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A Background to Variance Problems Under the Uniform Commercial Code: Toward a Contextual Approach

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I. Introduction

This article is an introduction to analysis of the variance problem in contract formation under the Uniform Commercial Code.[1] The focus in this essay will be upon pre-Code approaches to resolving the variance problem. This work has several premises and objectives. One premise is that, in order to correctly analyze a problem, one must learn as much as possible about the problem itself. A problem described under a single label may involve widely divergent and different facts in specific cases, or it may occur in widely various circumstances, and these matters may well affect the solution which is thought to be correct. A second premise is that history repeats itself in subtle and indirect ways. Old habits of thought or assumptions about a problem may affect the way in which we understand and construe a newer solution/statute or apply it. Identifying inadequate, antiquated habits of thinking about

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1. The Code section which addresses the variance problem is U.C.C. § 2-207 (1978).

the variance problem may also help to ascertain whether similar mistakes are occurring under the Code. A third premise is that context is important. Analysis of the variance problem will require examination of several contexts. Historical context often can show fully the general varieties of a particular problem, as well as the success or lack of it in various alternative solutions which have been attempted. Examination of the various processes by which the problem develops—its procedural context—also assists both in understanding the dimensions of the problem and in assessing the utility or desirability of various solutions. Finally, the context of policies served by various solutions and approaches to the problem must be examined.

This outline of the premises of the writer goes far toward identifying the objectives of this article. One goal is to correct the record about pre-Code treatment of variance. In doing so, it will be possible to identify more precisely the nature of the variance problem. This focus on the problem will have the advantage of identifying and isolating various prototype variance problems without struggling to understand or apply a Code solution at the same time. Understanding the problem will help to assess the usefulness of the Code solution, or any solution for that matter. Another objective of examining pre-Code approaches and solutions to variance is to correct the subtle and often indirect influence of traditional modes of thought and analysis of variance, which were based upon what this writer believes were incorrect descriptions of pre-Code law on variance. Even though the substance of the law on variance may have changed under the Code, old habits of thinking about and characterizing variance problems and solutions must be identified. Modern thought and analysis, if founded upon older, incorrect analyses of the problem and its solutions, may well adversely affect what has occurred under the Code. A subsequent article will analyze Code cases in light of the insights and considerations developed here.

II. Pre-Code Assumptions About Mirror Images and Their Solutions

Most analyses of Uniform Commercial Code section 207 began with the observation that it was a reaction to the mirror image rule.[2] This observation was illustrated especially with reference to

2. The mirror image rule is the common law rule that the response to an offer, if it is to operate as an acceptance, must match and conform to every term and particular of the

leading cases such as *Poel v. Brunswick-Balke-Collender Co.*,[3] and was followed by a textual explication of the statute. This approach was premised upon several unexamined or tacit assumptions. First, it was assumed that the variance problem itself with which the mirror image doctrine dealt, was relatively simple. A second unexamined assumption was the notion that the mirror image rule was a simple, mechanical principle which could be rigidly applied. The *Poel* court, later common law decisions, and Code analyses all shared these assumptions, but because they were assumptions, they were not examined or tested. We will now undertake that task.

One typical expression of the mirror image rule in the early twentieth century was that *any* variance in response to an offer prevented that response from operating as an acceptance. For example, in *Mahar v. Compton*,[4] the court stated:

> It is well settled . . . that . . . it must be made to appear that there was, not only a plain, unequivocal offer, but that the acceptance of such an offer was equally plain and free from ambiguity. In other words, there must have been an exact meeting of the minds of the contracting parties in respect to every detail of the proposed contract; and if the precise thing offered was not accepted, or if the acceptance was in any manner qualified . . . the universal rule seems to be that no valid contract is thereby established, but that such a modified or qualified acceptance must rather be treated as a rejection to the offer.[5]

Thus, the mirror image rule required a "meeting of the minds."[6] The rule appeared to focus upon the requirement of mutual assent, a proposition which several cases appeared to recognize explicitly.[7]

Poel v. Brunswick-Balke-Collander Co.,[8] a well-known case

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offer. A corollary of the mirror image rule is the last shot rule. This rule provides that a variant response to an offer is also a counter-offer which may then be accepted by the person who made the original offer. If this occurs, then the resulting contract consists of the terms contained in the counter-offer.

3. 216 N.Y. 310, 110 N.E. 619 (1915).

4. 18 A.D. 536, 45 N.Y.S. 1126 (1897).

5. 18 A.D. at 540-41, 45 N.Y.S. at 1128-29. *See also* Crown v. Goldsboro, 182 N.C. 217, 108 S.E. 735 (1921)(need meeting of minds on every detail); Stanley v. Gannon, 109 Misc. 611, 180 N.Y.S. 602 (1919)(need exact match on every detail); Howells v. Stroock, 30 Misc. 569, 63 N.Y.S. 1074 (1900)(slight variance means no meeting of minds); Marschall v. Eisen Vineyard Co., 7 Misc. 674, 28 N.Y.S. 62 (1894)(slightest variance means counter-offer).

6. This phrase is part of the now rejected subjective theory of contracts. For the origin of the phrase, *see* Farnsworth, *Meaning in the Law of Contracts*, 76 YALE L.J. 939, 943 (1967).

7. *See* El Reno Wholesale Grocery Co. v. Stocking, 293 Ill. 494, 127 N.E. 642 (1929) and Barrow S.S. Co. v. Mexican Cent. Ry., 134 N.Y. 15, 31 N.E. 261 (1892).

8. 216 N.Y. 310, 110 N.E. 619 (1915).

which illustrated these pre-Code assumptions, also displayed the confusion in analysis and application common to cases employing the mirror image rule. In *Poel*, an exchange of correspondence occurred after there had been oral negotiations between the parties for the sale of rubber. In a letter from the purchaser which was the purported acceptance, the phrase "[t]he acceptance of this order which in any event you must promptly acknowledge . . ." appeared.[9] The seller argued that because of this language, the reply was qualified and thus did not constitute acceptance. The court characterized the issue to be "whether these *writings* constitute a contract between the parties,"[10] and held that the correspondence was not a contract because the acknowledgement provision was a variance.[11] Thus, the *Poel* decision appeared to hold that when writings were exchanged, *only* the writings would be considered in determining whether an acceptance had occurred and the intent of the parties would be sought exclusively in the writings.[12] Furthermore, the court held as a matter of law that the slightest variance between the purported acceptance and the offer automatically and conclusively established the offeree's intent to enter into a contract only and exclusively upon all his terms.[13]

A. *The Poel Decision and the Statute of Frauds*

Closer analysis of the *Poel* opinion undertaken here, however, leads to the conclusion that, given the precedents existing at the time the case was decided, the result was probably incorrect. Many cases decided prior to the *Poel* decision did not dictate such an

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9. *Id.* at 317, 110 N.E. at 621.

