Y.S.2d 847, 848 (Sup. Ct. Kings County 1941). Such a spouse could also obtain an annulment of the marriage. *See* Saunders v. Saunders, 63 N.Y.S.2d 880, 881 (Sup. Ct. Westchester County 1946). There were also cases allowing the maintenance of actions for fraud in procuring separation agreements. *See* Schroeder v. Schroeder, 56 N.Y.S.2d 36, 37-38 (4th Dep't 1945); Weintraub v. Weintraub, 91 N.Y.S.2d 452 (Sup. Ct. N.Y. County 1949). During the 1950 and 1960, in contrast, the cases of fraudulent inducement to marry were divided. *Compare* Gonzalez v. Gonzalez, 228 N.Y.S.2d 4, 6 (Sup. Ct. Queens County. 1962) and Friedman v. Libin, 157 N.Y.S.2d 474, 485 (Sup. Ct. Bronx County 1956) and Levine v. Levine, 146 N.Y.S.2d 393, 394 (N.Y. City Mun. Ct. 1956) (suits allowed), *with* Rappel v. Rappel, 240 N.Y.S.2d 692, 698-99 (Sup. Ct. N.Y. County 1963) and Simms v. Simms, 221 N.Y.S.2d 1020, 1022 (Sup. Ct. Kings County 1961)

and 1970s, courts also were rejecting claims that a decedent's paramour had fraudulently induced an insurance company to pay the proceeds of his life insurance policy to her rather than to the plaintiff wife,[167] that a separation agreement had been procured by a wife's threat to reveal her husband's homosexuality,[168] and that a wife had broken her fraudulent promise publicly to acknowledge her marriage to the plaintiff.[169] Finally, the courts remained hesitant to allow fraud suits for the purpose of upsetting family property settlements.[170]

(suits not allowed). Although the Court of Appeals allowed suit to be brought in an egregious case in which a man had put a woman through a sham marriage ceremony, *see* Tuck v. Tuck, 200 N.E.2d 554, 556 (N.Y. 1964), an Appellate Division case that refused to permit suit unless the parties "were engaged or otherwise in a relationship of trust and confidence" when the misrepresentations were made, Pluchino v. Pluchino, 148 N.Y.S.2d 508, 510 (2d Dep't 1956), was more predictive of the law's direction. The Court of Appeals also put an effective end to suits claiming fraud in the inducement of separation agreements with a 1951 declaration that, when "a dispute over the amount to be paid by a husband for the support of his wife reaches the stage of court action, resort must be had to the appropriate statutory action" rather than to a common-law suit for fraud. Weintraub v. Weintraub, 96 N.E.2d 724, 727 (N.Y. 1951) (wife's disclaimer in separation agreement barred her suit against her husband). *See also* Cohen v. Cohen, 151 N.Y.S.2d 949, 951 (1st Dep't 1956); *cf.* Holm v. Shilensky, 388 F.2d 54, 57 (2d Cir. 1968) (to allow fraud suit would deny full faith and credit to Nevada divorce decree). Fraud suits in regard to support matters were successfully maintained, however, in special circumstances—by a wife alleging a scheme by her husband to withhold support payments despite his ability to make them, *see* Wolf v. Wolf, 263 N.Y.S.2d 195, 197-99 (Sup. Ct. N.Y. County. 1965), by a husband seeking to recover payments made to a wife after she had failed to inform him of her remarriage, *see* W_____ v. B_____, 183 N.Y.S.2d 258, 261 (2d Dep't 1958), and by a widow seeking to set aside an agreement waiving her intestate share of her deceased husband's estate *see In re* Denny's Estate, 160 N.Y.S.2d 722, 727 (Sur. Ct. Dutchess County 1957).

167. *See* Cummings v. Kaminski, 290 N.Y.S.2d 408, 411 (Sup. Ct. Kings County 1968).

168. *See* Smith v. Jones, 351 N.Y.S.2d 802, 807 (Civ. Ct. N.Y. County 1973).

169. *See* Roney v. Janis, 430 N.Y.S.2d 333, 335 (1st Dep't 1980); *see also* Puffer v. City of Binghamton, 301 N.Y.S.2d 274, 281 (Sup. Ct. Broome County 1969) (claim that a city clerk committed fraud in issuing a marriage license to a defendant who had failed to obtain court permission to remarry).

170. *See* Ross v. Preston, 55 N.E.2d 490,492 (N.Y. 1944) (dismissal of fraud suit affirmed); Greenfield v. Greenfield, 123 N.Y.S.2d 19, 22 (Sup. Ct. Kings County 1953)

The disappearance of fraud suits in marital and other family contexts also suggests, however, that traditional moral standards were beginning to erode and that the law was beginning to place less weight on the ethical values of honesty and full disclosure in personal affairs. Other cases confirm this suggestion. In one case a defendant claimed, allegedly contrary to the facts, to be "an honorable person . . . able to facilitate negotiations with" a particular foreign government, but the court refused to impose fraud liability, declaring that "[b]are assertions of personal honor and of ability . . . [could not] constitute actionable fraud."[171] For this judge in New York City in 1946, the increasingly important social value of individual autonomy perhaps outweighed the older moral values that had underlain the classical law of fraud.

For a Manhattan judge three decades later, that would clearly be the situation in a case where Bloomingdale's, the renowned department store, claimed that a debtor, who was a former lawyer, was fraudulently seeking to avoid payment of a $52,381 judgment.[172] Bloomingdale's sought to compel the debtor's wife to testify to his whereabouts and to the support payments she was receiving. The court ruled, however, that the marital privilege shielded her from the questions. In the court's view, "[f]rustration in fact-finding by reason of a statutory privilege based upon public policy considerations" of privacy and autonomy was "not fraud" or "concealment of fraud."[173] Preserving marital privacy outweighed the potentially competing value of preventing the possibly fraudulent redistribution of wealth that would occur when Bloomingdale's wrote off an uncollectible debt.

Traditional values of honesty and full disclosure were also slighted in cases where courts refused to subject entrepreneurs to common law

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(granting motion to require amended complaint). *But see* Tammero v. Tammero, 125 N.Y.S.2d 355, 357 (Sup. Ct. N.Y. County 1953) (holding that a misrepresentation of law may be the basis of an action for fraud where a relation of trust and confidence exists between the parties).

171. Cohen v. Cabo, 61 N.Y.S.2d 145, 146 (Sup. Ct. N.Y. County 1946).

172. *See* Federated Dep't Stores, Inc. v. Esser, 409 N.Y.S.2d 353, 357 (Sup. Ct. N.Y. County 1978).

173. *Id.* at 357.

fraud liability if they directed their deception to "the public at large" rather than to an individual plaintiff.[174] In one such case presenting "a novel situation which highlights the complex commercial relationships of modern times," a court refused to enjoin the producers of a popular radio show, which allegedly played each week's top ten songs without ever informing the public that no survey was done to determine rankings, "from intentionally making false statements which are injurious to another's business," since the plaintiff and the defendant producers were neither in privity of contract nor "in competition."[175] Some years later another judge indicated that sellers of goods who advertised despite their inability to deliver their product in the reasonably foreseeable future were not guilty of common law fraud, although they were subject to statutory remedies administered by the state attorney general.[176] Entering into a contract without disclosing a known condition of insolvency was also held not to constitute fraud.[177] In a similar vein, federal judges came to view the anti-fraud provisions of the federal securities laws not as spurs to business honesty and morality but as mechanisms for "providing investors with all the facts needed to make intelligent investment decisions."[178]

The values of honesty, full disclosure, and not allowing property to be taken without the informed consent of its owner—the values on which classic fraud doctrine had rested—were thereby trumped by concerns for business efficiency as well as privacy and autonomy. The traditional values were also trumped in another line of cases by a third modern value—a concern for the proper and efficient functioning of the legal system it-

174. *See* Advance Music Corp. v. American Tobacco Co., 50 N.Y.S.2d 287, 291 (Sup. Ct. N.Y. County 1944). On a subsequent appeal in the same case, Advance Music Corp. v. American Tobacco Co., 70 N.E. 401, 402 (N.Y. 1946), the Court of Appeals upheld an amended complaint by plaintiff on a theory other than fraud.

175. *Id.*

176. *See* State by Lefkowitz v. Bevis Indus., Inc., 314 N.Y.S.2d 60, 64 (Sup. Ct. N.Y. County 1970).

177. *See* Archawski v. Hanioti, 239 F.2d 806, 812 (2d Cir. 1956).

178. Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F.2d 112, 122 (2d Cir. 1974).

self.

This modern concern for judicial efficiency was initially felt in cases arising out of World War II rent and price control. Federal legislation enacted during the war and continued by the state thereafter had given both commercial and residential tenants a right, subject to certain specific exceptions, to remain in leased premises with little or no rent increase following the expiration of their term.[179] Many landlords responded by knowingly presenting false information to regulatory authorities to fit within one of the exceptions and thereby obtain eviction orders, or, alternatively, by threatening tenants with doing so. Could these tenants induced by such falsity to surrender their right to remain, bring a fraud suit after vacating the premises? Observing that "[t]he legality of ... diverse [price control] orders, etc., and their precise application ... [were] not free from doubt and [were] open to debate,"[180] some lower court judges allowed such suits,[181] while others did not.[182] Ultimately, though, the New York Court of Appeals held that no judicial remedy in state courts could exist,[183] in part because state courts lacked "jurisdic-

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179. *See* William E. Nelson, *Government Power as a Tool for Redistributing Wealth in Twentieth Century New York, in* LAW AS CULTURE AND CULTURE AS LAW: ESSAYS IN HONOR OF JOHN PHILLIP REID 322, 434-38 (Hendrik Hartog & William E. Nelson eds., 2000).

180. Hamilton Rubber Mfg. Co. v. Greater New York Carpet House, Inc., 47 N.Y.S.2d 210, 211 (Sup. Ct. N.Y. County 1944).

181. *See* Alabiso v. Schuster, 80 N.Y.S.2d 314, 315 (4th Dep't 1948); Rubin v. Scelsi, 83 N.Y.S.2d 474, 477 (City Ct. Bronx County 1948); Joanette Juniors, Inc. v. Board of Home Missions, 94 N.Y.S.2d 752, 753 (Sup. Ct. N.Y. County 1949); Rosenbluth v. Sackadorf, 76 N.Y.S.2d 447, 450 (Sup. Ct. Kings County 1947); Arm v. Kenridge Knitting Corp., 104 N.Y.S.2d 670, 672 (Sup. Ct. Kings County 1951).

