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Contracts - Paynter v. New York University: How Discretionary Are the Inherent Powers of Universities

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CONTRACTS—*PAYNTER v. NEW YORK UNIVERSITY*: HOW DISCRETIONARY ARE THE INHERENT POWERS OF UNIVERSITIES?

On Thursday evening, April 30, 1970, President Nixon announced that he had ordered American troops into Cambodia. The reaction to this announcement at universities and campuses across the country was spontaneous and immediate.[1] Millions of students were dismayed and outraged and anti-war demonstrations were mounted everywhere. By Sunday, May 3, 1970, tensions reflecting the growing disillusionment and frustration of the students at the Washington Square Center of New York University had built to such a pitch that the University president called a special advisory meeting of the University Senate in an effort to determine the most effective means of meeting and dealing with the apparent crisis.[2]

When four students were killed by a unit of the Ohio National Guard at Kent State University on May 4, 1970, the situation grew more serious all over the country. At New York University, the news of the killings "immeasurably aggravated the already explosive situation."[3] School property was seized and violence and vandalism ensued.[4]

On the evening of May 4, the president of the University suspended formal classes until the school senate could meet and plan further action to "protect the lives of students, faculty, and employees, and to safeguard the property of the University."[5] The buildings were cleared and order restored by University officials and police, but the senate resolved to suspend formal classes. "Resolutions were duly adopted permitting each college in the University to assess its own particular situation and to make rules and regulations concerning classes, examinations and grades."[6]

The School of Education and Washington Square College called off formal classes for the final week of the semester, making provision for

1. Brief for Defendant-Appellant (New York University) at 5.
2. *Id.* at 5-6 (Transcript at 20-21).
3. *Id.* at 6.
4. *Id.* at 6 (Transcript at 20-25).
5. *Id.* at 6.
6. *Id.* at 7 (Transcript at 21-23, 32-34).

the faculty to remain available in order that students could arrange for the completion of their studies.[7] Students were given the options to accept letter grades based on completed assignments, or on additional assignments, or examinations. The student could also accept a grade of "pass" or "fail" based upon his work in each course.[8] Thus, students could take final examinations although formal classes were suspended.

The senate meeting was held on Thursday, May 7, 1970.[9] The spring semester was scheduled to end on Friday, May 15, with final examinations to be held between May 16 and May 29.[10] Formal classes were officially suspended for a total of nine days—from May 5 to May 15.

On July 15, 1970, an action was commenced in the Civil Court of the City of New York, Small Claims Part, County of New York, by Roger Paynter, the father of a student who was enrolled in the School of Education of New York University, Washington Square Center, when classes were suspended in May of that year. The plaintiff sued for breach of contract claiming a refund of part of his son's tuition based on instruction time lost from the date of suspension of classes until the original closing date of the University.

Judge Patrick Picariello, in a five page decision, found for the plaintiff and awarded him $277.40 with interest from May 6, 1970 and costs.[11] The judge found that "[t]he defendant breached its contract during its lifetime. It matters not in what point in its duration."[12] *Paynter v. New York University*, 64 Misc. 2d 226, 314 N.Y.S.2d 676 (1970).

The defendant, New York University, appealed to the Supreme Court of the State of New York, Appellate Term: First Department (Index Number 49352/1970). The Appellate term unanimously reversed Judge Picariello's decision.[13] No comment has been made as to a possible appeal by plaintiff to the New York Court of Appeals.

The purpose of this casenote is to analyze the *Paynter* decision in the light of inherent rule-making powers of a university and the non-intervention policy of the courts, taking into consideration issues of contrac-

7. *Id.* at 7 (Transcript at 27-28).
8. *Id.* at 8 (Transcript at 22, 27, 28).
9. *Id.* at 6.
10. *Id.* at 4.
11. 64 Misc. 2d 226, 231, 314 N.Y.S.2d 676, 680 (1970).
12. *Id.*
13. Paynter v. New York University, 35 App. 2d —, 319 N.Y.S.2d 893 (1971). *See also* McFadden, New York Times, Apr. 5, 1971, at 1, col. 4.

tual obligations and performance, and the corresponding duties of parties to a contract. Cursory comment shall be made on the decision of the Small Claims Court (as this was an issue on appeal). However, the major concern of the *Paynter* decision is how it affects colleges and universities across the country in regard to suspension of classes due to disturbances, as well as instruction time lost due to absenteeism of faculty and staff. Allusions will be made to disciplinary actions of universities, as this too is an example of an inherent power of universities.

Our first inquiry is that of breach of contract in general, since the Small Claims Court seemingly decided the *Paynter* case strictly on this ground. Although Judge Picariello discussed at length the duties of the university with regard to dissemination of information and the maintenance of order on the campus, his final analysis was that no matter what was taking place at the Washington Square Center campus, New York University breached its contractual obligation to give instruction to the son of Roger Paynter until the scheduled close of the semester.[13a]

Since the issue of breach of contract was raised, it should be discussed before the questionable reasoning of Judge Picariello can be analyzed.

In order to lawfully "breach" a contract, one of several rules must be applied. In accordance with the general rule, if a party desires to be excused from performance in the event of a contingency arising, it was his duty to provide therefore in his contract,[14] at least where he

14. After a recitation of the facts—as stated above—Judge Picariello launched his attack on the defendant University in a seemingly extraneous manner. He began by saying, "This latest circumstance [*alleged* absence of students at defendant's Senate meeting when school closing was affirmed], combined with the distressing and appalling situation then pertaining on the defendant's campuses, impels the Court to inquire whether the Senate action reflects a condition of its isolation from environmental influences then existing, indifference to its legal obligations to the student body as a whole and to its moral responsibility to Society. Let us now examine the power of defendant's Board of Trustees to . . . use . . . its property as they shall deem for the best interests of the institution. . . ." 64 Misc. 2d 226, 227, 314 N.Y.S.2d 676, 677 (1970). Judge Picariello went on to discuss the duties and raison d'être of the university in America. "Universities are schools of education and schools of research. * * * The justification for a university is that it preserves connection between knowledge and the zest of life, by uniting the young and old in the imaginative consideration of learning. The university imparts information, but it imparts it imaginatively. At least this is the function it should perform for society." 64 Misc. 2d 226, 228, 314 N.Y.S.2d 676, 677 (1970). The Court cited two authorities in the above discussion: Whitehead, "THE AIMS OF EDUCATION," and "SOCIAL STATUS," pt. 11, ch. 17, Section 4.