10. *Id.* (emphasis added).

11. *Id.* at 319, 110 N.E. at 622. The court reasoned:

> That [acknowledgement] provision of the defendant's offer provided that the offer was conditional upon the receipt of the order being promptly acknowledged. It embodied a condition . . . . The import of this proposal was that the defendant should not be bound until the plaintiffs signified their assent to the terms set forth . . . . The plaintiffs did not acknowledge receipt of this order and the proposal remained unaccepted . . . . When the plaintiffs submitted this offer in their letter . . . only one of two courses of action was open to the defendant. It could accept the offer made and thus manifest that assent . . . or it could reject the offer. There was no middle course.

Id.

12. *See supra* note 10 and accompanying text.

13. That the offeree-buyer in *Poel* in fact intended to conclude a contract was suggested by an observation of the trial court that the market price for rubber fell drastically between the time that the purported acceptance was sent and the time for performance. *See* 78 Misc. 311, 317, 139 N.Y.S. 602, 607 (1912).

outcome and, further, the rationale for *Poel* was seriously misleading. An analysis of these earlier cases clearly demonstrates the misunderstanding of the *Poel* court about the precedents in the area which include confused statements of the applicable principles of law and their rationales.

The first step in such an analysis must be to examine the *Poel* litigation in the lower courts. Two issues were perceived there; first, whether there was a contract, and second, whether there was a memorandum sufficient to satisfy the Statute of Frauds.[14] The trial court found that there was a contract on the basis that the minds of the parties had met so clearly as to be "beyond question."[15] The existence of a contract appeared to have been so clear to the appellate court that it focused principally upon the Statute of Frauds issue.[16] Thus, the principal issue briefed by the parties before the highest court of New York was the Statute of Frauds question.[17]

This description of the arguments and issues in the lower courts is more than merely a matter of curiosity. Examination of the language in *Poel* against this litigational history leads to the inevitable conclusion that the rationale for that decision rested upon a particular understanding of the Statute of Frauds requirements and not upon any consideration of the policy or requirements of the contract formation process.[18]

The importance of the Statute of Frauds to the *Poel* rationale

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14. 159 A.D. 367, 144 N.Y.S. 727 (1913). Specifically, on appeal the court framed the issues as "whether the plaintiffs established a contract *valid within the statute of frauds*, and authority of defendant's agent to make the contract . . . ." *Id.* (emphasis added).

15. 78 Misc. at 316, 139 N.Y.S. at 606. The significant factors upon which the trial court relied included all of the oral negotiations and other acts of the parties, the writings, the actual understanding of the parties about whether a contract existed, and the fact that the market price of the product had been steadily falling and, at the time of performance, was well below the contract price.

16. *See* 159 A.D. at 373-78, 144 N.Y.S. at 731-34.

17. *See* 216 N.Y. at 311. The appellant's entire brief consisted of the following sentence which was accompanied by a string citation: "No contract valid within the provisions of the Statute of Frauds was proved." *Id.*

18. For example, the court explained that:

> The plaintiffs cannot prevail upon the theory that the writings express a contract, different in its terms and conditions from the contract which the parties entered into. *In order to satisfy the requirements of the statute of frauds* the written note or memorandum must include all the terms of the completed contract which the parties made . . . . The application of this principle to the facts of the present case makes it necessary that we should disregard the alleged oral agreement . . . and confine our attention to the writings.

216 N.Y. at 314, 110 N.E. at 620-21 (emphasis added).

was underscored by the precedents cited by the court. For example, in *Davis v. Shields*,[19] the stated issue was whether an oral agreement had been reduced to a writing sufficient to satisfy the Statute of Frauds. In that case, the court held that the plaintiff could not recover under the Statute of Frauds because the memorandum did not contain the oral agreement. In the language of the court, the memo was defective because it did not embody the "real agreement" of the parties.[20] Thus, *Davis* did not hold that there was not a contract, but that the contract—the real agreement—did not satisfy the Statute of Frauds and was, therefore, unenforceable.

Similarly, in *Julliard v. Trokie*,[21] after oral negotiations had occurred, the plaintiff sent a memorandum of the oral contract to the defendant. The defendant replied that the writing was erroneous and did not contain all of the agreed upon terms. At trial, the Statute of Frauds was interposed, and the court held that this statute required that a writing, in order to be enforceable as a contract, must embody *all* of the terms of a prior oral agreement.[22] In addition, *Leach v. Weil*[23] focused on the disparity between an oral agreement and a subsequent writing. The court held that the writing failed to satisfy the Statute of Frauds because essential contract terms were absent.[24]

The *Poel* court also relied on the decision in *Wright v. Weeks*.[25] In *Wright*, a writing referred to performance terms "as specified" and the specifications referred to were oral.[26] Holding that the requirements of the Statute of Frauds had not been met, the court reasoned that if a mere reference to a verbal agreement in a writing were held sufficient to satisfy the statute, then parties could evade the statute by signing a writing which recited that they had an oral contract.[27] The court also suggested that if the writing is

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19. 26 Wend. 341 (N.Y. 1841).
20. *Id.* at 349.
21. 139 A.D. 530, 124 N.Y.S. 121 (1910).
22. *Id.* at 533, 124 N.Y.S. at 123.
23. 129 A.D. 688, 114 N.Y.S. 234 (1908).
24. *Id.* at 691, 114 N.Y.S. at 236. The court explained that:

It does not suffice that the writing evidence *a* contract; it must embody the terms of *the* contract actually made. The writing relied upon in this case does not embody all of the terms of *the* contract actually made, hence such contract was void for not being evidenced as the statute [of fraud] requires.

25. 25 N.Y. 153 (1862).
26. *Id.* at 156.
27. *Id.* at 157. The court reasoned that:

If the reference in a writing to a verbal agreement would let that agreement, where

vague or incomplete, it would not satisfy the Statute of Frauds.[28] The *Wright* court's statement, that if "the reference [in a writing] is to something verbal, or ultimately to a writing, through the medium of something verbal . . . [t]he Statute [of Frauds] is not satisfied,"[29] emphasized that the entire rationale for the decision was the Statute of Frauds. But the court distinguished between the issue of whether a contract exists and whether a contract is enforceable under the Statute of Frauds. Under this view, the effect of variance is not to prevent formation of a contract, but rather to interfere with satisfaction of the Statute of Frauds, which renders the contract unenforceable. The *Poel* decision utterly missed this distinction.