182. *See* Pawgan v. Schneiderman, 85 N.Y.S.2d 615, 616 (2d Dep't 1948); *cf.* Connell v. Lazar, 94 N.Y.S.2d 235, 237 (Sup. Ct. Kings County 1949) (evicted tenant has no cause of action against third party for interference with contractual relations).

183. *See* Rosner v. Textile Binding & Trimming Co., 90 N.E. 2d 481, 482 (N.Y. 1950); A.B. Magonigle Trucking Co. v. Tambini, 96 N.E.2d 900, 901 (N.Y. 1951); *cf.* Fieger v. Glen Oaks Village, Inc., 132 N.E. 2d 492, 496 (N.Y. 1956) (tenants may not obtain review in common-law fraud action of rents set in F.H.A. housing project). Subsequently created statutory remedies were interpreted narrowly. *See* Denkensohn v. Ridgway Apartments, Inc., 180 N.Y.S.2d 144, 148 (2d Dep't 1958); Huff v. Maurel Realty

tion to review Federal administrative orders."[184]

This concern that state courts in a federal system retain a proper deference to national law and national lawmaking institutions was paralleled three years later in a case in federal court, where a district judge took the view that the "least appropriate of judicial forums in staking out new claims in the substantive law of torts is a federal one where constitutional considerations require national deference to State ascendancy in this area."[185] This same judge was also concerned with "the threat of inundation of litigation"[186] if the law of fraud was interpreted in an expansive fashion.

Corp., 102 N.Y.S.2d 279, 282-83 (N.Y. City Mun. Ct. 1951); *cf.* Niederman v. Straus, 145 N.Y.S.2d 745, 747 (2d Dep't 1955) (allowing tenant to join common-law fraud suit to statutory remedy when damages under both identical).

184. Wasservogel v. Meyerowitz, 89 N.E.2d 712, 717 (N.Y. 1949). Lower courts were also divided on whether fraud could be maintained for false statements that property could be rented or goods sold for a price higher than that set by the regulatory agency, *compare* Saklaris v. Evangelista, 155 N.Y.S.2d 256, 258 (Sup. Ct. Queens County 1956) (suit allowed); and Unger v. Eagle Fish Co., 56 N.Y.S.2d 265, 266 (Sup. Ct. Kings County 1945) (suit allowed), *with* Sommer v. E.B. Kelly Co., 47 N.Y.S.2d 57, 59-60 (City Ct. Kings County 1944) (suit not allowed), or to recover bribes paid to obtain leases at regulated rental prices, *compare* 34 Hillside Realty Corp. v. Norton, 101 N.Y.S.2d 437, 438 (City Ct. Bronx County 1950) (suit allowed), *with* Ingber v. Weinbrot, 100 N.Y.S.2d 662, 664 (N.Y. City Mun. Ct. 1950) (suit improper). *See also* Savoy Curtain Corp. v. Lobell, 73 N.Y.S.2d 108, 108-09 (Sup. Ct. N.Y. County 1947) (landlord allowed to sue tenant who breached promise to leave at end of term). Arguably the Court of Appeals spoke affirmatively on these issues and inconsistently with its holding in *Wasservogel* when it upheld a classic fraud suit by an employee who had agreed to continue work for a reduced salary on his employer's false representation that the reduction had been mandated by the Salary Stabilization Board. *See* Hanlon v. MacFadden Publications, Inc., 99 N.E.2d 546, 549-50 (N.Y. 1951). Fraud suits relating to regulatory matters were also allowed in other classic cases. *See* Klein v. Yale Homes, Inc., 158 N.Y.S.2d 881, 884 (Sup. Ct. Bronx County 1956) (prepayment on house recovered after seller's promise that V.A. would approve its construction and seller's obstruction of efforts to get V.A. approval); New York City Hous. Auth. v. Stern, 159 N.Y.S.2d 500, 505 (N.Y. City Mun. Ct. 1956) (suit allowed against public housing tenants who lied about their eligibility).

185. Dale System, Inc. v. General Teleration, Inc., 105 F. Supp. 745, 752 (S.D.N.Y. 1952).

186. *Id.* at 751.

State judges also expressed concern about a possible litigation explosion. *Simcuski v. Saeli*[187] was a case in which a doctor had committed fraud to cover up malpractice; the patient had not discovered the fraud, and hence the malpractice, until the statute of limitations on a malpractice suit had run. The issue in the case was not whether the patient could recover for fraud, since she surely could, but whether her damages would be the usual award given for malpractice or some different award appropriate to fraud. The court opted for the latter and determined her damages to be not the negligence judgment that she lost through the doctor's cover-up but the cost of obtaining a cure for the malpractice—the cure the doctor would have had to provide gratis if no cover-up had occurred.[188] Unfortunately, since there was no cure, the cost of obtaining it was zero, and the plaintiff's damages were nominal. "Accordingly," as the Court recognized, its "decision [was] not to be expected to open the proverbial floodgates,"[189] which could remain securely closed as judicial efficiency triumphed over medical disclosure and honesty.

The policies of individual freedom, business efficiency, and proper functioning of the judiciary did not stand as an obstacle, however, to all extensions of the law of fraud. Some such extensions did occur between 1940 and 1980, but not as a result of adherence to traditional values in the law of fraud of honesty, full disclosure, and the like. Instead, the most important motivating force behind pro-plaintiff change was a different moralistic value—a concern for equality, which took the form of judicial protection of the weak against those in possession of superior knowledge or of superior legal or market power.[190] Although this concern had long existed, it gained great strength in the middle of the century.

The most significant changes expanding the scope of New York's

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187. 377 N.E.2d 713, 715 (N.Y. 1978).

188. *See id.* at 719.

189. *Id.*

190. For another manifestation of this concern, see William E. Nelson, *A Man's Word and Making Money: Contract Law in New York, 1920-1960*, 19 MISS. C. L. REV. 1, 20-28 (1998)

law of fraud flowered from seeds planted during the 1920s and 1930s, which had placed special duties of disclosure on fiduciaries and on certain parties with superior knowledge. Under case law as it developed by 1980, fiduciaries could be liable in fraud on the basis of "mere failure to disclose,"[191] "misrepresentations of legal opinion,"[192] "a promise of future performance, or a prophecy of future results."[193] Attorneys were normally held to be fiduciaries,[194] since "[i]n our complex society . . . the lawyer's opinion can be [an] instrument for inflicting pecuniary loss more potent than the chisel or the crowbar,"[195] Banks and trust companies were also held to be fiduciaries.[196]

Fiduciary status was also extended to employers,[197] franchisors,[198]

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191. Frigitemp Corp. v. Financial Dynamics Fund, Inc., 524 F.2d 275, 283 (2d Cir. 1975); *accord* Industrial Bank of Commerce v. Snelling, 116 N.Y.S.2d 274, 277 (City Ct. N.Y. County 1952).

192. *In re* Levy's Estate, 244 N.Y.S.2d 22, 28 (1st Dep't 1963); *accord* Zacher v. Bogie, 84 N.Y.S.2d 404, 406 (Sup. Ct. Queens County 1948).

193. Brown v. Lockwood, 432 N.Y.S.2d 186, 195 (2d Dep't 1980); *accord* Dickinson v. Burnham, 197 F.2d 973, 981 (2d Cir. 1952).

194. *See* Slotkin v. Citizens Cas. Co., 614 F.2d 301, 314-16 (2d Cir. 1979); Chase Manhattan Bank, N.A. v. Perla, 411 N.Y.S.2d 66, 68 (4th Dep't 1978); People v. Rosenstein, 402 N.Y.S.2d 151, 153-54 (Sup. Ct. Suffolk County 1978). A fiduciary relation would not be found, however, when one attorney was dealing with another, *see* Amend v. Hurley, 59 N.E.2d 416, 419-20 (N.Y. 1944), or when a lawyer simply failed "to detect discrepancies between . . . [a client's] description and technical reports available to him in a physical sense but beyond his ability to understand." Securities and Exch. Comm'n v. Frank, 388 F.2d 486, 489 (2d Cir. 1968). It was almost impossible for an attorney to plead a fraud claim against a client. *See* Demov, Morris, Levin & Shein v. Glantz, 433 N.Y.S.2d 46, 47 (2d Dep't 1980).

195. *Securities and Exch. Comm'n*, 388 F.2d at 489 (quoting United States v. Benjamin, 328 F.2d 854, 863 (2d Cir. 1964).

196. *See* Scholen v. Guaranty Trust Co., 43 N.E.2d 28, 30 (N.Y. 1942).

197. *See* Schlansky v. United Merchants and Mfr., Inc., 443 F. Supp. 1054, 1059-60 (S.D.N.Y. 1977). *But cf.* Smith v. Russell Sage College, 432 N.Y.S.2d 914, 916 (3d Dep't 1980) (finding that because the employee neither relied upon nor was deceived by the employer, fiduciary status did not extend to the employer).

198. *See* Mobil Oil Corp. v. Rubenfeld, 339 N.Y.S.2d 623, 632 (Civ. Ct. Queens County 1972). *But cf.* Ashton v. Chrysler Corp., 261 F. Supp. 1009, 1014 (E.D.N.Y.

and operators of nursing homes.[199] "The exact limitations of . . . a [fiduciary] relationship [were] impossible of statement," but the concept "embrace[d] both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies upon, another," including relationships "between close friends" or "based upon prior business dealings."[200] "[A] fiduciary relationship [was] grounded upon domination, which [did] not necessarily rest upon ownership of controlling stock. . . , nor upon official title or office," but was "determined from all the facts, conduct and circumstances of a given situation."[201] A fiduciary relationship arose whenever the relations between the parties were:

> of such a character as to render it certain that they do not deal on terms of equality but that either on the one side from superior knowledge . . . or from overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood.[202]

Without speaking in terms of a fiduciary relationship, other judges agreed that "where one party to a transaction has superior knowledge, or means of knowledge not open to both parties alike, he is under a legal

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1965) (finding that the representations made were not fraudulent and that the plaintiff's reliance on the representation was unjustified).

199. *See* Gordon v. Bialystoker Center & Bikur Cholim, Inc., 385 N.E.2d 285, 288-89 (N.Y. 1978).