The Judge continued by stating: "Indeed, the task of a university is to weld together imagination and experience." 64 Misc. 2d 226, 228, 314 N.Y.S.2d 676, 678

could have anticipated the event.[15]

If . . . [the risk of the supervening event] was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed.[16]

Thus, except where a statute provides otherwise,[17] performance is not excused by subsequent inability to perform,[18] or by mere inconvenience.[19] Similarly, performance is not excused by mere unpleasantness,[20] by unforeseen hardship,[21] or unforeseen difficulties.[22]

Where the question of excuse of performance is raised, several arguments may be made to support the position. The possible defenses to an action based upon failure to perform are failure of consideration, both complete and partial on a unilateral basis; impossibility; contractual provisions pertaining to performance; absence of bad faith;

(1970). Continuing he then discussed the necessity of student-faculty communications and a "convocation" to supervise campus activities and troubles. This discussion, serving as an admonition to the defendant, as well as to Kent State University: "The Court shudders to wonder if the catastrophe which befell that college campus . . . might not have been averted had this program [informal student-faculty discussions] been pursued.", and all other universities to keep channels of communication open to avoid unrest. This section of the opinion of the Small Claims Court is dictum and will be favorably alluded to in the conclusion of this casenote. The fact remained, however, that Judge Picariello used his position as a forum for comment on the actions of college administrations, rather than deciding the case on principles of law. He found the defendant liable for breach of contract without weighing the possibility that an "education" had been proffered, although classes had ended early.

15. Leonard v. Autocar Sales and Service Co., 392 Ill. 182, 64 N.E.2d 477 (1945), *cert. denied*, 327 U.S. 804 (1946). *See* SELECTIONS FROM WILLISTON ON CONTRACTS, § 676 (1938 rev. ed.).

16. L.N. Jackson and Co. v. Lorentzen, 83 F. Supp. 486 (S.D.N.Y. 1949); *rev'd on other grounds*, L.N. Jackson v. Royal Norwegian Co., 177 F.2d 694 (2d Cir. 1949), *cert. denied*, 339 U.S. 914 (1950); Montauk Corp. v. Seeds, 215 Md. 491, 138 A.2d 907 (1958).

17. Lloyd v. Murphy, 25 Cal. 2d 48, 54, 153 P.2d 47, 50 (1944). *Cf.* SELECTIONS FROM WILLISTON ON CONTRACTS, § 808 (1938 rev. ed.); RESTATEMENT OF CONTRACTS, § 301 (1932).

18. Hughes v. Breazeale, 240 La. 126, 121 So. 2d 510 (1960); Niblett Farms v. Markley-Bankhead, Inc., 202 La. 982, 13 So. 2d 287 (1943). But performance held not excused under statute in Selby v. Battley, 149 Cal. App. 2d 659, 309 P.2d 120 (1957).

19. Platt v. Fischer, 285 Ill. App. 110, 1 N.E.2d 735 (1936). Caron v. Andrew, 133 Cal. App. 2d 402, 284 P.2d 544 (1955).

20. Smith v. Farmer's State Bank, 390 Ill. 374, 61 N.E.2d 557 (1945).

21. LiVolsi Construction Co. v. Shepard, 133 Conn. 133, 48 A.2d 263 (1946); Godburn v. Meserve, 130 Conn. 723, 37 A.2d 235 (1944).

22. Kiyoichi Fujikawa v. Sunrise Soda Water Works Co., 158 F.2d 490 (9th Cir. 1946), *cert. denied*, 331 U.S. 832, *reh. denied*, 332 U.S. 785; Butler v. Nepple, 54 Cal. 2d 589, 6 Cal. Rptr. 767, 354 P.2d 239 (1960).

and frustration of the purpose of the contract. These defenses will be considered in the above order, beginning with failure of consideration.

There is a failure of consideration where one party who has given or promised to give some performance fails, without his fault, to receive, in some material respect, the agreed exchange for that performance.[23] In its precise sense, the defense of failure of consideration rests not on facts existing at the time the mutual promises bargained for in a bilateral contract are made, but on some fact or contingency which occurs between the time of the making of the contract and the performance thereof which results in the material failure of performance by one party.[24] Another view of the doctrine of failure of consideration looks at a bilateral contract as a totality. It was felt in *Hurlburt v. Kephart*[25] that:

> there can . . . be no such thing as a failure of consideration. The promisor either receives the consideration he has bargained for, or he does not. If he does not, then there is no enforceable agreement, for there is no consideration. . . .[26]

The court in *Paynter* felt that this was true, since they held for the breach, notwithstanding the length of time remaining in the semester.[27]

The next defense considered is that of supervening impossibility. It has generally been held that supervening impossibility is an excuse for non-performance provided there is no contributory fault on the part of the promisor.[28] When the performance of a contract is rendered impossible due to circumstances beyond the control of the parties, the party failing to perform is exonerated.[29] The event that creates the impossibility must be a fortuitous one, and not the voluntary act of the

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23. Deibler v. Bernard Bros., 385 Ill. 610, 53 N.E.2d 450 (1944); United States v. Spearin, 248 U.S. 132 (1918).

24. Durkee v. Busk, 355 P.2d 588 (Alas. 1960); Guimarra v. Harrington Heights, 33 N.J. Super. 178, 109 A.2d 695 (1954), *aff'd*, 18 N.J. 548, 114 A.2d 720 (1955).

25. Boswell v. Reid, 199 Cal. App. 2d 705, 19 Cal. Rptr. 29 (1962); Benson v. Andrews, 138 Cal. App. 2d 123, 292 P.2d 39 (1955); Taliaferro v. Davis, 216 Cal. App. 2d 398, 31 Cal. Rptr. 164 (1963).

26. 50 Colo. 353, 115 P. 521 (1911).