The above line of authority cited in the *Poel* case focused wholly upon the requirements of the Statute of Frauds and also made it clear that variance does *not* prevent contract formation. Instead, the cases provided that all major terms must be contained in writing for the contract to be enforceable. Based upon this reasoning, a party did not need to present a variance argument in order to avoid contractual liability but could do so merely by asserting that the writing was *incomplete* because of a missing term or a reference to an oral specification. Thus, the approach fostered by the Statute of Frauds in these cases led the courts to prescribe the *minimum content* of the writing involved.

To the extent that the Statute of Frauds rationale of this line of cases is the basis for the *Poel* mirror image rule, two conclusions appear justified. First, because the *Poel* court conceded that the Statute of Frauds was a major ingredient of that decision, it follows that not every variance can or should prevent formation of a contract. Instead, the court's line of reasoning required that variances which violated the requirements of the Statute of Frauds would prevent enforcement of an agreement. Under this approach, mere variance as to minor matters had not in the past and should not have prevented formation of an enforceable contract. But the clear implication of the *Poel* opinion was that *any* and *all* vari-

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> the subject was one which the statute required to be in writing, it would be sufficient for parties desiring to avoid the trouble of reducing their bargains to writing, to sign a statement that they had contracted verbally respecting a given subject and they would thus dispense with the statute.

Id. (Opinion by Denio, C.J.).

28. *Id.* at 160. Under this analysis, "If the [written] agreement be vague and indefinite, so that the full intention of the parties cannot be collected from it, it cannot be said that the contract is in writing and it is therefore void." *Id.* (Opinion by Allen, J.).

29. *Id.* at 157-58.

ances, whether they fell within the requirements of the Statute of Frauds or not, prevented formation of a contract.[30]

Second, since these cases relied upon in *Poel* involved interpretation of a *particular* Statute of Frauds, when that Statute was changed or amended, the rule as to variance which had evolved from it should have been reexamined and probably changed. This proposition seems almost too apparent to require restating: If the reason for existence, or basis or rationale, of a particular principle of law changes, then the principle should be reexamined to see if it should be changed as well. Unfortunately, after the *Poel* decision, the mirror image rule took on a life of its own, and later courts citing *Poel* as precedent did not perceive the way in which the Statute of Frauds issue and the contract formation issue had been confused in that opinion.[31]

B. *Other Precedents Misused in Poel*

The *Poel* opinion also relied upon several cases which did not involve the Statute of Frauds. All of these cases are also inapposite and distinguishable. In the first of these cases, *Nundy v. Mathews,*[32] a plaintiff-creditor proposed compromise of an undisputed, liquidated claim against her debtor by immediate payment of an amount less than the conceded claim. The defendant responded with a proposal that payment within one year should operate as a discharge. The plaintiff did not reply, but more than one year later sued to collect the lesser amount specified in the defendant's reply on the basis that the defendant's reply amounted to a "substantial acceptance" of her original offer.[33] This contention was rejected, with the explanation that when an answer varies the terms of an offer, it is a rejection if it conditions and qualifies "material" terms of the offer.[34] Thus, the premise of the *Nundy* holding was that the variance was *material*, a conclusion which was clearly justified since the substance of the negotiations and the principal concern of both parties was—as it will be in virtually all compromise situations—at what time and in what amount the debtor was to pay the creditor. Clearly, the case did not involve change in a minor detail, but rather a change in a term about

30. *See supra* note 18 and accompanying text.

31. *See, e.g.*, Hoffstot v. Dickinson, 166 F.2d 36 (4th Cir. 1948); Raisler Heating Co. v. Clinton Wire Cloth Co., 168 N.Y.S. 668, 670 (1918).

32. 41 N.Y. Sup. Ct. 74 (1884).

33. *Id.* at 76.

34. *Id.* at 78.

which both parties were concededly deeply concerned, and about which they had actively negotiated.

Another case cited in the *Poel* opinion, *Vassar v. Camp*,[35] appears even more obviously inapposite. In that case, after oral negotiations, the defendant sent a letter to the plaintiff which stated in passing that the defendant would recognize the contract when the plaintiff's reply was received. The plaintiff's reply was lost in the mail. When the plaintiff sued on the contract, the defense interposed was that the defendant's reply provided that plaintiff's communication was to have been effective when received, not when posted. The court held that in order to avoid the operation of the mailbox rule, the intent of the offeror-defendant must have been more "explicitly" stated.[36] Thus, the issue in *Vassar* was not variance, but the operation of the mailbox rule.

The *Poel* opinion also drew upon *McCotter v. Mayor of New York*.[37] In *McCotter*, the parties were negotiating for the purchase by the city of land on Ward's Island in New York. The plaintiff offered to sell his land on the island to the city, and the city responded that it accepted an offer to purchase *all* land on the island not owned by the city at that time. The court correctly held that there was no contract, because the parties never agreed to the same thing: the plaintiff justifiably understood that he was selling all land that he owned, which was less than all land not already owned by the city on the island; and the defendant-city reasonably understood that the offer was to sell all land on the island not already owned by the city. So considered, the basis of the *McCotter* decision is distinguishable from the situation in *Poel*. In the *McCotter* case, the variance involved the identity and quantity of the subject matter of the transaction, a matter patently material and important to the parties. This distinction is underscored by the realization that in *McCotter* the variance in the proposed acceptance may well have been caused by mistake on the part of the offeree. Moreover, whatever the cause of the variance, the holding of the court was expressly premised upon the finding that the intent *in fact* of the defendant-offeree was to purchase *all* of the remaining land.[38] Thus, the result in the *McCotter* case did not turn upon a

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35. 11 N.Y. 441 (1854).

36. *Id.* at 451.

37. 37 N.Y. 325 (1867).

38. *Id.* at 329. The court explained that, "it was the object of the City to purchase *all* the lands on the island not owned by it . . . ." *Id.* Further, the court observed that:

[T]he negotiation therefore amounted to just this: the plaintiff offered to sell to the

court's presumption about the legal effect of a variance *qua* variance; instead, it rested upon the court's conclusion, supported by all of the circumstances of the case, that there was a major, material variance which consisted of different understandings of the offeror and offeree about the quantity and identity of the subject matter.

Another case on which the *Poel* opinion relied upon was *Barrow v. Mexican Central Railway*.[39] The dispute in *Barrow* involved an alleged contract by the defendant to supply passengers to the plaintiff, a steamship line. The plaintiff's position was that the defendant had agreed to supply a minimum of at least 250 passengers. Although the trial court had directed a verdict in favor of the plaintiff, on appeal the majority reasoned that the principal issue—the interpretation of the correspondence between the parties—was a question of law for the court to resolve. The court held that there was no contract. In reaching this conclusion, the court examined at least six communications, and found numerous and unequivocal expressions of doubt by both parties about the number of passengers.[40] In seeking the meaning of the language used by the parties, the court emphasized that its focus was upon the "understanding"—the intent in fact — of the parties.[41] It is no coincidence that the court closely examined expressions concerning the number of passengers. The opinion explained that the relevance of such an inquiry was that those expressions illustrated party "expectations,"[42] an issue which the *Barrow* opinion treated

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city of New York property which he at the time owned or controlled, and the city replied by offering to purchase, not alone the lands offered, but other lands in addition thereto, so as to own the whole island.