200. Penato v. George, 383 N.Y.S.2d 900, 904-05 (2d Dep't 1976).

201. Oil & Gas Ventures—First 1958 Fund, Ltd. v. Kung, 250 F. Supp. 744, 749 (S.D.N.Y. 1966).

202. *In re* Estate of Phillips, 176 N.Y.S.2d 918, 923 (Sur. Ct. N.Y. County 1958).

obligation to speak and his silence constitutes fraud."[203] Likewise, they held that "a misrepresentation . . . made by an individual possessing superior knowledge [could] be the predicate of a fraud action."[204] "[S]ilence" could also "constitute fraud where one of the two parties to a contract has notice that the other is acting upon a mistaken belief as to a material fact,"[205] especially when the mistake resulted from the other's less-than-complete disclosure of the truth.[206] From these cases it was

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203. State by Lefkowitz v. ITM, Inc., 275 N.Y.S.2d 303, 316 (Sup. Ct. N.Y. County 1966). *See, e.g.,* Dellefield v. Blockdel Realty Co., 128 F.2d 85, 90 (2d Cir. 1942).

204. Weinstein v. Schwartz, 107 N.Y.S.2d 337, 340 (Sup. Ct. Kings County 1951). On these bases, they sustained suits by an employee against an employer "possessed of substantial experience in the valuation of cars" for selling a car at an unfair price, Forest v. Elliott Truck & Tractor Sales, Inc., 289 N.Y.S.2d 431, 432 (3d Dep't 1968), by a parent who had signed a release in a personal injury case on the basis of unfair impositions by an insurance adjuster, *see* Inman v. Merchants Mut. Ins. Co., 74 N.Y.S.2d 87, 89 (Sup. Ct. Tompkins County 1947); *see also, e.g.,* Trombley v. Merchants Mut. Ins. County, 360 N.Y.S.2d 829, 830 (Sup. Ct. Clinton County 1974), and by tenants against landlords who refused to consent to subleases, and upon the tenants' removal from the premises, leased directly to the proposed sublessees *see* Dress Shirt Sales, Inc. v. Hotel Martinique Assocs., 239 N.Y.S.2d 660, 663 (1963) (dictum); Health & Beauty Studios, Inc. v. Gray, 368 N.Y.S.2d 200, 201 (1st Dep't 1975). Other cases support the general principle asserted in the text, *see* Magnaleasing, Inc. v. Staten Island Mall, 428 F. Supp. 1039, 1043 (S.D.N.Y.), *aff'd,* 563 F.2d 567 (2d Cir. 1977); Todd v. Pearl Woods, Inc., 248 N.Y.S.2d 975, 977 (2d Dep't 1964); Kiamesha Dev. Corp. v. Guild Properties, 164 N.Y.S.2d 958, 962 (3d Dep't 1957); Greenberg v. Glickman, 50 N.Y.S.2d 489, 491 (Sup. Ct. Kings County 1944).

205. Warren Bros. Co. v. New York State Thruway Auth., 309 N.Y.S.2d 450, 452 (3d Dep't 1970); *accord* Frigitemp Corp. v. Financial Dynamics Fund, Inc., 524 F.2d 275, 282 (2d Cir. 1975); Miller v. National City Bank, 69 F. Supp. 187, 197 (S.D.N.Y. 1946), *aff'd,* 166 F.2d 723 (2d Cir. 1948); Green v. Hamilton Int'l Corp., 437 F. Supp. 723, 729 (S.D.N.Y. 1977).

206. *See* Peerless Mills, Inc. v. American Tel. & Tel. Co., 527 F.2d 445, 449 (2d Cir. 1975); Securities & Exch. Comm'n v. Great Am. Indus., Inc., 407 F.2d 453, 461 (2d Cir. 1968); People v. National Cancer Hosp., 102 N.Y.S.2d 103, 107 (Sup. Ct. N.Y. County 1951); Schlenoff v. Kroll, 141 N.Y.S.2d 370, 373 (N.Y. City Mun. Ct. 1955). Thus, the state was held liable for fraud when its officials declared that plans for constructing a bridge were final when, in fact, final plans were frequently changed. *See* Sheridan Drive-In, Inc. v. State, 228 N.Y.S.2d 576, 585 (4th Dep't 1962). This is similar to a buyer of land who stated he wanted to use it for a summer camp and never disclosed

easy to move to an analogous principle that "a person who has made a representation must correct that representation if it [subsequently] becomes false and if he knows people are relying on it."[207]

A few cases went even further. Judge Friendly, for instance, declared "negligence sufficient for tort liability where a person supplies false information to another with the intent to influence a transaction in which he has a pecuniary interest."[208] A Brooklyn Civil Court judge held that a buyer of an automobile had to pay the unpaid portion of the purchase price even though the dealer thought the price had been fully paid, since it was "no longer acceptable . . . to conclude in knowing silence, a transaction damaging to a party who is mistaken about its basic factual assumptions."[209] One Second Circuit opinion even declared that "[a] representation made with an honest belief in its truth may still be" actionable "because of lack of reasonable care in ascertaining the facts . . . or absence of skill or competence required by a particular business or profession."[210]

This initiative, however, did not thrive. Led by the Supreme Court of the United States, most judges would not follow it. The Supreme Court was unwilling to recognize "a general duty between all participants in market transactions to forgo actions based on material, nonpublic information" because "such a broad duty . . . [would] depart radically from . . . established doctrine"[211] as well as from the classical underpinnings of a capitalist economy. The "general rule" was thus settled that:

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his unique knowledge about its valuable mineral deposits. *See* Jansen v. Kelly, 200 N.Y.S.2d 561, 562 (3d Dep't 1960).

207. Fischer v. Kletz, 266 F. Supp. 180, 188 (S.D.N.Y. 1967); *accord* Bank v. Board of Educ., 111 N.E.2d 238, 244 (N.Y. 1953).

208. Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1300 (2d Cir. 1973).

209. Gaines Serv. Leasing Corp. v. Carmel Plastic Corp., 432 N.Y.S.2d 760, 763 (Civ. Ct. Kings County 1980); *accord* Dale System, Inc. v. General Teleradio, Inc., 105 F. Supp. 745, 750 (S.D.N.Y. 1952) (dictum).

210. United States v. Garcia & Diaz, Inc., 291 F.2d 242, 245-46 (2d Cir. 1961) (quoting 1 HARPER & JAMES, THE LAW OF TORTS 551).

211. Chiarella v. United States, 445 U.S. 222, 233 (1980).

> if the facts represented are not matters peculiarly within the [one] party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth . . . , he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.[212]

A person having "the opportunity to obtain knowledge of the facts" simply could "not sit idly by to reap the harvest, if plentiful, but in the event of scarcity, charge fraud."[213]

In the end, then, a policy concern for opportunity and efficiency in a capitalistic economy constrained judges' capacity to pursue a policy of protecting the weak from economic actors with superior knowledge or market power. The two policies were simply in tension with each other. That tension was also especially apparent in a line of fraud cases dealing with the enforceability of contract clauses declaring that the entire agreement of the parties was embodied in the written contract and precluding recourse to parole evidence.

The modern line of cases began in 1957 with *Sabo v. Delman*,[214] where Judge Fuld, for a 5-2 majority of the New York Court of Appeals, refused to permit a defendant to plead as a defense to a charge of fraud that a provision in a written contract indicated that nothing except what was contained in the writing would be binding on either party. Fuld reasoned that enforcing such a clause would put it in a defendant's "power to perpetrate a fraud with immunity, depriving the victim of all redress," simply by virtue of having the "foresight" and the bargaining power "to

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212. Danann Realty Corp. v. Harris, 157 N.E.2d 597, 600 (N.Y. 1959); *accord* Perin v. Mardine Realty Co., 168 N.Y.S.2d 647, 648 (2d Dep't 1957); Brockton Assoc. v. Weinbaum, 198 N.Y.S.2d 675, 677 (Sup. Ct. Kings County 1960); Irvlor Realty Corp. v. 62-114 Imlay St. Corp., 151 N.Y.S.2d 191, 196 (Sup. Ct. Kings County 1956).

213. Hartford Accident & Indemnity Co. v. Kranz, 184 N.Y.S.2d 918, 921 (3d Dep't 1959); *accord* Arndt v. Altman, 49 N.Y.S.2d 706, 708 (Sup. Ct. N.Y. County 1943).

214. 143 N.E.2d 906, 909-10 (N.Y. 1957).

include a merger clause in the agreement."[215] In a later case, however, a majority, over Fuld's dissent, quickly carved out an exception to *Sabo*, when the majority refused to allow a plaintiff to maintain a fraud claim on the basis of a representation which a written settlement of a divorce dispute specifically stated had not been made.[216] The majority acted without opinion for the obvious reason, later noted by Fuld, that the case was "a most unusual one" involving "an agreement designed to settle pending marital litigation" and thereby promote judicial efficiency.[217]

The final, dispositive case was *Danann Realty Corp. v. Harris*,[218] where the majority barred a fraud suit by a purchaser of a lease because the sale contract contained general language that the seller had not made the sorts of representations on which the purchaser was basing a suit. In *Danann Realty Corp.*, the majority reasoned that any other result would make it "impossible for two businessmen dealing at arm's length to agree that the buyer [was] not buying in reliance on any representations of the seller as to a particular fact."[219] This policy of promoting business efficiency, as Fuld reminded the majority in another dissent, was nevertheless in tension with "everyday experience" that people with inferior bargaining power often accepted "exculpatory clauses . . . in reliance upon the honesty of supposed friends, the plausible and disarming statements of salesmen, or the customary course of business."[220]

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215. *Id.* at 161.

216. *See* Cohen v. Cohen, 144 N.E.2d 649, 649 (N.Y. 1957).

217. *Danann Realty Corp.*, 157 N.E.2d at 605 (dissenting opinion).

218. 157 N.E.2d 597, 604 (N.Y. 1959).

219. *Id.* at 600.

220. *Id.* at 601. To a significant degree, Fuld lost the battle in *Danann Realty* but won the war when the Court of Appeals held in Wittenberg v. Robinov, 173 N.E.2d 868, 869 (N.Y. 1961), that a merger clause disclaiming specific representations barred suit only against the contracting party and not the party's agents and when lower courts on the whole read particular merger clauses as fitting within the *Sabo* rather than the *Danann Realty* principle. *See* Stryker v. Rusch, 187 N.Y.S.2d 663, 665 (3d Dep't 1959); Warshavsky v. Worthington Equity Corp., 203 N.Y.S.2d 538, 540 (Sup. Ct. N.Y. County 1960); Joyner v. Albert Merrill Sch., 411 N.Y.S.2d 988, 993-94 (Civ. Ct. N.Y. County 1978) (*Danann Realty* applies only in cases when a plaintiff had opportunity to learn true facts).