27. Hurlburt v. Kephart, *supra* note 25, at 362, 115 P. at 524. *See also* Myers v. Council Mfg. Corp., 276 F. Supp. 541 (W.D. Ark. 1967); Sonnichsen v. Streeter, 4 Conn. Cir. 659, 239 A.2d 63 (1967).

28. *Supra* note 1, at 4.

29. Dolman v. United States Trust Co., 206 Misc. 929, 134 N.Y.S.2d 508 (1954), *aff'd*, 1 App. Div. 2d 809, 148 N.Y.S.2d 809, *rev'd on other grounds*, 2 N.Y.2d 110, 157 N.Y.S.2d 537, 138 N.E.2d 784 (1956); Bissell v. Edison, 9 Mich. App. 276, 156 N.W.2d 623 (1967).

promisor, as in closing down his business.[30] The question of subsequent impossibility is not a decided rule of law in all jurisdictions. Under a number of authorities, the promisor is not discharged.[31]

Several authorities hold that the impossibility which will, or may, excuse the performance of a contract must be concerned with the nature of the thing to be done, and not in the inability or incapacity of the promisor, or obligor, to do it.[32] This last view applied to the *Paynter* situation, where the events leading to the closing of N.Y.U. were not caused by or under the control of the University.[33] Furthermore, the University was able to perform, but could not [or would not] due to the national and local circumstances following the killings at Kent State.[34]

It followed, then, that *Paynter* could have been decided on the grounds of a situation of impossibility which arose subsequent to the entrance into a tuition contract, where such subsequent situation was not the fault of the University. Because of this fortuitous situation, the promisor was precluded from performing by external circumstances. However, the consideration of subsequent impossibility, although patently germane to the fact situation, was not employed by the defense either at trial or on appeal.

Another defense which must be considered relates to specific provisions in a contract excusing performance. A provision in a contract that performance shall be excused in the event of certain contingencies is valid, but it cannot be extended to cover contingencies not specifically provided for therein.[35] What this means is that where a person by his contract charges himself with an obligation that is possible and can be lawfully performed, he must perform it.[36]

30. Whelan v. Griffith Consumers Co., 170 A.2d 229 (D.C. 1961); Dudley v. Boise Cascade Corp., 76 Wash. 2d 466, 457 P.2d 586 (1969).

31. Del. Martin v. Star Publishing Co., 50 Del. 181, 126 A.2d 238 (1956).

32. Phelps v. School Dist. #109, 302 Ill. 193, 134 N.E. 312 (1922); Industrial Natural Gas Co. v. Sunflower Natural Gas Co., 330 Ill. App. 343, 71 N.E.2d 199 (1947); Platt v. Fischer, 285 Ill. App. 110, 1 N.E.2d 735 (1936).

33. Deibler v. Bernard Bros., 385 Ill. 610, 53 N.E.2d 450 (1944); Pioneer Life Ins. v. Alliance Life Ins. Co., 374 Ill. 576, 30 N.E.2d 66 (1940); Crown Ice Machine Leasing Co. v. Sam Senter Farms Inc., 174 So. 2d 614 (Fla. App. 1965).

34. "Every effort was . . . made by the administration and the faculty to calm the students and to direct their energies away from violence and into constructive channels." Brief for Defendant-Appellant, at 6-7 (Transcript at 27).

35. Formal classes were suspended for the final week of the semester and provision was made for the faculty members to make themselves available to all students to assist them in arranging for the completion of their studies. Brief for Defendant-Appellant, at 7 (Transcript at 26-28).

36. Whelling Valley Coal Corp. v. Mead, 186 F.2d 219 (4th Cir. 1950), 28 A.L.R.2d 1007.

In *Paynter* there was no actual contractual stipulation excusing performance in times of crisis on the campus. Nonetheless, there was a statement in the University bulletin which referred to the fact that the University's academic programs were expressly subject to change without notice, at the discretion of the administration,[37] and this was relied upon by the University in their defense.[38] Although Judge Picariello regarded this statement as "too specious to merit any consideration,"[39] it should not have been ignored by the court.[40] The school bulletin was a statement of University policy, giving constructive notice to students of these particular standards and stipulations. There was no mention of Paynter's son expressing any displeasure or taking any exception to this or any other University policy made known to him on or about the time the tuition contract was entered into.[41]

A correlative of this issue of avoiding the terms of a contract by stipulation of possible situations whereby performance will be excused is the question of bad faith on the part of the party allegedly failing to perform. The absence of bad faith in failure to perform may be a material factor in determining whether non-performance is excused.[42]

The final defense to be considered is frustration of contractual purpose, also a material factor, but nonetheless absent in this case. Impossibility of performance of a contract may be subjective, or objective and due to the incapacity of the particular person who has

37. Platt v. Fischer, 285 Ill. App. 110, 1 N.E.2d 735 (1936); Zeff v. Farrington, 168 Colo. 48, 449 P.2d 813 (1969); Bayview Gen. Hosp. v. Assoc. Hosp. Service, 45 Misc. 2d 218, 256 N.Y.S.2d 471 (1964).

38. 64 Misc. 2d 226, 230-31, 314 N.Y.S.2d 676, 680 (1970).

39. *See supra* note 1, at 14, wherein the defendant University commented on the court's disregard for the bulletin by stating, "This explicit written provision [power to change] of the contract was before the Court; it should not have been ignored."

40. *Supra* note 38, at 230-231.

41. *Supra* note 1, at 14.

42. The adherence by defendant N.Y.U. to the binding power of the bulletin raises the question of just how binding *is* a policy statement in a university bulletin? On appeal, the court found an *implied* right on the part of college officials to make minor alterations in classes, and that the closing of the entire school to be just as "insubstantial" a change. Paynter v. New York University, 35 App. 2d —, 319 N.Y.S.2d 893, 894. The appellate court here is consolidating full-scale closing of an entire university within the ambit of superficial room or curricula alterations. Is there not an important distinction between these two actions? By impliedly binding the student to the mandates of the bulletin is not the court blindly assuming that the bulletin is carefully read by the applicant prior to tender of tuition? In order to hold the bulletin so binding, should it not be offered for perusal *when the tuition contract is entered into*? This could be readily compared with garage claim tickets, tickets to sports events, or other similar circumstances wherein a party tries to limit his contractual or tort liability by disclaimer clauses.

undertaken to do the thing.[43] This, in essence, is the doctrine of frustration. Performance of the terms of a contract is excused if the purpose thereof is frustrated by law or an emergency situation. The doctrine is infrequently invoked and recognized by the courts even less often.[44]

The applicability of this tenuous doctrine of commercial frustration to the *Paynter* case was a moot point. The inherent difficulty in determining whether or not frustration applied was that the court's interpretation of the facts and the doctrine was the deciding factor. It could have been argued that due to the emergency situation on campus, and the desire of New York University to save lives and safeguard property, the University should have been absolved from performance of its obligation to keep the schools open.[45] The result of such a defense being pursued in this or any other similar action is, however, unknown.