Id.

39. 134 N.Y. 15, 31 N.E. 261 (1892).

40. The court pointed out that the defendant's agent, in a chain of communications to plaintiff's agent, had made the following statements: "[The Mexican Central Railway] can secure a party of about 175 to 200 people . . . there is a probability that there will be 250 people or more . . . there is a probability that the party will exceed 250, but I have not been furnished with information as to the exact number . . . ." *Id.* at 21-22, 31 N.E. at 261-62.

41. *Id.* at 22, 31 N.E. at 263. This approach was far different from that in the *Poel* case, where *any* variance constituted rejection. *See supra* notes 4-13 and accompanying text.

42. *Id.* at 26, 31 N.E. at 265. Moreover, in its concluding paragraph, the court stated that, "Although the expectation founded upon the statement . . . may have led to preparations prejudicial to the plaintiff, it is not seen that defendant (assuming it acted in good faith) is chargeable with the consequences." *Id.* Thus, although variances existed, and although in fact plaintiff had a particular expectation, it was not justified. Aside from the temptation to launch into analysis of this statement as an expression of an objective theory of contract, its significance is plain—the actual understanding of the parties' controls. The court refined this approach one step further by holding that the understanding must also be

as a factual matter. When it is recalled that both parties were involved in the business of transporting passengers, it is only logical to conclude, as the court did, that the number of passengers would be important and material to both.[43] Repeated expressions of doubt by the defendant were consistent with the idea that the variances as to quantity were not intended as definite commitments, and should have been so understood by the plaintiff.

This approach was wholly different from the approach in *Poel*, where a variance in phrasing was held to be material as a matter of law, regardless of the intent of the parties. The analytical approach followed by the court in *Barrow* was thus fundamentally different from *Poel*. The objective of the *Barrow* court was to determine the intent in fact, or actual understanding, of the parties, and the court approached this issue as a question of fact, not a question of law.

Hough v. Brown,[44] the final case relied upon in the *Poel* opinion, is also distinguishable. In *Hough*, the parties engaged in oral negotiations for the transportation of freight. The plaintiff thereafter directed a letter to the defendant which stated in pertinent part: "We accept your proposition for our entire freight . . . . We include some nine or ten thousand hides. The price of freight is understood to be nine dollars through to New York, and ten dollars through to Boston . . . . You will acknowledge the acceptance of the above."[45] The trial court charge permitted the jury to decide whether an oral offer had been made to which this letter was an acceptance, and under these instructions the jury returned a verdict in favor of the plaintiff. The appellate court reversed an ordered a new trial on several grounds; first, it was not clear that an oral offer had been made and even if such offer had been made, interpretation of the writing was a question of law for the court; second, the inclusion of the acknowledgement provision in the defendant's reply constituted a rejection of any offer which might

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reasonable and justified. It is submitted that this is a rather different theory from that expressed in *Poel*, where the mere existence of the variance was alone conclusive.

43. 31 N.E. at 264-65. The court pointed out that the objective of the defendant in this transaction was to secure passengers. The number of passengers, therefore, must have been important to it, since the greater number of passengers transported on a given run for which there were fixed costs, the greater the profit received from that run. The same reasoning was, of course, applicable to the plaintiff.

44. 19 N.Y. 111 (1859).

45. *Id.* at 112. Because of its apparent factual similarity to the communications held to constitute a variance in the *Poel* case, the letter has been quoted in the text practically in its entirety.

have been made; and finally the parties had not agreed upon the quantity to be shipped.[46] Thus, the basis of the *Hough* decision was ambiguous, for there were at least three, and possibly four, alternative reasons given for the court's decision. The court also particularly emphasized that the parties did not agree upon quantity, because of the divergence upon that term between the oral negotiations and the writings. This analysis reveals that *Hough*, therefore, stood for the proposition that a failure to agree upon quantity, an obviously important and material term, when coupled with an acknowledgement clause constituted a fatal variance. In addition, *Poel* is inconsistent with *Hough* since there was no variance over quantity in *Poel*.

The precedents examined immediately above which were relied upon in the *Poel* case also failed to support the mechanical mirror image approach to variance which that case adopted and promoted. The *Nundy, McCotter, Barrow* and *Hough* cases all involved failure to agree upon major, material terms. More importantly, those cases recognized that variance problems were not to be resolved by recourse to a literal, technical comparison of the writings involved, but through a determination of the actual understanding or intent of the parties. And, in several of those cases, the court did not confine itself to examination of only the writings.[47] It is clear that the courts' position, in those cases which were not confined to the writings, was not that oral negotiations could not be considered, for the courts *themselves* considered oral negotiations.[48] Of greater import was the evidence in *Barrow* and *Hough* that there were indeed substantial, repeated and vigorously expressed differences about material matters such as quantity. These variances, considered in the context of the business in which the parties were engaged and the type of transaction involved, were patently material, and were so treated by the parties themselves.

Thus, the *Poel* decision grossly distorted the holdings of these earlier cases. In the earlier cases, the courts had treated the ques-

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46. *Id.* at 113-15.

47. In both the *Barrow* and *Hough* cases the court considered testimony about prior oral negotiations.

48. What probably occurred was that the appellate court was reluctant to permit a jury to decide contract formation questions under a general charge: In most of these cases juries had rendered verdicts in favor of the plaintiffs below. So considered, the emphasis upon writing was a manifestation of distrust of the jury, and one cannot help but suspect that the variance rule invoked in those cases as a mere "procedural" expedient selectively used to control lay juries.

tion of whether a contract had been formed as a question of fact, and in all of those cases, variances and disagreements as to major, clearly material terms—usually quantity—had justified and supported the conclusion that no agreement and, hence, no contract had been reached. Conversely, in *Poel* the intent of the parties as objectively manifested was ignored, variances on any matter were transformed into matters that *per se* revealed an intent not to contract, and the generally understood and accepted approach to contract formation, in which courts considered all relevant evidence of intent as a question of fact, was apparently forced into a mold which treated the question of contract formation as a matter of law based only on writings.

C. *The Mirror Image Doctrine Reexamined*

The *Poel* holding was regrettable for the additional reason that it was uncritically accepted by many pre-Code courts and commentators. Although there were some cases decided prior to[49] and after[50] the *Poel* decision which followed its reasoning, there were many other cases which did not. In these latter cases, the *Poel* approach was denied, ignored or replaced with a contradictory approach. Unfortunately, this other line of case authority has been misdescribed or utterly ignored.