Tradeoffs between competing policy values also affected the development of doctrine dealing with the measure of damages. Thus, the New York Court of Appeals held that punitive damages were available in fraud cases essentially for reasons of business efficiency—"not only to punish . . . but to deter . . . . those who deliberately and coolly engage in a far-flung fraudulent scheme, systematically conducted for profit," at the expense of the economy at large.[221] A lower court also granted punitive damages against a school that had, with no concern for economic efficiency, induced students to enroll in "courses neither suited to an applicant's needs nor the job market."[222] Punitive damages could also be assessed to redress bargaining inequalities, as was done against a credit firm that "for many years" had "implement[ed] a broad consumer fraud scheme, victimizing thousands of residents of ghetto areas . . . ."[223] In contrast to the state judges, federal judges applying New York law in diversity cases were hostile to punitive damage claims, which they feared would open "the door . . . for plaintiffs in deceit actions . . . to manufacture the jurisdictional amount . . . and thereby gain unwarranted access to" and decrease the efficiency of the federal courts.[224]

Concerns for economic efficiency were important on other occasions, as when the New York Court of Appeals, recognizing that "foreign currency reserves are of vital importance to . . . a friendly nation," allowed a fraud suit by a Brazilian bank.[225] So too were concerns for judi-

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221. Walker v. Sheldon, 179 N.E.2d 497, 498-99 (N.Y. 1961).

222. *Joyner*, 411 N.Y.S.2d at 995.

223. Star Credit Corp. v. Ingram, 347 N.Y.S.2d 651, 652 (Civ. Ct. N.Y. County 1973). Punitive damages were allowed only in cases of "fraud 'aimed at the public generally,'" where the goals of economic efficiency and redressing imbalances of societal power could be attained. Vinlis Constr. Co. v. Roreck, 262 N.E.2d 215, 216 (N.Y. 1970). *But see* Banco Nacional de Costa Rica v. Bremar Holdings Corp., 492 F. Supp. 364, 373-74 (S.D.N.Y. 1980); Borkowski v. Borkowski, 355 N.E.2d 287, 289 (N.Y. 1976) (dictum).

224. DuPont Galleries, Inc. v. International Magne-Tape, Ltd., 300 F. Supp. 1179, 1182 (S.D.N.Y. 1969); *accord* Fritz v. Warner-Lambert Pharm. Co., 349 F. Supp. 1250, 1252-53 (E.D.N.Y. 1972).

225. Banco Frances e Brasileiro S.A. v. Doe, 331 N.E.2d 502, 506 (N.Y. 1975). *See also* Reliance Ins. Co. v. Daly, 329 N.Y.S.2d 504, 506 (2d Dep't 1972) (requiring

cial efficiency, as when the appellate division, in passing upon an issue of damages, observed that, when "the ordinary standards" for measuring damages were "not available," it would "resort to some practical means that will be just."[226]

Concerns for efficient functioning of the economy and the courts thus put a significant brake on the development of the law of fraud. Old moralistic concerns about full disclosure and free consent had almost no impact on legal development, and even the newer policy of protecting the ignorant and the weak from the knowledgeable and the strong had only limited impact. In the second half of the twentieth century, concerns for business efficiency, freedom of opportunity, and upward mobility largely triumphed over the nineteenth-century norms of justice that had lingered from the first half of the century as a motivating force for legal change. These same concerns even provided resistance to the newer norm of equality.

B. *Interference with Economic Relationships*

The law sanctioning interference with contractual and other economic relationships witnessed, even more explicitly, the triumph of utilitarian efficiency and freedom of opportunity over business morality. The triumph occurred more slowly than in some other doctrinal areas, however, as the "expansive tendencies of actions . . . for tortious interferences with a relationship contractual"[227] continued to manifest themselves during the two decades at the mid-point of the century. Courts continued for some years to hold that the malice required to maintain an

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insurance company to defend suit against insured who had defrauded it, but permitting it to sue insured for fraud).

226. Mills Studio, Inc. v. Chenango Valley Realty Corp., 221 N.Y.S.2d 684, 687-88 (3d Dep't 1961). Similar flexibility with regard to damages was shown in other cases. *See* Towers Realty Corp. v. Fox, 103 N.Y.S.2d 437, 438 (1st Dep't 1951); Richard Silk Co. v. Bernstein, 82 N.Y.S.2d 647, 649-50 (Sup. Ct. Kings County 1948); Paramount Pictures, Inc. v. Brandt, 84 N.Y.S.2d 64, 68 (Sup. Ct. N.Y. County 1948).

227. Benton v. Kennedy-Van Saun Mfg. & Eng'g Co., 145 N.Y.S.2d 703, 706 (Sup. Ct. N.Y. County 1955), *aff'd*, 152 N.Y.S.2d 955 (1st Dep't 1956).

interference suit need not be actual malice,[228] but merely "the intentional doing of a wrongful act without legal or social justification."[229] They also held that actions for interference could be maintained even if the plaintiff had an enforceable claim against the other contracting party[230] or if the interference resulted in harm to the plaintiff short of a breach.[231] Finally, they declared that "interference with pre-contractual relations [was] actionable where a contract would have been entered into [but] for the malicious conduct of a third person."[232] Apart from cases reiterating the principle that a "person is generally privileged to interfere with a contract interest where such interference is made in protection of an equal or superior right,"[233] most cases involved specific factual determinations that plaintiffs either had[234] or had not[235] made out their claims.

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228. *See* A.S. Rampell, Inc. v. Hyster Co., 144 N.E.2d 371, 375-76 (N.Y. 1957).

229. Calvada Inc. v. Fidelity & Deposit Co., 139 N.Y.S.2d 92, 95 (Sup. Ct. Kings County 1955) (quoting Hornstein v. Podwitz, 173 N.E. 674, 674 (N.Y. 1930); *accord* Katz v. Thompson, 189 N.Y.S.2d 982, 986 (Westchester County Ct. 1959).

230. *Id. at* 986.

231. *See* Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 101 N.Y.S.2d 483, 498 (Sup. Ct. N.Y. County 1950), *aff'd*, 107 N.Y.S.2d 795 (1st Dep't 1950); Haggerty v. Burkey Mills, Inc., 211 F. Supp. 835, 837 (E.D.N.Y. 1962).

232. *A.S. Rampell, Inc.*, 144 N.E.2d at 375.

233. Burr v. Carvel Dari-Freeze Stores, Inc., 191 N.Y.S.2d 235, 237 (Sup. Ct. Suffolk County 1959). *See, e.g.*, Terry v. Dairymen's League Coop. Ass'n, 157 N.Y.S.2d 71, 78 (3d Dep't 1956) (defendant acted "in ordinary course of business . . . to serve its interests"); Martin v. Mantell, 167 N.Y.S.2d 198, 200 (Sup. Ct. Queens County 1957) (defendant acted to avoid "unreliable . . . tenant").

234. *See* Gold Medal Farms, Inc. v. Rutland County Coop. Creamery, Inc., 195 N.Y.S.2d 179, 184-85 (3d Dep't 1960); Minnesota Mining & Mfg. Co. v. Technical Tape Corp., 192 N.Y.S.2d 102, 119 (Sup. Ct. Westchester County 1959); Kaplan v. Kaplan, 133 N.Y.S.2d 59, 61 (Sup. Ct. Westchester County 1954); Delehanty v. Walzer, 59 N.Y.S.2d 777, 792-93 (Sup. Ct. Kings County 1945).

235. *See* Associated Flour Haulers & Warehousemen, Inc. v. Hoffman, 26 N.E.2d 7, 10 (N.Y. 1940); Best Window Co. v. Better Bus. Bureau, 151 N.Y.S.2d 833, 834 (1st Dep't 1956); Photographic Importing & Distrib. Corp. v. Elgeet Optical Co., 122 N.Y.S.2d 215, 216 (1st Dep't 1953); Noah v. L. Daitch & Co., 192 N.Y.S.2d 380, 385 (Sup. Ct. N.Y. County 1959); Burrus v. Scott, 178 N.Y.S.2d 416, 418 (Sup. Ct. Queens County 1958); Lance Television Labs., Inc. v. Certified Appliance Co., 99 N.Y.S.2d 485, 487 (Sup. Ct. Bronx County 1950); Rizika v. Potter, 72 N.Y.S.2d 372, 376-77 (Sup. Ct.

Another related doctrine that, in the language of the New York Court of Appeals, was "still in the process of growth" during the 1940s and 1950s was the doctrine of prima facie tort.[236] This doctrine, which had originated in the case of *Al Raschid v. News Syndicate Co.*,[237] provided the mechanism whereby "in modern business dealings the zone of liability against those causing injury to others [was] gradually expanding."[238] "New torts [were] created every day" pursuant to the "expanding doctrine"[239] of prima facie tort to deal with the "infliction of intentional harm, resulting in damage, without legal excuse or justification"[240] and with defendants who subjected plaintiffs "to economic pressures and . . . thereby injur[ed] their business without justification in law."[241]

Advance Music Corporation v. American Tobacco Company was a case where an unethical business practice was held on the pleadings to be a prima facie tort. In *Advance Music Corporation*, the plaintiff asserted that his song was among the most popular songs in the nation and that because the Hit Parade failed to conduct surveys to determine a song's actual ranking, despite representations otherwise, the Hit Parade failed to play the plaintiff's song as one of its top ten songs.[242] Another case, *Ruiz v. Bertolotti*, was successfully brought under the prima facie tort rubric by a Puerto Rican husband and wife who sought to buy a house in a residential section of Long Island, New York, and alleged that the defendant

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Oneida County 1947). Two interesting Court of Appeals cases denied plaintiffs recovery on the ground of the nonexistence of contracts, in one case because the plaintiff had already lost a breach of contract suit against the principal obligor. *See* Israel v. Wood Dolson Co., 134 N.E.2d 97, 99 (N.Y. 1956). The other case was because the contract was illegal. *See* Paramount Pad Co. v. Baumrind, 151 N.E.2d 609, 610 (N.Y. 1958).