The preceding doctrines for excuse of performance of a contract could have been employed by the University, or by the plaintiff in response to N.Y.U. denials. The contract questions discussed above were given very little exposure in the University's appellate brief,[46] and cursory observance by the lower court judge. Thus, no reasons were given for the court's conclusion that "the defendant breached its contract during its lifetime."[47] The lower court did not consider or even mention the terms of the contract, the obligations of the University thereunder, or the acts constituting the breach. The University, as appellant, claimed these failures to be reversible error.[48]

43. Lutz v. Currence, 91 W. Va. 225, 112 S.E. 506 (1922). Bad faith was not raised in *Paynter*, although the issue could have been raised in a hypothetical situation. That is, did the defendant University act in bad faith by closing its doors and not continuing formal classes. The argument here would have been tenuous, but, had the closing come earlier in the semester, it might have been feasibly argued that "locking out" the student body from their bargained for classes was acting in bad faith.

44. Smith Eng. Co. v. Rice, 102 F.2d 492 (9th Cir. 1938), *cert. denied*, 307 U.S. 637 (1939); The B's Co. v. B.P. Barber, 391 F.2d 130 (4th Cir. 1968).

45. Anderson, *Frustration of Contract—A Rejected Doctrine*, 3 DE PAUL L. REV. 1 (1953).

46. *Supra* note 12, at 6.

47. Defendant University claimed that plaintiff gave no evidence as to the terms of the contract. Defendant stated further that no reasons were given for the court's finding of the breach. The University alluded to New York's substantive law, pointing out requisite elements for finding liability for breach of contract. Defendant finally discussed the question of the entirety of tuition contracts and found them to be entire and indivisible. *Supra* note 1, at 11, 14, 16-20, and 21-23.

48. *Supra* note 11.

In Point II of its argument,[49] the University did discuss the tuition contract made with the plaintiff's son, mainly in terms of error promulgated in the lower court in dealing with it. The University stated in its appellate brief that:

> in order to find liability for breach of contract under New York Law, it is necessary to establish the terms of the contract, the nature of the contractual obligation alleged to have been breached and the facts evidencing breach.[50]

The appellant University further suggested that:

> although the courts could have looked to the interest of the parties in the formation of the contract, it could not alter any of the terms of the contract under the guise of interpretation.[51]

In its brief, the University further stated that this rule of contracts applied to tuition contracts, and had been so applied by New York courts for nearly a century.[52]

Since several doctrines concerning excuse of performance were not used in connection with *Paynter*, the foremost questions to be considered forthwith are what rights and obligations are inherent in a contract for tuition and did the University have certain inherent rights exclusive of judicial intervention?

When a student enters a tax-supported college or university, he creates a contractual relationship with that school, whereby, attendance may be considered a right by the prospective student. In the case of private institutions, this is a matter of strictly contractual agreement between the institution and its students.[53] This point was accepted by

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49. *Supra* note 1, at 14.

50. *Supra* note 1, at 15. Point II is captioned, "THE FAILURE OF THE TRIAL COURT TO APPLY THE SETTLED RULES AND PRINCIPLES OF SUBSTANTIVE LAW IN THE INSTANT CASE DEPRIVES THE UNIVERSITY OF SUBSTANTIAL JUSTICE."

51. *Supra* note 1, at 16. *See also* Clark v. N.B.C., 28 Misc. 2d 481, 209 N.Y.S. 2d 60 (Sup. Ct. 1960).

52. *Supra* note 1, at 17. *See also* Muzak Corp. v. Hotel Taft Corp., 1 N.Y.2d 42, 133 N.E.2d 688 (1956); Wilson Sullivan Co. v. International Paper Makers Realty Corp., 307 N.Y. 20, 119 N.E.2d 573 (1954); Poel v. Brunswick-Balke-Collender Co., 216 N.Y. 310, 110 N.E. 619 (1915), *motion for reargument denied.*

53. Carr v. St. John's University, 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd. without opinion*, 12 N.Y.2d 802, 187 N.E.2d 18 (1962); *Anthony v.* Syracuse University, 224 App. Div. 487, 231 N.Y.S. 435 (1928); Van Brink v. Lehman, 199 App. Div. 784, 192 N.Y.S. 342 (1922); Goldstein v. New York University, 76 App. Div. 80, 78 N.Y.S. 739 (1902); People *ex rel.* Cecil v. Bellvue Hosp. Medical College, 60 Hun. 107, 14 N.Y.S. 490 (1891), *aff'd. on opinion below*, 128 N.Y. 621, 28 N.E. 253 (1891); Jones v. Vassar College, 59 Misc. 2d 296, 299 N.Y.S.2d 283 (1969); William v. Stein, 100 Misc. 677, 166 N.Y.S. 836 (1917).

both the plaintiff and defendant in *Paynter*.[54] In its brief, defendant asserted further that since the student was not required to enter, the university may impose such reasonable conditions upon his entrance as it deemed proper.[55] The defendant felt that such conditions were a part of the implied tuition contract and were binding upon the parties. Thus—impliedly under this theory—a student seeking to recover on the contract is bound by all of its provisions and may not be permitted to repudiate one part in order to recover on another.[56] The defendant suggested then, that the tuition contract was entire and indivisible.[57]

The plaintiff, Paynter, on the contrary, considered the contract to be a divisible one. He considered the tuition to be based upon the number of credits attached to a course, which, in turn, were based upon the numbers of hours of classroom lecture, laboratory and so forth. The consideration for the tuition payment, therefore, would have been the promise by the University to offer the student the opportunity to attend a certain number of lectures of a certain duration.[58] In essence, Paynter prayed for a proportionate refund because the University kept his son from receiving a definite number of hours in class that he, Paynter, had contracted for.[59]

The University countered the plaintiff's argument of a divisible contract by stating that:

> A student is entitled to pursue the educational program for which he has enrolled and if, by reason of a university's breach of contract, he is prevented from doing so, he may recover all that he has paid. In short, it is a *course of study* which the university must provide, and, if it fails at all, it fails completely.[60] (emphasis added)

In *Kabus v. Seftner*,[61] the court held:

> The plaintiff should have received all or nothing, for the contract was entire and

54. Howard College v. Turner, 71 Ala. 429 (1882). *See also* People *ex rel.* Tinkoff v. Northwestern University, 333 Ill. App. 224, 77 N.E.2d 344 (1947), *cert. denied*, 335 U.S. 829 (1948).