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49. *See, e.g.*, Knox v. McMurray, 159 Iowa 171, 140 N.W. 652 (1913) (even if the language of purported acceptance appears to be a polite request, if it is different from the offer, it is a fatal variance); Elks v. North State Life Ins. Co., 159 N.C. 619, 75 S.E. 808 (1912)(elementary that minds must meet exactly); Gates v. Dudgeon, 72 A.D. 562, 76 N.Y.S. 561 (1902)(offer and acceptance must be without qualification and match on precise terms); Howells v. Stroock, 30 Misc. 569, 62 N.Y.S. 870 (1900)(exact meeting of minds required); Myers v. Smith, 48 Barb. 614 (1867) (acceptance must be in words of offer); Chicago Railway v. Dane, 43 N.Y. 240, (1870)(language of acceptance must be clear); Corcoran v. White, 117 Ill. 118, 7 N.E. 525 (1886) (acceptance must be unconditional); Egger v. Nesbitt, 122 Mo. 667, 27 S.W. 385 (1894)(any new proposition makes reply a counteroffer); Marschall v. Eisen Vineyard Co., 7 Misc. 674, 28 N.Y.S. 62 (1894). These cases did not address the Statute of Frauds issue as had the earlier mentioned decisions. *See supra* notes 27-37 and accompanying text.

50. *See, e.g.*, Minar v. Skoog, 235 Minn. 262, 50 N.W.2d 300 (1951)(exactitude is required in acceptance); Ajax Holding Co. v. Heinsbergen, 64 Cal. App. 2d 675, 149 P.2d 189 (1944) (acceptance must be unequivocal); Richardson v. Greensboro Warehouse & Storage Co., 223 N.C. 344, 26 S.E.2d 897 (1943) (mutual intent in written documents governs); United States v. Mitchell, 104 F.2d 343 (8th Cir. 1939) (acceptance must be unequivocal); Friedman & Co. v. Newman, 255 N.Y. 340, 174 N.E. 703 (1931)(oral communications and written ones must exactly match); El Reno Wholesale Grocery Co. v. Stocking, 293 Ill. 494, 127 N.E. 642 (1920) (writing with additional terms is no acceptance); Stanley v. Gannon, 109 Misc. 611, 180 N.Y.S. 602 (1919)(minds of parties must meet exactly on every term); Raisler Heating Co. v. Clinton Wire Cloth Co., 168 N.Y.S. 668 (1918)(any difference is fatal variance).

It has been common knowledge among most lawyers that there have been exceptions to the mirror image rule. One of these exceptions was rationalized under the rubric of "mere request" or "suggestion," rather than conditional acceptance.[51] Other cases recited that a variant reply did not prevent formation of a contract if the variance involved a "mere detail of performance" rather than a detail of formation.[52] But none of these cases explained how one is to distinguish a detail of performance from a detail of formation. For example, some cases involved a detail which had been left open in the offer, which the courts held was cured by the acceptance. Thus, the explanation of the courts was that there was no variance because indefinite terms were merely being clarified.[53] Other cases stated that no variance existed because the additional or variant material in the reply was an "implied" factual or legal condition contained in the offer.[54] Since the reply merely made explicit a term of the offer, there was held to be no variance.

The labels and devices employed in these cases were misleading, for they concealed a serious theoretical conflict. The courts, through use of the labels, euphemisms, and circumlocutions described above, maintained the *appearance* of consistency with the mirror image rule. However, these benign mischaracterizations concealed the fact that in many cases the courts employed a fundamentally different approach to the variance problem, one that was theoretically and conceptually inconsistent with the *Poel* common law perspective. That the true *ratio decidendi* of these cases is fundamentally contradictory to the mirror image doctrine is apparent from the most cursory examination.

For example, in *Kreutzer v. Lynch*,[55] a case involving the sale of real estate, the acceptance recited that title to the real estate was to be perfect. The court held that this acceptance was a mere sug-

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51. *See* Annot., 3 A.L.R.2d 257 (1949) for an extensive collection of cases illustrating this exception. *See also* Note, *Contracts-Offer and Acceptance-Variation*, 21 U. CIN. L. REV. 68 (1952).

52. *See* Barnum v. Prescott, 86 W. Va. 173, 102 S.E. 860 (1920)(statement which differs from offer after offeree performs is mere detail of performance); Turner v. McCormick, 56 W. Va. 161, 49 S.E. 28 (1904)(mere request *re* performance). *See also* Annot., 3 A.L.R.2d 257, 258-60 (1949).

53. *See* Propstra v. Dyer, 189 F.2d 810 (2d Cir. 1951)(actions of parties show additional material in acceptance was mere clarification); Kreutzer v. Lynch, 122 Wisc. 474, 100 N.W. 887 (1904) (actions show mere suggestion intended).

54. *See* Valashinas v. Koniuto, 308 N.Y. 233, 124 N.E.2d 300 (1954)(writings and actions show condition implied); Morse v. Tillotson, 253 F. 340 (2d Cir. 1918)(acceptance conditioned on what law implies is valid). *See also* Annot., 1 A.L.R. 1508 (1919).

55. 122 Wisc. 474, 100 N.W. 887 (1904).

gestion, and was not conditional. The rationale for that holding was that the variance was "intended" by the offeree and "understood" by the offeror not to be conditional.[56] It is significant that the court based this conclusion upon an oral conversation between the parties which had occurred prior to the writings.[57] Thus, the holding was based upon the understanding of the parties, gathered from all sources, oral and written.

The court adopted a similar test in *Rucker v. Sanders*.[58] There the offeree in his purported acceptance provided for payment of the purchase price of stocks at a place different from the place of delivery. The court held that the test for a fatal variance was whether the additional term was "intended and understood" by the parties to be a condition and added that "we must give effect to the most essential and controlling element of all executory contracts, to wit, *the real understanding and intention of the parties.*"[59] In the *Rucker* decision, the variation in the acceptance did not prevent formation of the contract because it was a mere suggestion; and was held to be a mere suggestion because of the actual understanding—the intent in fact—of the parties.