236. Rager v. McCloskey, 111 N.E.2d 214, 217 (N.Y. 1953).

237. 191 N.E. 713, 714 (N.Y. 1934).

238. Advance Music Corp. v. American Tobacco Co., 50 N.Y.S.2d 287, 292 (Sup. Ct. N.Y. County 1944).

239. Herbert Prods., Inc. v. Oxy-Dry Sprayer Corp., 145 N.Y.S.2d 168, 171 (Sup. Ct. N.Y. County 1955).

240. Gantell v. Friedmann, 197 N.Y.S.2d 605, 608 (Sup. Ct. Kings County 1959).

241. United M.P.B. Novelty Mfg. Corp. v. Sinensky, 219 N.Y.S.2d 729, 731 (Sup. Ct. Kings County 1961).

242. *See Advance Music Corp.*, 70 N.E.2d at 402-03.

"expressed anger at 'colored persons' moving into the neighborhood, and threatened bodily harm" to the seller and to the plaintiffs, to "frighten" them into "surrender[ing] their legal right to buy a house where they pleased."[243] Other successful suits were brought against an attorney who gave perjured testimony before an official referee,[244] against a labor union that refused to admit women to membership and picketed an establishment employing women,[245] against a business associate who falsely reported information about the plaintiff's income to the Internal Revenue Service,[246] and against a landlord who harassed his tenant by bringing "baseless lawsuits" in connection with the lease.[247]

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243. Ruiz v. Bertolotti, 236 N.Y.S.2d 854, 855 (Sup. Ct. Nassau County 1962). *But cf.* Proctor v. Mount Vernon Arena, Inc., 40 N.Y.S.2d 775, 777 (2d Dep't 1943), (reversed a judgment on behalf of an African-American child who had been denied admission to a skating rink on the ground, which the defendant had failed to plead or prove at trial, that the child was a minor by statute who could not be admitted to the rink unless accompanied by a parent or guardian).

244. *See* Nones v. Security Title & Guaranty Co., 162 N.Y.S.2d 761, 762 (Sup. Ct. Nassau County 1956).

245. *See* Wilson v. Hacker, 101 N.Y.S.2d 461, 464-66 (Sup. Ct. Erie County 1950).

246. *See* Gale v. Ryan, 31 N.Y.S.2d 732, 733 (1st Dep't 1941). *But see* Kaufman v. M.T. Davidson Co., 76 N.Y.S.2d 893, 894 (Sup. Ct. N.Y. County 1947) (labor union could not sue employer for opposing wage increases before War Labor Board).

247. *See* J.J. Theatres, Inc. v. V.R.O.K. Co., 96 N.Y.S.2d 271, 272 (Sup. Ct. N.Y. County 1950). For other cases in which plaintiffs were permitted to go forward with their suits, *see generally* Schisgall v. Fairchild Publications, Inc., 137 N.Y.S.2d 312 (Sup. Ct. N.Y. Court 1955); Kasten v. Vincent Edwards, Inc., 87 N.Y.S.2d 777 (Sup. Ct. N.Y. County 1949); Girard Trust Co. v. Melville Shoe Corp, 81 N.Y.S.2d 900 (Sup. Ct. N.Y. County 1948); Ledwith v. International Paper Co., 64 N.Y.S.2d 810 (Sup. Ct. N.Y. County 1946). The main grounds on which prima facie tort suits were dismissed were that the plaintiff failed to make a sufficient showing of damages, *see* Simon v. Noma Elec. Corp, 56 N.E.2d 537, 539-540 (N.Y. 1944); Goldfarb v. Strauss, 212 N.Y.S.2d 579, 580 (Sup. Ct. Nassau County 1961); Marcus v. Textron, Inc., 177 N.Y.S.2d 964, 966 (Sup. Ct. N.Y. County 1958); that the defendant lacked an intention to harm the plaintiff, *see* Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575, 579 (Sup. Ct. N.Y. County 1948); and that the plaintiff's injury could be remedied through some traditional category of tort action, *see* Rager v. McCloskey, 111 N.E.2d 214, 217 (N.Y. 1953); Green v. Time, Inc., 147 N.Y.S.2d 828, 830 (Sup. Ct. N.Y. County 1955).

Beginning around 1960, however, the judiciary's enthusiasm for the doctrines of prima facie tort and interference with contractual relations began to wane. The first clear sign of the loss of enthusiasm was the 1958 Court of Appeals decision in *Brandt v. Winchell*,[248] where the organizer of the Cancer Welfare Fund had sued the well-known reporter, columnist, and commentator, Walter Winchell, and the New York philanthropist, Elmer H. Bobst, for inducing various public officials to investigate and ultimately destroy public confidence in the Cancer Fund so that it could not remain as an effective competitor for Winchell's and Bobst's Damon Runyon Fund. In a decision containing no dissent, New York Court of Appeals Chief Judge Conway agreed that the "law [was] now settled" that an "act done solely out of malice and ill will to injure another *may* be actionable."[249] But that was "not to say," Conway continued, "that the present state of the law is that an act . . . will, without exception, become actionable when it is done with . . . blameworthy purpose."[250] There were always "reasons [why] a court [might be] constrained to ignore the wrongful motive of an actor," such as "the paramount consideration of the public welfare."[251] Whenever a claim was made, either in a prima facie tort case or in an interference with contractual relations case—"that an otherwise lawful act ha[d] become unlawful because the actor's motives were malevolent"—it was necessary "to analyze and weigh the conflicting interests of the parties and of the public."[252] On doing so in *Brandt*, the New York Court of Appeals unanimously dismissed Brandt's suit.

In the next case that came before the New York Court of Appeals, the plaintiffs claimed that a prima facie tort or interference suit would "lie in favor of anyone whose contractual expectations ha[d] been indirectly injured by socially undesirable conduct" when "the injury was

248. 148 N.E.2d 160 (N.Y. 1958).

249. *Id.* at 163.

250. *Id.* at 163-64.

251. *Id.*

252. *Id.* at 164. (emphasis in original).

foreseeable by defendant."[253] Observing that under the plaintiff's "theory it might well be argued that, anytime a debtor refused to pay a creditor, the creditors of that creditor would have a cause of action against the debtor for interfering with the contract between the debtor's creditor and this creditor's creditor," the court concluded that "[t]he law [did] not spread its protection so far" and that "nothing but . . . confusion [could] be accomplished by allowing this suit to continue."[254]

Lower courts agreed that what one of them called "the law of tortious interference with economic relations" was not always "based on sound logic," that "[a]nalysis of the various elements comprising the tort ha[d] been lacking," and that its "parameters" were "not . . . as clearly defined as those areas of the law which enjoyed less erratic development."[255] Because the scope of the tort was "limitless, there [was] danger that its unrestricted use [might] lead to grave abuse and unwarranted claims."[256] Although courts recognized that prima facie tort and comparable doctrines had "proved useful in assisting the development of needed reforms" as "new relationships and power groupings formed, and continuously reformed, in the business world," they nevertheless thought it "unwise" to set "aside large bodies of case law which have defined our limits, established our guidelines and set forth the essential elements of traditional tort" and thereby "to allow every unrealized cause of action to be tortured into a *prima facie* tort action."[257] They would not permit the development of a general law of interference with economic relationships that would "become a 'catch-all' alternative for every cause of action which [could] not stand on its own legs."[258]

This about-face in judicial attitude did not mean that no one recov-

253. Sloan v. Clark, 223 N.E.2d 893, 896 (N.Y. 1966).

254. *Id.* at 895.

255. Ryan v. Brooklyn Eye & Ear Hosp., 360 N.Y.S.2d 912, 916 (2d Dep't 1974).

256. Frank v. 903 Park Ave. Co., 354 N.Y.S.2d 329, 331 n.1 (Civ. Ct. N.Y. County 1974).

257. Belsky v. Lowenthal, 405 N.Y.S.2d 63, 65 (1st Dep't 1978), *aff'd on opinion below*, 47 N.Y.2d 820 (1979).

258. *Id.*

ered for prima facie tort or for interference with contractual relationships. Suits were upheld, for example, against unethical attorneys,[259] against a doctor who gave an insurer a false diagnosis that caused a plaintiff to lose disability benefits,[260] against a labor union that used threats of intimidation and ordered its members not to cross a picket line of another union for the purpose of inducing breach of a collective bargaining agreement,[261] and against employees of a Japanese corporation for their disruptive and harassing office behavior in support of their claim that the corporation discriminated against women who were not Japanese nationals.[262]

Still, the change in judicial approach produced dramatic transformations in doctrine. Thus, in a number of cases in the 1960s and 1970s, judges reached results that were precisely opposite of those that other judges had reached a few decades earlier. Suits for interference with contract rights were not permitted, for example, when a plaintiff had an enforceable suit for breach of contract against the principal obligor,[263] when a contract was voidable because it was not in writing as required by the Statute of Frauds,[264] or when the claim was that the defendant attempted

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259. *See* Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 343 N.E.2d 278 (N.Y. 1975); Riverside Fin. Corp. v. Coniglio Builders, Inc., 425 N.Y.S.2d 433 (4th Dep't 1980); Racoosin v. LeSchack & Grodensky, P.C., 426 N.Y.S.2d 707 (Sup. Ct. N.Y. County 1980).

260. *See* Felis v. Greenberg, 273 N.Y.S.2d 288 (Sup. Ct. Kings County 1966). *But cf.* Clark v. Geraci, 208 N.Y.S.2d 564, 567-68 (Sup. Ct. Kings County 1960) (plaintiff could not object to doctor's full disclosure of his health where he had authorized doctor in the past to make incomplete disclosures).

261. *See generally* American Broad. Co. v. Brandt, 287 N.Y.S.2d 719, 723 (Sup. Ct. N.Y. County 1968).(Upholding that tortious interference with business by threat of intimidation will afford a common law action).

262. *See* Avigliano v. Sumitomo Shoji Am., Inc., 473 F. Supp. 506, 516 (S.D.N.Y. 1979). Plaintiffs also enjoyed at least some success in Herzog & Straus v. GRT Corp., 553 F.2d 789 (2d Cir. 1977); Sadowy v. Sony Corp., 496 F. Supp. 1071 (S.D.N.Y. 1980); Jewelcor Inc. v. Pearlman, 397 F. Supp. 221 (S.D.N.Y. 1975); Harris Diamond Co. v. Army Times Pub. Co., 280 F. Supp. 273 (S.D.N.Y. 1968).