55. Brief for Defendant-Appellant at 18. Brief for Plaintiff-Respondent at 3.

56. *See* Anthony v. Syracuse University, 224 App. Div. 487, 231 N.Y.S. 435 (1928).

57. Brief for Defendant-Appellant at 18.

58. *See, e.g.*, William v. Stein, 100 Misc. 677, 166 N.Y.S. 836 (1917); Kabus v. Seftner, 34 Misc. 538, 69 N.Y.S. 983 (1901); Drucker v. New York University, 59 Misc. 2d 789, 300 N.Y.S.2d 749 (1969), *aff'd. without opinion*, 23 App. Div. 2d 1106, 308 N.Y.S.2d 644 (1970).

59. Brief for Plaintiff-Respondent at 4.

60. Brief for Defendant-Appellant at 21.

61. 34 Misc. 538, 69 N.Y.S. 983 (Sup. Ct. 1901).

indivisible. The defendants agreed to qualify the plaintiff for a particular examination. If they failed to do that they were entitled to no compensation. On the other hand, if the acts of the plaintiff prevented them from living up to their contract, he forfeited the entire amount paid for his tuition. Under the contract in evidence there could not be part performance and a partial recovery on some theory of quantum meruit.[62]

The defendant agreed with plaintiff's stand that the tuition was refundable if the University breached its obligation to instruct a student in courses agreed upon when the contract went into effect. The main point in contention then was whether the University offered class hours or a course of study for the tuition paid. In *Anthony v. Syracuse University*, the court held that one "matriculating at a university establishes a contractual relationship under which, upon compliance with all reasonable regulations as to scholastic standing, attendance, deportment, payment of tuition, and otherwise, he is entitled to pursue his selected course to completion. . . ."[63]

The Supreme Court of the State of New York, Appellate Term, First Department held in *Paynter* (on appeal by N.Y.U.), that:

while in a strict sense, a student contracts with a college or university for a number

62. 34 Misc. 538, 539-40, 69 N.Y.S. 983, 984 (Sup. Ct. 1901). In the Kabus case, the plaintiff, a student, sought to recover tuition fees for defendant university's failure to give him the necessary instruction to enable him to pass the examination given by the state board of regents. The Supreme Court, Appellate Term, held that it was error to allow a proportionate recovery for the instruction which plaintiff (student) did not receive by his being suspended for improper conduct. Since the contract was entire and indivisible, the plaintiff was either entitled to total recovery or forfeiture. The Court here held the latter to be the case.

63. Anthony v. Syracuse Univ., 224 App. Div. 487, 490, 231 N.Y.S. 435, 438 (1928). The plaintiff (a student) was dismissed from defendant university and brought suit to be restored to the student body. Plaintiff had signed a card upon registration at the university promising to comply with regulations of the university, including those of conduct. It seems that plaintiff violated these regulations, precipitating his dismissal. *See also, supra* note 59, at 12-13, for comments on divisibility.

Are the two promises for this contract mutually exclusive? If the student does not comply with "reasonable" regulations must the university *still* supply the "course of study;" and, conversely, if the university fails to supply the requisite elements of the "course of study," is the student compelled to comply? If a student in a law school contracts for a course of study in law with the understood goal of passing the bar examination of his state, does he have recourse to the law school if he fails the bar due to an incomplete or non-existant course in—for instance—equity? Does the student have a right against the school for the cost of retaking the exam due to the *school's* failure to fulfill its contractual obligation to provide a "course of study" to prepare a student for the bar (assuming full compliance on the part of the student with all school regulations). The same situation would apply to an accountant hoping to become certified or the medical student working to achieve his M.D. and state certification.

of courses to be given during the academic year, the services rendered by the university cannot be measured by the time spent in a classroom.[64]

Thus, the court found that there was no breach by the University, and consequently the lower court was reversed.

The final point concerning the tuition contract in *Paynter* revolved around the University bulletin and the "emergency" change in the school's closing date. In *Texas Military College v. Taylor*, the court decided that although a college or university catalogue may be binding as a written contract where the student enters under the terms of the catalogue, there is nothing to prevent the parties from making a contract different from that contemplated by such catalogue.[65] Plaintiff, Paynter, stated in its brief that, as a general rule, a contract cannot be modified or altered without the consent of all parties thereto.[66]

New York University saw its actions in modifying the bulletin as an exercise of its discretionary power of control over academic programs and requirements[67] and a contractual right stated in the bulletin itself.[68] Also holding in favor of this point was *Samson v. Trustees of Columbia University*, where the court found that:

[t]he institution . . . obligated itself—*subject, of course, to changes of plan, curriculum and the like*—to permit a student in good standing to continue the particular course for which he has entered, upon payment of the necessary fees and compliance with other reasonable requirements.[69] (emphasis added)

Other courts have held that the ordinary contractual relation of tuition for a course of study is subject to modification by the university regulations assented to by the student.[70]

The court reviewing *Paynter* held that the insubstantial change

64. 319 N.Y.S.2d 893, 894 (1971). This statement will be further considered in the conclusion of this casenote.

65. Texas Military College v. Taylor, 275 S.W. 1089 (Tex. Civ. App. 1925).

66. Brief for Plaintiff-Appellee at 5, wherein, Alcon v. Kinton Realty Inc., 2 A.D.2d 454, 156 N.Y.S.2d 439 (1956), is cited as authority.