Similarly, in *First National Exchange Bank of Roanoke v. Roanoke Oil Co.*[60] the court, basing its finding upon numerous meetings, conversations, and writings between the parties, held that an option to purchase had been exercised in spite of additional terms in the acceptance, because the parties intended and understood that it had been exercised. The intent of the parties prevailed over what was concededly a variance in the writings exchanged.[61] And, in *Johnson v. Federal Union Surety Co.*,[62] the court squarely held that variance problems are controlled and resolved by recourse to the intent of the parties, and that intent is to be sought in all of the communications and acts of the parties.[63] Thus, these four cases employed an approach to variance which was fundamentally different from the approach in the *Poel* opinion, but concealed the

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56. *Id.* at 475, 100 N.W. at 888.
57. *Id.*
58. 182 N.C. 607, 109 S.E. 857 (1921).
59. *Id.* at 608, 109 S.E. at 858 (emphasis added).
60. 169 Va. 99, 192 S.E. 764 (1937).
61. *See also* Matteson v. Scofield, 27 Wisc. 671 (1871) for an identical holding.
62. 187 Mich. 454, 153 N.W. 788 (1915). *See also* Elks v. North State Life Ins. Co., 159 N.C. 619, 75 S.E. 808 (1912), where the court stated that it was "quite clear" that the question of whether a variance prevents contract formation is a question of intent. *Id.* at 621, 75 S.E. at 810.
63. 187 Mich. at 458, 153 N.W. at 792.

differences under the label "mere suggestion."

A closely related approach emphasized the intent of the offeree. One typical case in this group, *Barnum v. Prescott*,[64] held that additional terms in a reply which the offeree intended as possible accommodations to the offeror, but which recognized a contract, was not a fatal variance. In another case, the court held that the offeree's intent to remain flexible as to date of performance, gathered from all communications between the parties, prevented a variance in the acceptance from precluding formation of a contract.[65] The most important of these cases, *Turner v. McCormick*,[66] involved a dispute over whether the requirements for an abstract of title to mineral rights in a purported acceptance was a fatal variance. The court held that the addition was a mere request for a change, and explained that "when a man has deliberately made a firm contract of sale, he ought not to be permitted to avoid it on some flimsy pretext in order to avail himself of a better bargain."[67] A clearer statement that the actual intent of the offeree controls can hardly be imagined. In fact, the court's conclusion was that the offeree intended to accept, and the understanding of the offeror was that there was a contract in spite of any variance. The offeree's actual intent, as manifested by his words and actions at the operationally significant time, before he discovered a better bargain, prevailed over a later attempt to invoke the mirror image rule after he had changed his mind.

Several other cases described as falling within this "narrow exception" evolved the concept of immaterial variance. In *Foster v. West Publishing Co.*,[68] the court construed an equivocal response as an acceptance because a bona fide intent to contract was shown. The court reasoned that immaterial or collateral variances must be disregarded in deciding whether a contract exists, but that the question of what is or is not material is to be resolved according to

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64. 86 W. Va. 173, 102 S.E. 860 (1920).

65. *See* Valashinas v. Koniuto, 308 N.Y. 233, 124 N.E.2d 300 (1954).

66. 56 W. Va. 161, 49 S.E. 28 (1904).

67. 56 W. Va. at 171, 49 S.E. at 32. The court also explained its holding on the basis that the variance involved a mere detail of performance, and added that in the allegedly variant acceptance, words of acceptance *preceded* the new material. "The request . . . for modification of the offer made before its acceptance might well have been regarded as an indication of a purpose not to accept. Here the acceptance precedes the request for a modification." 56 W. Va. at 167-68, 49 S.E. at 31. This particular rule of construction is arbitrary. The issue was not whether the new term was read by the offeror before or after other language of acceptance; rather, the issue was whether the additional term conditioned the acceptance whenever it *appeared* on the offeree's form.

68. 77 Okla. 114, 186 P. 1083 (1920).

the intent of the parties.[69]

This principle of immaterial variance appears to have been carried even further in *Farmers Produce v. McAlester*.[70] In that case, the offeree's response contained a provision that it needed time to fill any order. The court held that a contract existed. Of significance was the court's explicit recognition that the reply did vary the offer, and its conclusion that the variance was nonetheless immaterial. The court reasoned that "[a]n offer of sale . . . and its acceptance must receive a reasonable construction . . . . Immaterial variances between the offer and its acceptance will be disregarded."[71] The variance was not viewed as material because the offeror did not treat it as such and the actual intent of the offeror, as disclosed by all of his acts, controlled. This approach is precisely the opposite from that of the *Poel* line of cases where the mere existence of a variance was automatically fatal and the courts refused to acknowledge that *any* construction of the writings was permitted.

Describing these cases as "minor" or "narrow" exceptions to the mirror image doctrine, or as somehow consistent with that rule, is simply wrong. These cases fundamentally contradict the *Poel* approach in several important ways. First, the principle which most effectively explains the outcome in those cases is that party intent, objectively manifested, controlled the question of whether variance in a reply to an offer prevented formation of a contract. In most of these "exceptional" cases, the courts examined all of the circumstances and communications involved. These factors included *oral* and written communications, the nature of the transaction, the subject matter of the transaction in general, the subject of the variance, and the other actions of the parties. The *Poel* mirror image approach, on the other hand, looked only to the writings and *presumed* the absence of intent from *any* variance. Thus, these "minor exception" cases fundamentally contradicted *Poel* by treating the question of intent to contract as a dispositive issue of *fact* to be gathered from all the circumstances. The label "mere sugges-

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69. 77 Okla. at 116, 186 P. at 1084. The court explained that:

> [I]f a bona fide intent on both sides to come to a definite agreement is shown, it should be so construed, if possible, as to constitute an agreement rather than to defeat one. [Here a] reasonable construction . . . is to say there appears a bona fide intent on both sides to come to a definite agreement.

Id.

70. 48 Okla. 488, 150 P. 483 (1915).

71. 48 Okla. at 490, 150 P. at 485.

tion" or "mere detail of performance" and the other labels employed as part of the exceptions expressed or conveyed the court's *conclusion* that the parties intended to contract in spite of variances. But the *process* of examining all of the circumstances to find the actual, objectively manifested intent, even though a variance had occurred, was wholly alien to the *Poel* mirror image approach. Although it is clear that these cases employed a wholly different approach to the variance problem, courts and commentators incorrectly described these cases as involving narrow, almost negligible, exceptions. This approach obscured the true nature of the theoretical conflict in this area.

One may well ask why the contradiction between these two approaches to the variance problem was ignored or denied. There appear to be some persuasive answers. The mirror image rule was conceptually simple and apparently easy to apply. These attributes may have made it attractive to busy decision-makers. Another possible explanation may well have been the desire for symmetry in the law. Once the courts perceived the usefulness of the mirror image doctrine in rationalizing the results in close or difficult cases, it was unlikely that many of them would be inclined to adopt what was admittedly a contradictory theory to be used in essentially similar cases. Instead, deviations from the mirror image rule were described as narrow exceptions, aberrations, or (fictionally) as consistent with the mirror image rule.