263. *See* Stevens v. Siegel, 239 N.Y.S.2d 827, 828 (2d Dep't 1963).

264. *See* Livoti v. Elston, 384 N.Y.S.2d 484, 485-86 (2d Dep't 1976).

unsuccessfully to interfere with contractual relations.[265] Similarly, it was determined that a defendant did not commit a tort when he gave intentionally misleading information about a plaintiff's income to the Internal Revenue Service.[266]

Far more important, however, was the transformation that occurred in the policies underlying the law of interference with economic relations. Whereas the classic law of the 1920s and 1930s had reflected adherence to moral views grounded in hostility to coerced redistribution of wealth, the new law of the 1960s and 1970s was concerned with business efficiency, freedom of opportunity, upward social mobility, and proper operation of the judiciary and other agencies of government. This was the same policy transformation that had occurred in the law of fraud.

In the new policy world of the 1960s and 1970s, judges spoke of "the policy of fostering free enterprise" and of a person's right "to advance his own economic self-interest."[267] They recognized "that the mere occurrence of damage to a business resulting from competition carried on in good faith [did] not give rise to a cause of action,"[268] and looked on a desire to increase profits as "sound economic policy when dealing with one's own property."[269] For these reasons, the courts refused to sustain prima facie tort claims, and frowned on suits for interference with contract rights when a defendant "had a valid business interest to protect"[270]

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265. *See* Lynn v. Cohen, 359 F. Supp. 565, 569-70 (S.D.N.Y. 1973).

266. *See* Penn-Ohio Steel Corp. v. Allis-Chalmers Mfg. Co., 280 N.Y.S.2d 679, 680-81 (1st Dep't 1967).

267. Robbins v. Ogden Corp., 490 F. Supp. 801, 811 (S.D.N.Y. 1980).

268. Royal Farms, Inc. v. Minute Maid Co., 236 N.Y.S.2d 368, 369 (Sup. Ct. Kings County 1962).

269. Williamson, Picket, Gross, Inc. v. 400 Park Ave. Co., 405 N.Y.S.2d 709, 711 (1st Dep't 1978).

270. Luxonomy Cars, Inc. v. Citibank, N.A., 408 N.Y.S.2d 951, 954 (2d Dep't 1978); *see also* Williamson, Picket, Gross, Inc. v. 400 Park Avenue Co., 391 N.E.2d 296, 296 (N.Y. 1979); Felsen v. Sol Cafe Mfg. Corp., 249 N.E.2d 459, 461 (N.Y. 1969); Ansonia Assocs. v. Ansonia Residents' Ass'n, 434 N.Y.S.2d 370, 374 (1st Dep't 1980); Fox v. Congel, 426 N.Y.S.2d 878, 880-81 (3d Dep't 1980); Global Casting Indus., Inc. v. Daley-Hodkin Corp., 432 N.Y.S.2d 453, 456 (Sup. Ct. Nassau County 1980); *cf.* Gold-

or believed "that an employee who sought to frustrate the decisions of the organization employing him had outlived his usefulness."[271] One judge even went so far as to urge that "each business enterprise must be free to select its business relations in its own interest" and that, under New York law, it was "well-settled . . . that the refusal to maintain trade relations with any individual is an inherent right which every person may exercise lawfully."[272]

A parallel policy was the concern for the proper and effective functioning of government and its courts. At a most concrete level, judges grew hostile to claims of interference with economic rights for fear of "affording a forum for a never ending source of new litigation."[273] They were also concerned that claims for interference with economic rights not be permitted to arise out of the defendants' presentation of information or grievances to appropriate government authorities,[274] including the courts.[275] The courts also displayed due deference to the decisions of other agencies of government.[276]

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stein v. Garlick, 318 N.Y.S.2d 370, 375-76 (Sup. Ct. Queens County 1971) (protection of efficiency in functioning of newspaper).

271. Stillman v. Ford, 238 N.E.2d 304, 306-07 (N.Y. 1968); *accord* Widger v. Central Sch. Dist., 247 N.Y.S.2d 364, 368 (4th Dep't 1964); Smith v. Helbraun, 238 N.Y.S.2d 212, 219 (Sup. Ct. Westchester County 1963).

272. Shaitelman v. Phoenix Mut. Life Ins. Co., 517 F. Supp. 21, 25 (S.D.N.Y. 1980).

273. Belsky v. Lowenthal, 405 N.Y.S.2d 62, 65 (1st Dep't 1978), *aff'd on opinion below*, 392 N.E.2d 560 (N.Y. 1979).

274. *See* Altimus v. Manhood Found., Inc., 425 F. Supp. 1118, 1124-26 (S.D.N.Y. 1976); Davis v. Williams, 379 N.E.2d 158, 158-59 (N.Y. 1978); Rudoff v. Huntington Symphony Orchestra, Inc., 397 N.Y.S.2d 863, 865 (Sup. Ct. 1977).

275. *See* Artvale, Inc. v. Rugby Fabrics Corp., 232 F. Supp. 814, 822 (S.D.N.Y. 1964); Tuvim v. 10 E. 30 Corp., 329 N.Y.S.2d 275, 278 (1st Dep't 1972).

276. *See e.g.*, Alberta Gas Chem., Ltd. v. Celanese Corp., 497 F. Supp. 637 (S.D.N.Y. 1980); Catterson v. Caso, 472 F. Supp. 833 (E.D.N.Y. 1979). For other significant cases in which relief for interference with economic relations was denied, see Alvord & Swift v. Stewart M. Muller Constr. Co., 385 N.E.2d 1238 (N.Y. 1978); Robert A. Bories, Inc. v. Westinghouse Broad. Co., 288 N.Y.S.2d 697 (1st Dep't 1968); Metromedia, Inc. v. Mandel, 249 N.Y.S.2d 806 (1st Dep't 1964).

The issues underlying the transformation of prima facie tort doctrine and the law of interference with contractual relations emerged with greatest clarity, however, in *Guard-Life Corp. v. S. Parker Hardware Manufacturing Corp.*,[277] a contractual relations case decided by a closely divided New York Court of Appeals. The three dissenters in *Guard-Life* contended that "the *raison d'etre* of the law of interference with contractual relations" was "the ethical precept that one competitor must keep his hands off of the contracts of another."[278] In their view, "the law ha[d] decided, long ago, that enforcement of certain market morals [was] a societal interest worthy of protection."[279] "If society were interested only in fostering economic competition," they added, "the tort of contractual interference would never have developed," and "the law would have allowed business entities to engage in unfettered competition."[280] It was in pursuit of moral values that the dissenters were prepared to keep teeth in the law of contractual interference and to grant the plaintiff the relief it demanded.

The four-judge majority, in contrast, was hostile to classic doctrine, which it found "inconstant and mutable, drawing its substance from the circumstances of the particular situation at hand."[281] In deciding particular cases, it was necessary:

> to achieve a balancing of the protection of the interests of the one party in future enjoyment of contract performance and society's interest in respect for the integrity of contractual relationships, on the one hand, and, on the other, the right to freedom of action on the part of the party interfering and society's concern that competition not be unduly hampered.[282]

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277. 406 N.E.2d 445 (N.Y. 1980).
278. *Id.* at 454.
279. *Id.*
280. *Id.*
281. *Id.* at 448.
282. *Id.*

The majority was especially hostile to making "the result hinge on the subjective . . . state of mind of the parties" or on the related "ethical considerations . . . urged by the dissenters as having a bearing."[283] The majority, that is, was not prepared to reward economic actors with good intentions or to punish those with plans for evil; in the majority's view, "the imposition of liability . . . must depend on the worth and significance of the objective interest"—presumably economic, business, governmental, and judicial efficiency— "to be protected."[284]

As we have seen, the majority's approach had come to dominate the New York judiciary by the time *Guard-Life* was decided in 1980. Thus, although the courts had maintained a limited willingness to protect the ignorant and the weak from the knowledgeable and the strong, they had more often let their concerns for business efficiency, freedom of opportunity, and upward social mobility override established precedents calling for the enforcement of business morality. This same pattern of judicial decision making was also true in a third area of the law regulating business conduct—the law of conversion.

C. *Conversion*

Like the doctrines of fraud and interference with contractual relationships, the doctrine of conversion was put to novel uses. In one case, for example, a man claimed that, when his deceased wife's body was disinterred from a cemetery in Rahway, New Jersey, for reburial in Yugoslavia, the funeral director in charge converted the waterproof airtight casket in which she had been buried and replaced it with an inexpensive tin casket.[285] In another case, a dispute arose over whether the 10,000-year-old skeleton of a mastodon (an extinct mammal resembling an elephant), found beneath the roadbed of Interstate 84 while it was under construction, belonged to the state or to the fee simple owner of the land.[286] There

283. *Id.* at 450.

284. *Id.*

285. Skalko v. Barrett, 415 N.Y.S.2d 856, 857 (1st Dep't 1979).

286. Hunterfly Realty Corp. v. State, 346 N.Y.S.2d 455, 456-57 (Cl. Ct. 1973).

were also cases involving disputes over former marital property between spouses who had divorced or separated,[287] and between family members following the death of a relative with the power of signature over a joint account concerning the disposition of the account's proceeds.[288]

The reporting of these cases—indeed, the cases themselves—may have been quirks of fortune, but other cases were not. Several cases arose, for example, out of new, harsher enforcement policies by the government. In one federal case, the customs service made an "illegal" seizure of imported books, such as Thomas Paine's *Age of Reason,* apparently for their "subversive character," held the books for some six months, and then released the books after requests for judicial review arose—all to the substantial damage of the importer.[289] In another case, a claim was made of "conversion" by "duress" when "agents and employees of the Government" by "various threats and acts, . . . coerced" a party into a "compromise agreement and [into] paying $26,000 to the Government thereunder."[290] On the state level, two cases arose out of a change in policy made by the district attorney of Westchester County and by a county court judge who wrote opinions in support of that change.[291] The district attorney seems to have instituted a policy of not returning non-contraband items seized pursuant to lawful police searches, even though the individuals from whom the items were seized either were not indicted or were acquitted of criminal charges. The judge, in turn, supported the district attorney's policy, concluding that the want of indictment or conviction was "not a determination of the question of" an individual's "ownership or right to possession of the money taken from him" and that the individual would have to pass procedural hurdles and sustain

287. *See e.g.,* Lerman v. Lerman, 431 N.Y.S.2d 253 (Sup. Ct. Albany County 1980); Moran v. Moran, 346 N.Y.S.2d 424 (Dist. Ct. Suffolk County 1973).