67. Brief for Defendant-Appellant, *supra* note 1, at 20.

68. It stated in the bulletin that, *subject to change* at the discretion of the administration, the spring semester would commence on February 2, and end on May 15 (Emphasis added). *Supra* note 1, at 4.

69. 101 Misc. 146, 148, 167 N.Y.S. 202 (Sup. Ct. 1917), *aff'd. without opinion*, 181 App. Div. 936, 167 N.Y.S. 1125 (1917). Plaintiff, a student at defendant Columbia University, was dropped from the student body for actions held to constitute misconduct. In other words, plaintiff had not complied with the reasonable requirements of the University that students not interfere with the running of the University or impair its control over the student body.

70. *See, e.g.*, Anthony v. Syracuse University, 224 App. Div. 487, 231 N.Y.S. 435 (1928).

made in the schedule of classes did not permit a recovery of tuition.[71] The probable rationale for this decision was the fact that the students of New York University lost only a few days of class instruction, the bulk of time lost by the closing being days set aside strictly for final examinations.[72] Since these examinations could have been made up or bypassed by options open to the students at plaintiff's son's college,[73] the "breach" by defendant was patently inconsequential. And even if it were not, by tacit assent to the University bulletin Paynter impliedly agreed to such a change.

The foregoing discussion leads directly to an examination of the inherent rule-making authority of universities. Are universities allowed to promulgate rules and regulations governing student dress, conduct and attendance, etc.[74]; and if so, what are the limits on these powers? Is there any "due process" requirement? Is there judicial review? In its brief, New York University asserted that:

> the promulgation of rules and regulations whereunder formal classes were suspended and students were offered various options for the completion of their courses[75] was within the discretionary powers of the administration.[76]

The right of private universities to manage their internal affairs without coercion or outside interference has hardly been open to doubt since the decision of the United States Supreme Court in *Trustees of Dartmouth College v. Woodword.*[77] In New York, the applicable rule is that:

> private universities are governed on the principles of academic freedom, and, where a matter is within the discretionary powers of the university administration and where there is no showing that the exercise of such power was arbitrary, capricious or illegal, a court has no right to substitute its judgment for that of the administration.[78]

Clearly the scope of judicial review is limited.

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71. 319 N.Y.S.2d 893, at 894 (1971).

72. *Supra* note 1. Quaere: Would the Court have arrived at the same conclusion if *forty* days of instruction time had been lost?

73. *Supra* note 1, at 8.

74. *See also* Comment: *The Legality of Dress Codes for Students*, 20 DE PAUL L. REV. 222 (1970).

75. *Supra* note 1, at 8.

76. *See, e.g.*, Harte v. Adelphi University, N.Y.L.J., May 19, 1970, at 19, col. 2 (Sup. Ct. Nassau Co.).

77. 17 U.S. (4 Wheat) 518 (1819).

78. *See, e.g.*, Lesser v. Bd. of Education, 18 App. Div. 2d 388, 239 N.Y.S.2d 776 (1963); People *ex rel.* Goldenkoff v. Albany Law School, 198 App. Div. 460, 191 N.Y.S. 349 (1921); Beta Sigma Rho, Inc. v. Moore, 46 Misc. 2d 1030,

The goal of a university is to maintain a climate adequately suitable for the advancement of learning. A natural concomitant, therefore, is that the university can promulgate its own rules to uphold this academic atmosphere, and take any necessary steps to punish or forestall conduct implicitly deleterious to the university system. Thus, a further rationale for the inherent discretionary powers of the university is sustained by the basic needs of higher learning institutions themselves.[79] Along with this inherent power there is a corresponding responsibility on the part of the student to observe the university's rules and regulations.[80]

After the student enters a contracted agreement with a private university, and has impliedly agreed to conform with rules of conduct, the question necessarily arises as "to whom conduct must be 'acceptable,' and what is 'proper,' and what does 'good taste' require."[81] In *Buttny v. Smiley*, the court ruled that regulations and rules which are necessary in maintaining order and discipline are always considered reasonable.[82] In addition to the inherent power theory, the district court indicated that university regulations for students need not meet the requirements of specificity imposed upon state statutes, since the goals

261 N.Y.S.2d 658 (Sup. Ct. 1965), *aff'd. mem.*, 25 App. Div. 2d 719, 269 N.Y.S. 2d 1012 (1966); Edde v. Columbia University, 8 Misc. 2d 795, 168 N.Y.S.2d 643 (Sup. Ct. 1957), *aff'd.*, 16 App. Div. 2d 780, 175 N.Y.S.2d 556 (1958), *appeal dismissed*, 5 N.Y.2d 881, 182 N.Y.S.2d 828, *cert. denied*, 359 U.S. 956 (1959); People *ex rel.* O'Sullivan v. New York Law School, 68 Hun. 118, 22 N.Y.S. 663 (1893); *see also* Carr v. St. John's University, Anthony v. Syracuse University, Goldstein v. New York University, Jones v. Vassar College, *supra* note 53. For an Illinois view on the exercise of "corporate" powers by a university, *see* People *ex rel.* Board of Trustees of University of Illinois v. Barrett, 382 Ill. 321, 46 N.E.2d 951 (1943).

79. It is a truism that a student at a private university is there as a matter of privilege, and not as of right, as in state schools. Since privileges may be revocable by the grantor, the question arises of affording the grantee—the private university student—procedural safeguards prior to a revocation. *See also* Buttny v. Smiley, 281 F. Supp. 280 (D.C.D. Colo. 1968), wherein it was stated: "University authorities have an inherent general power to maintain order on campus. . . .;" and Due v. Florida A. & M. University, 233 F. Supp. 396 (N.D. Fla. 1963), which concurs. *See generally* Project: *Procedural Due Process and Campus Disorder: A Comparison of Law and Practice*, 1970 DUKE L.J. 763, 773, 795.

80. "Colleges and universities have the inherent power to promulgate reasonable rules and regulations for government of the university community; likewise, students have corresponding responsibilities and their observance of those rules and regulations." Zanders v. Louisiana State Bd. of Education, 281 F. Supp. 747, 757 (W.D. La. 1968); *see also* Goldberg v. Regents of University of California, 248 Cal. App. 867, 57 Cal. Rptr. 463 (1967).