III. The Last Shot Doctrine Reexamined

The so-called "last shot" rule was a corollary to, and companion of, the *Poel* approach to variance, which later writers also misdescribed. The standard version of the last shot doctrine provided that any variance in a purported acceptance converted it to a counter-offer, and any act relative to the subject matter of the transaction performed by the recipient of the variant acceptance/counter-offer would constitute an acceptance of the counter-offer and all of its terms.[72] Hence, the title "last shot" because the offeree had sent the last communication; that is, he fired the last shot in the battle of the forms, and thus the contract was on his terms.[73]

This rule was uncritically followed in numerous decisions after

72. *See* J. Murray, Murray On Contracts 112-13 (1974) and the cases cited therein.
73. *Id.*

the *Poel* case.[74] In most cases involving variance, the courts applied the last shot rule in a mechanical fashion. If the purported written acceptance contained *any* variance, and the recipient subsequently performed *any* act relative to the subject of the contract, then, even if he did not and should or could not have known of the change, the contract was held to include all of the terms of the variance.[75] It was this aspect of the last shot rule which later commentators described and emphasized. This emphasis was misleading, for the fact of the matter was that in many variance situations, opinion writers either expressly refused to apply the last shot rule or else they circumvented it through a variety of fictions and other manipulative devices.

In *Everett v. Emmons Coal Mining Co.*,[76] a typical last shot case, the vendor and vendee sent order forms to each other after oral negotiations and an exchange of detailed telegrams had occurred. Vendee's form recited that it contained the "final" agreement of the parties and that it should be returned at once if the vendor did not agree that it did not accurately describe the understanding of the parties.[77] The vendor's form, which was last to arrive, provided that it was subject to conditions on the back of the form. One of these boiler plate conditions was a clause excusing delay in performance.[78] Vendee accepted delivery of several *conforming* loads of coal, but refused subsequent deliveries made after the performance dates stipulated in vendee's order form. The court held that the contract between the parties consisted of the provisions of the vendor's forms, which included the excuse clause. Al-

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74. *See, e.g.*, Shpetner v. Hollywood Clothing, 42 A.2d 522 (1945)(receipt of partial order is acceptance); Onyx Oil v. Steinberg, 180 Misc. 315, 44 N.Y.S.2d 583 (1943) (slight action with knowledge after change is acceptance of counter-offer); Aluminum Products v. Regal, 296 Mass. 84, 4 N.E.2d 1003 (1936)(receipt of delivery and bill which contradicted offer was acceptance of counter-offer); Riverside Coal v. Elman Coal, 114 Conn. 492, 159 A. 280 (1932)(additional terms followed by action constituted acceptance of counter-offer); Johnson v. O'Neill, 182 Minn. 232, 234 N.W. 16 (1931)(change and performance are acceptance of changed terms); Hartwell v. Crane, 209 Ill. App. 399 (1918)(lower price in response to offer followed by shipment is acceptance of lower price); Caldwell Bros. & Co. v. Coast Coal Co., 58 Wash. 461, 108 P. 1075 (1910)(action after change in destination was acceptance); Sneed & Co. Iron-Works v. Douglas, 49 Ark. 355, 5 S.W. 585 (1887)(action by original offeror after change/counter-offer was acceptance of counter offer).

75. *See, e.g.*, Onyx Oils v. Steinberg, 180 Misc. 315, 44 N.Y.S.2d 583 (1943); Vaughan's Seed Store v. Morris April & Bros., 123 N.J.L. 26, 7 A.2d 868 (1939); Caldwell Bros. & Co. v. Coast Coal Co., 58 Wash. 461, 108 P. 1075 (1910).

76. 289 F. 686 (6th Cir. 1923). *See also* White Oak Coal Co. v. Squier Co., 219 S.W. 693 (Mo. App. 1920).

77. 289 F. at 689-90.

78. *Id.*

though the telegrams were quite detailed, they did not result in a contract because there was a minor variance in one of them. Vendee's form order, which had been dispatched after the exchange of telegrams did not form a contract by itself, according to the court, because it stipulated that it superseded prior communications.[79] Since the vendee received this variant acceptance form and later took delivery of several conforming shipments, a contract was formed upon the terms of vendor's form.[80]

The opinion is questionable for several reasons. First, the court's explanation suffered from a major inconsistency which may have been created by the last shot rule. On the one hand, the court stated that the contract terms were controlled and provided by the vendee's and vendor's forms. On the other hand, the court held that the terms of the contract between the parties included only the terms in the *vendor's* form. In spite of the language in the opinion which suggested that the vendee's intent or understanding of the deal between the parties was part of the contract terms, it is clear that on the specific matter at issue, excuse for delay in performance, the vendor's form and intent controlled. Moreover, the court's description of the vendor's form as the acceptance was simply inaccurate. What the court in fact decided was that the vendor's form was a counter-offer under the last shot rule, and that counter-offer was accepted by the vendee's receipt of several deliveries. This inconsistency is, however, the least serious criticism which can be made about the *Emmons* opinion.

At a more fundamental level, the decision clearly illustrates the unfairness which can result from a rigid application of the last shot rule. As a result of the oral negotiations and telegrams, it would appear quite likely that the parties understood that they had agreed upon terms which did not include the exculpation clause. Nevertheless, the vendor's form, including the clause which had not been discussed, was held to control. In effect, the vendee was held to be subject to an absolute duty to read and to understand every term on every form which he received. Putting aside the question of what the duty to read generally is or ought to be,[81] the reasoning in the opinion poses the question of what the duty to

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79. *Id.* The court concluded that "[t]he undisputed facts make it clear . . . that the only contract between the parties was constituted by [vendee's] order . . . and [vendor's] acceptance . . . ." *Id.* at 689.

80. *Id.*

81. For a discussion concerning the duty to read, *see* CALAMARI & PERILLO, CONTRACTS §§ 9-41 to 9-46 (2d ed. 1977).

read and understand should be *in these specific circumstances.* When parties have reached agreement orally (or in the telegrams exchanged) upon *every* major term of the proposed transaction, there should surely be some diminution of the absolute duty to read. In the *Emmons* case, since prior agreement on major terms was clear, and since the vendee also stated in his order form that he was accurately reducing that agreement to writing and wished to be notified if he was inaccurate, this conclusion would appear to be especially appropriate. The only notice of changed or additional terms which the vendor gave was boiler plate on the back of his form. It is difficult to perceive how it can tenably be argued that this type of response would or should have been understood by the vendee, even if it were reasonably read by him, as notice of rejection or as the notice requested by vendee in his form.

This analysis assists in defining one of the most serious problems inherent in the last shot approach. Where parties agree on all major terms either orally or by informal, non-form written communications, and when they understand that they have reached agreement, new or different terms in a subsequent form should not become part of their contract as a matter of course. Unfortunately, the last shot rule usually led to this inequitable result.[82] One basic objective of Anglo-American courts in cases involving formation of contracts concededly has been, and is, to identify the mutual intent or understanding of the parties, objectively determined; this goal is usually achieved by treating it as a question of fact. Cases such as *Emmons* demonstrate that the last shot rule is inconsistent with this objective.