288. *See* Brown v. Bowery Sav. Bank, 415 N.E.2d 906 (N.Y.1980); Schwartz v. Schwartz, 365 N.Y.S.2d 584 (Civ. Ct. N.Y. County 1974).

289. Truth Seeker Co. v. Durning, 147 F.2d 54, 56 (2d Cir. 1945).

290. United States v. Ein Chem. Corp., 161 F. Supp. 238, 246 (S.D.N.Y. 1958).

291. *See* Errico v. County of Westchester, 242 N.Y.S.2d 524 (Westchester County Ct. 1963); Kamienska v. County of Westchester, 241 N.Y.S.2d 814 (Westchester County Ct. 1963).

a high burden of proof to recover it.[292]

Another line of cases grew out of the breakup of employment relationships. The cases involved such practices as a refusal by former law partners to allow a partner leaving the firm to take his books and office equipment with him,[293] a former employee's destruction of computer programs he had been preparing on his job,[294] and a former employer's breaking into the former employee's office and searching his files.[295] The behavior of parties in the cases was sufficiently egregious to warrant the award of punitive damages in the two cases that went to judgment, while in the third case, which was still at the pleading stage, punitive damages were not foreclosed.

These cases surely suggest that traditional marketplace ethics were breaking down, with litigation becoming an increasingly common and viable alternative to gentlemanly resolution of business disputes. *Merrick v. Four Star Stage Lighting, Inc.*,[296] a case in which "a well-known stage producer"[297] sought to repossess stage lighting equipment from a business that supplied and stored it, provides further evidence from its "convoluted course" and "acrimonious history."[298] *Harper & Row, Publishers, Inc. v. Nation Enterprises*[299] was another case that pointed to the breakdown of traditional business ethics. In that case, Harper & Row, which was publishing a biography of former President Gerald Ford and had licensed Time, Inc. to pre-publish book excerpts, claimed that the

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292. *See Errico*, 242 N.Y.S.2d at 527.

293. *See* Ashare v. Mirkin, Barre, Saltzstein & Gordon, P.C., 435 N.Y.S.2d 438, 439 (Sup. Ct. Suffolk County 1980).

294. *See* Veeco Instruments, Inc. v. Candido, 334 N.Y.S.2d 321, 323 (Sup. Ct. Nassau County 1972).

295. *See* Health Delivery Sys. Inc. v. Scheinman, 344 N.Y.S.2d 190, 192 (2d Dep't 1973).

296. 378 N.Y.S.2d 65 (1st Dep't 1975).

297. *Id.* at 66.

298. Merrick v. Four Star Stage Lighting, Inc., 400 N.Y.S.2d 543, 544 (1st Dep't 1978); *see also* Four Star Stage Lighting, Inc. v. Merrick, 392 N.Y.S.2d 297 (1st Dep't 1977).

299. 501 F. Supp. 848 (S.D.N.Y. 1980).

defendant had committed the tort of conversion by obtaining a copy of the Ford manuscript without authorization, and by publishing excerpts of it in *The Nation* before Time had published the excerpts. Because of The Nation Inc.'s actions, Time canceled its licensing arrangement with Harper & Row.

Federal Insurance Co. v. Fries[300] was another case in which the breakdown of traditional patterns of ethical behavior brought litigants to court claiming conversion. In *Federal Insurance Co.*, a bank, serving as an executor, mistakenly delivered rings belonging to a different estate to Fries, an heir, who was unaware of the mistake; sold the rings for cash; and then spent it. Two years later, the bank discovered the mistake and demanded the return of the rings. Declining to abide by a traditional ethical concept of not keeping property that was not rightfully his own, Fries refused to return them. The bank sought reimbursement from its insurance company, which paid for the loss and then, unmindful of its insurer's duty to cover losses that could no longer be readily undone, sued Fries to recover the cash. With this suit, the ethical dilemmas of whether an heir should keep a windfall to which he or she was not entitled but had already spent, and of whether an insurance company should cover a loss that had produced a windfall for another, were transformed into a legal problem of whether, for purposes of the statute of limitations, conversion occurred when Fries received the rings, sold the rings, or refused the bank's demand for their return.

D. *Privacy*

Developments in the law of privacy paralleled events in other areas. Many cases continued along established channels that permitted newsworthy but not commercial appropriation of the name or likeness of an

300. 355 N.Y.S.2d 741 (Civ. Ct. N.Y. County 1974); *see also* Graphic Arts Mut. Ins. Co. v. Bakers Mut. Ins. Co., 382 N.E.2d 1347 (N.Y. 1978) (not a trover case but a suit by an automobile insurer against a workers' compensation carrier for a declaratory judgment as to which company was responsible for insurance coverage in an accident case. This case further suggests that litigation was replacing traditional mechanisms within an industry as the preferred way to resolve disputes).

individual. For instance, an animal trainer who gave a performance during halftime at a football game was held not to have had his privacy interests infringed by a commercial telecast of his performance.[301] Nor were a famous designer's rights infringed by the public attachment of her name to a dress she had in fact designed.[302] The same was true for a child prodigy turned recluse,[303] and for a husband of a famous feminist leader whose wife chose to write about their marriage after her divorce.[304]

On the other hand, courts found privacy violations in cases involving a contest winner whose winning entry was altered without her consent,[305] an entrepreneur for whom an adult educational career game was named without his consent,[306] and a judge whose integrity was challenged in an advertisement on behalf of a newspaper conducting an investigative report about him.[307]

Interesting doctrinal developments also included a holding that New York's privacy statute gave a remedy in the case of a fictionalized depiction of a person's life;[308] a ruling that the state could be sued if, in its non-governmental activities, it engaged in commercial exploitation of an individual;[309] and a decision that Elvis Presley's right not to be subject to commercial exploitation, except by his licensees, extended beyond his death.[310] Doctrinal retreats occurred in trivial cases, such as in one hold-

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301. *See* Gautier v. Pro-Football, Inc., 107 N.E.2d 485, 489 (N.Y. 1952).

302. *See* Jaccard v. R.H. Macy & Co., 37 N.Y.S.2d 570, 571 (1st Dep't 1942).

303. *See* Sidis v. F-R Pub. Corp., 113 F.2d 806, 810-11 (2d Cir. 1940).

304. *See* Friedan v. Friedan, 414 F. Supp. 77, 78-79 (S.D.N.Y. 1976).

305. *See* Manger v. Kree Inst. of Electrolysis, Inc., 233 F.2d 5, 8-9 (2d Cir. 1956).

306. *See* Rosemont Enter., Inc. v. Urban Sys. Inc., 345 N.Y.S.2d 17, 18 (1st Dep't 1973).

307. *See* Rinaldi v. Village Voice, Inc., 359 N.Y.S.2d 176, 181 (Sup. Ct. N.Y. County 1974).

308. *See* Garner v. Triangle Publications, Inc., 97 F. Supp. 546, 550 (S.D.N.Y. 1951).

309. *See* Seidelman v. State, 110 N.Y.S.2d 380, 381 (Cl. Ct. 1952).

310. *See* Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 221 (2d Cir. 1978) (suit for misappropriation after death of the name and likeness of Elvis Presley).

ing that the likeness of a dog was not subject to privacy protection,[311] and in major cases like *Time, Inc. v. Hill*,[312] where the United States Supreme Court held that the scope of New York's privacy right was limited by the First Amendment's free speech and press guarantees.

This layering of doctrine, however, often blurred the line between the permissible and the impermissible. The line is best illustrated perhaps by the distinction between *Murray v. New York Magazine Co.*,[313] which held that a person photographed in Irish garb at the St. Patrick's Day Parade had no actionable claim when his picture was used two years later on the cover of a magazine containing an article about Irish immigration to contemporary New York, and *Flores v. Mosler Safe Co.*,[314] which upheld a claim against a defendant that reprinted news stories about a fire involving the plaintiff in advertisements for its products. Yet, many decisions seem quite inconsistent with each other. Consider, for example, *Everett v. Carvel Corp.*,[315] where a photograph of a child, who was the 10,000th visitor to Carvel's ice cream factory, was published in a newspaper without consent; and *Paulsen v. Personality Posters, Inc.*,[316] where a photograph of the plaintiff, who was conducting a mock presidential campaign, was used on an unauthorized poster. Consistent with the *Murray* case, both plaintiffs were denied relief on the ground that the pictures for which they sued were newsworthy.[317] On the other hand, the plaintiff in *Miller v. Madison Square Garden Corp.*,[318] whose picture riding a horse was published in a booklet sold to patrons at a bicycle race, won.

One must also consider the cases involving pictures of scantily clad and nude subjects. In one such case, a professional model recovered

311. *See* Lawrence v. Ylla, 55 N.Y.S.2d 343, 345 (Sup. Ct. N.Y. County 1945).
312. 385 U.S. 374, 387-88 (1967).
313. 267 N.E.2d 256 (N.Y. 1971).
314. 164 N.E.2d 853 (N.Y. 1959).
315. 334 N.Y.S.2d 922 (Sup. Ct. Westchester County 1972).
316. 299 N.Y.S.2d 501 (Sup. Ct. N.Y. County 1968).
317. *See Everett*, 334 N.Y.S.2d at 924; *Paulsen*, 299 N.Y.S.2d at 507.
318. 28 N.Y.S.2d 811 (Sup. Ct. N.Y. County 1941).

damages for unauthorized use of her nude photograph in the 1955 publication of *U.S. Camera Annual*.[319] In a second case, a prominent novelist and screenwriter won a motion for summary judgment from a magazine that had erroneously attached her name to pictures of a nude woman and an orgy scene.[320] In a third case, the boxer Muhammad Ali obtained a preliminary injunction against distribution of an issue of *Playgirl Magazine* containing a photograph of "a nude black man seated in the corner of a boxing ring . . . unmistakably recognizable as plaintiff Ali."[321] On the other hand, a candidate for the title of "Mr. Universe-1956" lost his suit arising out of the attachment of his picture to an article discussing the relationship between muscular development and virility;[322] an actress who had performed nude scenes had her complaint dismissed when it appeared that the producer intended only to exhibit the film at the Cannes Film Festival in an effort to obtain financial backing;[323] and the actress Ann-Margaret lost her suit against the magazine *High Society Celebrity Skin*, which, against her express conditions, had obtained still photographs from a film in which she had appeared "unclothed from the waist up."[324]

One must also consider two cases involving unauthorized biographies. The older of the two, *Spahn v. Julian Messner, Inc.*,[325] involved a suit by "one of professional baseball's great left-handed pitchers"[326] for damages and an injunction against an unauthorized publication of a ficti-

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319. *See* Myers v. U.S. Camera Publ'g Corp., 167 N.Y.S.2d 771, 774 (Civ. Ct. N.Y. County 1957).