81. *See* Note, 29 OHIO L.J. 1023 (1968).

82. Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968).

and purposes of the university, as well as the nature of the institution, are peculiarly different.[83]

A study of American case law has indicated that arguments against university rules based upon due process or vagueness have not met with success. The courts have seldom overturned disciplinary actions whether taken by public or private universities.[84] These actions were taken in accordance with what might be called an "academic judgments" rule. The tendency has been to treat the academic administrator's judgment in the same fashion as the business judgments of a corporate director. The deference has extended, however, from the academic realm to the realm of conduct, in which the expertise of the court is unsurpassed.[85]

The courts seem to have been completely excluded in the determination of matters involving university policies. In *Carr v. St. John's University*, the court held that:

> when a university, in expelling a student, acts within its jurisdiction, not arbitrarily but in exercise of an honest discretion based on facts within its knowledge that justify the exercise of discretion, a court may not review the exercise of discretion.[86]

In *Goldberg v. Regents of California*, upon finding that the university had "inherent power" to dismiss the students for their actions, the court refused to consider the extensively briefed vagueness claim.[87] Such inherent powers are not exclusively possessed by the universities and they are applicable at the high school level as well.[88]

In *Paynter*, the Supreme Court of the State of New York adhered

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83. Jones v. State Bd. of Education, 279 F. Supp. 190, 202 (M.D. Tenn. 1968); *see also* Steier v. New York State Educ. Commissioner, 271 F.2d 13 (2d Cir. 1959), *cert. denied*, 361 U.S. 966 (1960); Dixon v. Alabama State Bd. of Education, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

84. Due v. Florida A. & M. University, *supra* note 79; Dehaan v. Brandeis University, 150 F. Supp. 626 (D. Mass. 1957); People *ex rel.* Pratt v. Wheaton College, 40 Ill. 186 (1866); Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913); Carr v. St. John's University and Anthony v. Syracuse University, *supra* note 53; People *ex rel.* Goldenkoff v. Albany, *supra* note 78; and Goldberg v. Regents of University of California, *supra* note 80.

85. "Such rules of deference should be extended only to areas where the courts lack expertise and are unable to easily become knowledgeable." Note, 29 (OHIO L.J. 1023, 1024 (1968)). *See* note 83 *supra.*

86. *Supra* note 53, at 632. *See e.g.*, People *ex rel.* Goldenkoff v. Albany, *supra* note 78; People *ex rel.* O'Sullivan v. New York Law School, *supra* note 78; People *ex rel.* Cecil v. Bellvue Hosp. Medical College, *supra* note 53.

87. Goldberg v. Regents, *supra* note 80.

88. McGee v. Board of Education, District #209, Docket No. 71C1871 (N.D. Ill., filed Aug. 18, 1971), dismissed, Feb. 13, 1972; Appeal will be taken.

(on appeal) to the reasoning of the pro-university decisions discussed above. A unanimous court held that:

> Private colleges and universities are governed on the principal of self-regulation, free to a large degree, from judicial restraints . . . and *they have inherent authority to maintain order on their campuses.* In the light of the events on the defendant's campus and in college communities throughout the country on May 4 and 5, 1970, *the [lower] court erred in substituting its judgment for that of the university administrators* and in concluding that the university was unjustified in suspending classes for the time remaining in the school year prior to the examination period. The circumstances of the relationship permit the implication that the professor or the college may make minor changes in this regard. The insubstantial change made in the schedule of classes does not permit a recovery of tuition. We conclude that substantial justice was not done between the parties 'according to the rules and principles of substantial law'. . . . (emphasis added)[89]

Accordingly, the decision of Judge Picariello was reversed and the complaint of Roger Paynter was dismissed.

IMPLICATIONS OF PAYNTER V. NEW YORK UNIVERSITY

> Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[90]

The decision in *Paynter v. New York University* had a two-fold significance. First, the court sought to define "an education" and secondly, it re-enforced a firmly established judicial practice of not reviewing discretionary decisions made by trustees of universities.[91]

The court was reasonable in its decision to the extent that it felt that Paynter's son did, in fact, receive the education he had contracted for. The time spent in the classroom is not the sole criterion for deciding whether or not the education bargained for has been received. College courses are bound by ridiculously few constants (*e.g.* textbooks, syllabi, bulletin synopses). It is the variables—the professor and his personality, preparation, knowledge, *et al*—which decide how a course will be taught. It is obvious that the same course taught by different instructors will have varied results, perhaps the least of which is the strong possibility that one professor may conclude his presentation of the *required* course material before the other. It therefore appears to be true that "the services rendered by the university cannot be measured by the time spent in a classroom"[92]—*up to a certain extent.*

89. Paynter v. New York University, 35 App. 2d —, 319 N.Y.S.2d 893, 894 (1971).

90. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); *see also* Note, 29 OHIO L.J. 1023, n.86 (1968).

91. *Supra* notes 83, 84, 85.

92. *Supra* note 64, at 894.

The logic of the court here was basically sound, but it failed to consider an important factor. Quaere: Since it was decided that time spent in the classroom was not the only determinant of a university's performance, is it not possible that the loss of a number of class hours *can* constitute a breach of contract? Professors may miss classes due to professional demands, personal business, speaking engagements, and a myriad of other reasons. Is this enough to constitute a breach? The pass-fail option, as offered by the Senate of N.Y.U.,[93] for example, may not compensate for the laxity of a law professor who knowingly allows his private practice to take him from the classroom and his contractual duty to instruct. A half-hearted presentation or frequent lapses between class meetings (as well as concentrated, last-minute make-up "jam" sessions) can have a deleterious effect upon students who pay tuition to learn in a continuous and conscientious process and not in scattered sessions.[94]

Although *Paynter* raised the issue of time in class, it may not escape scrutiny on the question of quality of education. The fact that classes were nearly completed before final examinations when N.Y.U. closed implied that all course matter approached a level of entirety. The presumption, though, was a rebuttable one. The spectre of quality and quantity of education hovers over the outcome of the case. Time and documentation do not permit an attempted complete answer to this grave problem at the present time.[95]

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93. *Supra* note 1, at 8.