320. *See* Lerman v. Chuckleberry Publ'g, Inc., 496 F. Supp. 1105, 1107, 1109 (S.D.N.Y. 1980).

321. Ali v. Playgirl, Inc., 447 F. Supp. 723, 725 (S.D.N.Y. 1978).

322. *See* Delinger v. American News Co., 178 N.Y.S.2d 231, 232 (1st Dep't 1958).

323. *See* McGraw v. Watkins, 373 N.Y.S.2d 663, 664-65 (3d Dep't 1975).

324. *See* Ann-Margret v. High Soc'y Magazine, Inc., 498 F. Supp. 401, 403 (S.D.N.Y. 1980).

325. 221 N.E.2d 543 (N.Y. 1966), *remanded for reconsideration in light of Time, Inc. v. Hill*, 385 U.S. 374, *aff'd*, 233 N.E.2d 840 (N.Y. 1967).

326. *Id.* at 544.

tious biography of his life. On remand from the Supreme Court, the New York Court of Appeals adhered to its prior decision granting Spahn both damages and injunctive relief, since it found the falsified biography had been published with reckless disregard of the truth. To allow publication of the book, the Court reasoned, would grant "a literary license ... destructive of an individual's right—albeit a limited one in the case of a public figure—to be free of the commercial exploitation of his name and personality."[327] The New York Court of Appeals refused, however, to interfere with the publication of the next biography that came before it—one of Ernest Hemingway—on the ground that there was "no allegation ... of any misstatement knowingly or recklessly made" and thus there could be no objection to the author's making a profit out of Hemmingway's life.[328]

Although it may have been constitutionally compelled, the distinction drawn by the court made little sense in terms of the underlying remedial purposes of New York's privacy legislation. The distinction, in effect, transformed New York's property-protective rule that people, famous or otherwise, could stop others from commercially appropriating their personalities into a body of moralistic doctrine that gave private individuals a right to stop any publication concerning themselves, but gave public figures a similar right only if the publication was knowingly or recklessly false.

The New York Court of Appeals took a further step toward redefining New York's law of privacy in *Nader v. General Motors Corp.*,[329] when it upheld Ralph Nader's "right to protect" himself "from having" his "private affairs known to others and to keep secret or intimate facts about" himself "from the prying eyes or ears of others."[330] It specifically held that General Motors' "unauthorized wiretapping and eavesdropping" and "'overzealous' ... surveillance," if proved, violated Nader's

327. Spahn v. Julian Messner, Inc., 233 N.E.2d 840, 843 (N.Y. 1967).

328. Estate of Hemingway v. Random House, Inc., 244 N.E.2d 250, 258 (N.Y. 1968).

329. 255 N.E.2d 765 (N.Y. 1970).

330. *Id.* at 768.

privacy rights.[331] The court reached this conclusion, however, by applying District of Columbia rather than New York law to the case.

A later case, however, did apply New York law, and it reached essentially the same result in its holding that a newspaper publication of allegations in a divorce proceeding, obtained in violation of the proceeding's confidentiality, constituted an invasion of privacy. The court reached this result even though no special advertising or commercialization had occurred in the case, which had involved nothing more than simple newspaper stories.[332] It accordingly seemed that New York law had been transformed into a body of doctrine protecting the ethical value of privacy as well as property, and that mere public revelation of private facts about a person would give rise to a cause of action for violation of privacy.

But the court did not state that a new cause of action had come into existence, and, as a result, its holding left the lower courts somewhat confused. Citing *Griswold v. Connecticut*[333], *Roe v. Wade*,[334] and *Nader v. General Motors*[335] and taking note "of the expanding recognition of invasion of privacy actions,"[336] the appellate division held that a complaint alleging a psychiatrist's disclosure of confidential patient communications stated a cause of action for invasion of privacy. The appellate division then remanded the case for trial,[337] which the plaintiff ultimately won.[338] In contrast, in a case in which a school district had divulged information given by a pupil to its employees in confidence, the court declared that the "invasion of privacy theory [could] be quickly dismissed," since New York law merely prohibited "the commercial exploitation of a person's name, portrait or picture" and "the line of decisions" had "in-

331. *Id.* at 770.
332. *See* Shiles v. News Syndicate Co., 261 N.E.2d 251, 252 (N.Y. 1970).
333. 381 U.S. 479 (1965).
334. 410 U.S. 1131973).
335. 255 N.E.2d 765 (N.Y. 1970).
336. Doe v. Roe, 345 N.Y.S.2d 560, 562 (1st Dep't 1973).
337. *Id.*
338. Doe v. Roe, 400 N.Y.S.2d 668, 679-80 (Sup. Ct. N.Y. County 1977).

variably confined" the granting of relief "to such commercial situations."[339]

The court then turned to a discussion of the *Nader* case, which it read as one involving intentional infliction of emotional distress, and held that the school district's divulging of information might "well constitute outrageous actionable conduct," which a plaintiff had a right to show at trial.[340] A third case held that an insurance company's publication of an article about the plaintiffs' automobile accident injuries and damage claims, which were labelled "astronomical," might impair their right to an impartial jury and thus could be enjoined.[341] In contrast, a final case held that a political candidate's use in a campaign advertisement of a photograph of the plaintiff, who had been charged with killing two New York City policemen, was absolutely privileged.[342]

In a series of cases with significant political overtones, federal judges sitting in New York read the New York Court of Appeals cases more uniformly as creating a true right of privacy. Although federal judges recognized that legislators were immune to suits stemming from statements they made within the context of their legislative duties,[343] and that actions for invasion of privacy would not lie absent allegations of specific harm,[344] they read New York law as providing authority for privacy suits brought on behalf of Dr. Benjamin Spock, who alleged that the National Security Agency had intercepted his oral, wire, telephone, and telegraph communications;[345] on behalf of the Socialist Workers Party, which alleged that the FBI had engaged in illegal informant activities and

339. Blair v. Union Free Sch. Dist. #6, 324 N.Y.S.2d 222, 223 (Dist. Ct. Suffolk County 1971).

340. *Id.* at 228.

341. Quinn v. Aetna Life & Cas. Co., 409 N.Y.S.2d 473, 475 (Sup. Ct. Queens County 1978).

342. *See* Davis v. Duryea, 417 N.Y.S.2d 624, 625, 628-29 (Sup. Ct. N.Y. County 1979).

343. *See* Bergman v. Stein, 404 F. Supp. 287, 298-99 (S.D.N.Y. 1975).

344. *See* Fifth Ave. Peace Parade Comm. v. Gray, 480 F.2d 326, 333 (2d Cir. 1973).

345. *See* Spock v. United States, 464 F. Supp. 510, 513 (S.D.N.Y. 1978).

in illegal disruption of the party's political activities;[346] and on behalf of several individuals whose mail had been unlawfully opened by the CIA.[347] A federal court also upheld an invasion of privacy claim brought on behalf of Jacqueline Kennedy Onassis against a photographer who kept her under close surveillance, harassed her, and carried out paparazzi attacks.[348] In reaching these results, federal judges declared that they were "not obliged automatically to apply the last highest state court determination," but should "hold as [they] believe[d] the state court would hold today."[349] They were, in turn, "persuade[d] . . . that *Nader* foreshadowe[d] the course that the New York Court of Appeals would follow today in dealing with intrusions on the right of privacy"[350] and that the "evidence [was] overwhelming that New York would recognize the common law right of privacy sufficiently to compensate for" intrusion into private mail and similar areas.[351] Indeed, even the Second Circuit overruled its earlier decisions and agreed that "extreme, physical invasion of privacy" was actionable in New York.[352]

The New York Court of Appeals, however, would not state clearly what everyone else believed it would and should state—that a broad, general common law right of privacy existed in New York. Puzzlingly citing *Nader* and *Flores*, it would declare only that:

> whatever may be the law in other jurisdictions with respect to the right to judicial relief for invasion of privacy in consequence of unreasonable publicity, in our State thus far there has been no recognition of such right other than under sections 50 and 51 of

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346. *See* Socialist Workers Party v. Attorney Gen., 463 F. Supp. 515, 522 (S.D.N.Y. 1978).

347. *See* Birnbaum v. United States, 436 F. Supp. 967, 976 (E.D.N.Y. 1977), *aff'd as modified on other grounds*, 588 F.2d 319 (2d Cir. 1978).

348. *See* Galella v. Onassis, 353 F. Supp. 196, 203-204 (S.D.N.Y. 1972), *aff'd*, 487 F.2d 986, 991-992 (2d Cir. 1973).

349. *Spock*, 464 F. Supp. at 516.

350. *Galella*, 353 F. Supp. at 231.

351. *Birnbaum*, 436 F. Supp. at 978.

352. Meeropol v. Nizer, 560 F.2d 1061, 1067 (2d Cir. 1977).

the Civil Rights Law.[353]

This was the ultimate contradiction in an otherwise conflicted and confusing body of doctrine.

III. CONCLUSION

It was, however, the same contradiction that ran through the law of trespass, conversion, fraud, privacy, and tortious interference with contract by the end of the 1970s. All five areas of law retained much of their initial function of serving an essentially ethical end of preserving private wealth and property. In mid-century, they had also begun to assume new ethical goals of upholding business morality, of shielding the weak and poor from the manipulations of the wealthy and powerful, and, perhaps, of protecting personal privacy. All four ethical goals were at odds, however, with other judicial concerns for business efficiency, freedom of opportunity, and hence upward social mobility that became increasingly important as the century progressed and descendants of immigrants achieved positions of dominance on the New York bench. The end result was a doctrinal mix of ethical and efficiency overlays atop a pro-property foundation. It was a mix that was reflective, in turn, of the demographic mix that characterized the population of New York and much of America.

353. Wojtowicz v. Delacorte Press, 374 N.E.2d 129, 130 (N.Y. 1978).