94. The Paynter case involves a student working toward a bachelor's degree. His final grades in college may have some bearing on his post-graduate courses or employment. The fact that he did not receive the "full measure" of his classes probably will not have a great effect upon his future plans. Consider, however, the plight of a law student, whose classes and their content directly apply to his passage of the bar examination, which in turn bears upon his future earnings. Would such a student have any recourse if, for instance, he received only a partial course in civil practice, and thereby failed his state's bar? Would the university, as employer of the professor, be liable to the student for the cost of retaking the bar exam; or for a bar review course; or even for a projected figure of loss of future earnings? When a law school contracts (this comes within the ambit of the tuition contract) with a student, it either explicitly or impliedly agrees that the student will be prepared to take a bar exam, by having been offered the requisite courses. When a course or courses are improperly taught or otherwise not completed, does the university become liable for breach of contract? Does the deprived student have standing to demand some type of relief? Or will the courts dismiss the action based on a Paynter theory on non-intervention in matters of discretionary decisions by university trustees? It appears that these hypothetical issues should come under the purview of the courts.

95. Should not universities be responsible for the quality of the education they offer by contractual obligation? At least a student-faculty committee could be

The second implication of the *Paynter* decision—that of inherent powers—can only be given cursory coverage, since no answer has been forthcoming to this date. This is due to the paradoxical aspect of these "powers." The university must be able to exercise certain discre-

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authorized to hear critical (and constructive) opinions on classes and instructors to maintain some standards for education. Otherwise, would the university be liable for poor quality dissemination of information by poor quality of absentee professors? Can a university be allowed to go unchecked if it accepts money from a student who in good faith expects an "education" and receives something less through no fault of his own?

The question can also be raised at this juncture as to the performance of the university if it closes its doors during the academic session for some reason. If the student can sue for pro rata refund of tuition, can the university be allowed to mitigate damages? Would a plan for finals or a pass-fail grade—as in Paynter—lessen the liability of a university that shut down general operations before the scheduled end of the year? Also along this same line of questioning: can a student contract away his right to claim damages if he is not given a full or quality course of study? If so, can this be done unknowingly by the student through a statement in the bulletin exculpating the university?

The lower court decision in *Paynter* covered the above areas in its dictum. The court stated: "The justification for a university is that it preserves connection between knowledge and the zest of life, by uniting the young and the old in the imaginative consideration of learning. The university imparts information, but it imparts it imaginatively. At least this is the function which it should perform for society. A university which fails in the respect has no reason for existence." 64 Misc. 2d 226, 228, 314 N.Y.S.2d 676, 677.

"Indeed, in an effort to improve relations between students and faculty, in a situation of persistent smouldering uneasiness which was then permeating its campuses' atmosphere, Kent State University instituted a program two years ago in which faculty members visited dormitories for informal discussions with students. This program was dropped soon thereafter for lack of faculty interest. This court shudders to wonder if the catastrophy which befell that college campus soon thereafter might not have been averted had this program been pursued." 64 Misc. 2d 226, 229, 314 N.Y.S.2d 676, 678.

After admonishing the defendant university's administrators for acting in a manner constituting "*panic reaction* to avoid violence and bloodshed instead of a *planned action*" which would make them a "responsible force in social change," Judge Picariello continued by stating, "[defendant's administrators] have failed to gauge the tenor of contemporary social movements to be able, as is the function entrusted above all to the university, with sufficient foresight, sensitivity, honesty, and courage in the consideration of these developments, to help, guide, and give direction to our society, and to do so with the full democratic participation of the students. To expect students to develop loyalty and commitment to democratic principles when, in the ideal situation of intellectual exchange in the university, they have a voice neither in the governance of their behavior nor the proper guidance in correct, effective ways of expressing thoughts on such vital issues as the survival of the individual, of the nation, and of humanity, and to offer by way of consolation the fact that they have 'passed' courses, for which they have received grades, the symbols, not the substance of knowledge, is to disappoint the hopes of students, of parents, and of the nation." 64 Misc. 2d 226, 229-230, 314 N.Y.S.2d 676, 679.

Is a far-reaching deterioration of the relationship between student and university administration the outcome if these problems are allowed to stand unchecked?

tion in running its affairs for the safety and smooth operation of its institutional purposes. It is when these "necessary" powers come into conflict with contractual and constitutional rights of students that the discretion of the trustees must be questioned and scrutinized by the courts. It is little wonder that the powers and *practices* of the trustees have been questioned.[96] In some cases, it appeared that the rights of due process had been either suspended or neglected in the universities' exercise of their inherent discretionary powers.[97] The courts, however, have refused to become involved whenever the use of "discretion" was involved.[98]

The problem of inherent powers is not limited to the university level. A suit has recently been filed in federal court to test the constitutionality of the school expulsion law in Illinois.[99] Hopefully, other cases will arise at all educational levels to test the seemingly strong home-rule authority that escapes the supervision of the judiciary. There are questions that must be answered. The decision of *Paynter v. New York University* cannot be dismissed lightly.

Samuel K. Bell

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96. *Supra* note 81, at 1023.

97. *Supra* note 79, at 773.

98. *Supra* note 85. Will the judicial policy of "laissez-faire" allow college and university administrators to control school policies totally unfettered? Since the courts have said that they will step in only when the acts of the trustees are capricious, who is to be the judge of the severity of the courts' actions?

The most pressing issue here is what can be done to restrain college administrators from exercising injuriously uncontrolled power? Administrators manage college affairs for a body of students who contracted for an education. Why should this viable agglomerate not be allowed to participate in the running of that which they sustain to a great extent through their tuition payments? Judge Picariello cautioned N.Y.U. and all universities to open channels of communication with their respective student bodies. Students should take part in programs to improve their schools, and administrators should permit and encourage this. Caution, however, to the administrator who lets student representatives on to standing or ad hoc committees, and then ignores student wishes. He is merely throwing a sop to his charges, which *could* (regrettably) be thrown back in his face in the heat of multi-fold vehemence. May this unnecessary state of affairs *not* be permitted to come about, by proper steps that are meant to be mature and effective.

99. *Supra* note 87.