It may be objected that this criticism of the last shot rule is based upon a return to a subjective theory of contracts. An opponent to this position would argue that the basis of this approach is the determination of whether the recipient of the acceptance in fact saw the variant term; if he did not, then his actual understanding and the prior agreement between the parties, exclusive of the new or different terms, controls. To permit the actual "inner" understanding of the offeror to control, it would be argued, is to adopt a purely subjective theory of contracts. A proponent of this position would argue that it is *expressions* of assent, not inward states of mind, which are determinative.[83] The controlling principle should be the effect of the outward manifestations or acts of

82. *See supra* note 74 and accompanying text.
83. *See* CALAMARI & PERILLO, *supra* note 81, at § 2-2; CORBIN, CONTRACTS § 9 (1952).

the vendor (such as taking delivery) as calculated in light of his duty to read. Thus, the approach which is being argued here is fully consistent with an objective theory of contracts.

Applied to the *Emmons* facts, the simple analysis under this objective theory would be as follows. The vendee understood that there was a contract which included the terms agreed upon before the exchange of forms and, as a reasonable man, he was justified in that understanding. In such a situation, he should not be required to observe and understand all of the fine print boiler plate on the back of forms which he later receives. In these circumstances, the vendee's belief is reasonably justified, and he is entitled to rely upon what has been fairly agreed upon between the parties. In other words, it is no more reasonable to conclude that a subsequent writing of the vendor controls than it is to conclude that the reasonable, justified understanding of the vendee controls, but it is certainly more unfair to do so.[84] In the latter situation, the understanding of both parties is the basis of the contract, for it consists of what they actually agreed upon. In the former, the terms and hence purposes of one party, the vendor, controls even though he knows or should know that the other party does not agree. Thus, the standard last shot rule is arbitarary and unfair. It imposes an unnatural and unrealistic standard of behavior on businessmen, who often deal in large volumes of transactions, in that they are required to read like a lawyer every clause of every form which they receive, and to locate and understand which of those terms are additions to, or contradict, the terms upon which the deal was agreed. The unfairness of imposition of this lawyers' standard is emphasized by the context in which it occurs. When parties have agreed and even exchanged informal writings, surely there should be some relaxation of the absolute duty to read and understand subsequent forms, for it is only natural for parties to lower their guard after they have reached agreement orally and/or in informal writings. This unfortunate failure or refusal to give effect to the mutual intent of the parties—a basic goal of Anglo-American con-

84. Although directed to a problem described under a different label, Karl Llewellyn suggested a similar analysis of the problems involving "boiler plate":

> Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.

LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370-71 (1960).

tract law—occurs without even a persuasive explanation or mention of alternative values or objectives served by the last shot rule.

Nor is the *Emmons* case an isolated example of the inequity of the doctrine. In *White Oak Coal Co. v. Squier Co.*,[85] the vendee ordered a fixed quantity of "5 x 2 bar-screened large egg coal" in a written order form.[86] The vendor's acknowledgement form contained an exculpatory clause which permitted vendor to prorate orders for that grade and type of coal if demand outstripped his supply. After receiving this acknowledgement, the vendee wrote to the vendor to emphasize that *all* coal shipped had to be of the grade and type specified in vendee's form, namely "5 x 2 bar-screened large egg New River coal."[87] After several conforming shipments, the vendor shipped a different type of coal, which vendee refused to accept.

After vendor filed suit for breach, the court held in favor of the vendor on the theory that the contract between the parties was on the vendor's terms, because vendee had accepted several carloads after receipt of the variant acknowledgement form.[88] The acknowledgement was considered to be a counter-offer, which vendee accepted when he took delivery of coal. The holding is a classic example of the standard last shot rule. The court conceded that *both* parties "clearly" understood that the contract "required" coal of the grade specified in vendee's form, and the court also agreed that the vendee *after receipt* of the variant acknowledgement had "emphasized" (e.g., objected) in writing that the coal had to be of the quantity and quality specified by vendee in his forms.[89] Thus, vendor actually understood, as a result of vendee's specific written objection, that his additional term was not acceptable. It is difficult to understand how or why that term, which was either expressly rejected or rejected by plain and necessary implication, could become part of the contract.

The injustice of the result which the last shot doctrine produced in *White Oak Coal* is clear, but the case is disturbing for another reason. The court did not even correctly apply the last shot doctrine as it was then understood by its followers. Instead, the analysis should have been as follows: First, the exculpatory clause of vendor's acknowledgement form involved a variance as to quantity

85. 219 S.W. 693 (Mo. App. 1920).
86. *Id.* at 695, 697.
87. *Id.* at 696.
88. *Id.* at 697.
89. *Id.*

and quality terms, and the communication was, therefore, a counter-offer. Vendee's subsequent written insistence that all coal supplies had to conform to vendee's terms was a rejection of vendor's counter-offer, and this objection was, in turn, another offer made by vendee to contract on the vendee's terms. After vendee made this return counteroffer, shipment by the vendor of several shipments which conformed to the terms insisted upon by the vendee was an acceptance of *vendee's* counter-offer and all of its terms.[90]

The incorrect analysis of the court in *White Oak Coal* illustrates several commonly occurring problems with the last shot doctrine as applied. First, the rule was misleading. In spite of the apparently simple and absolute nature of the rule, it was not self-applying or self-executing in the sense that there could be only one obvious analysis and result whenever it was employed. Exactly the opposite was commonly true in most variance situations. There were numerous written forms and oral communications as well as numerous acts by both parties relative to the subject matter, many of which could be characterized as the last shot and the acceptance. Often under the last shot approach characterization of *several* different writings as the last shot was equally plausible and tenable, but each choice of a writing as the last shot pointed to a different outcome for the case. Thus, cases like *White Oak Coal* demonstrate that the apparent certainty and simplicity of the last shot rule was illusory. In many last shot situations, the courts made a choice among several competing characterizations of the variant communications and acts of the parties, but the only explanation which they gave for the choice made was a recitation of the last shot rule. Since the rule could have been applied to several communications or acts this rationale was practically useless, because it did not explain *why* the particular communication which was selected by the court and characterized as the last shot had been chosen to prevail over other equally plausible competing

90. This alternative analysis would appear to be more consistent with the last shot rule. The standard mirror image rule, it will be remembered, provided that the slightest variance in a purported acceptance converted it to a counter-offer. Hence, vendor's acknowledgement was a counter-offer. Application of this same principle leads to the conclusion that *vendee's* subsequent letter was by its terms another counter offer because it varied the previous counter-offer by insisting upon the original quantity and quality of coal. The standard last shot rule provided that any act relative to the subject matter following the latest counter-offer was an acceptance of that counter-offer; thus, vendor's subsequent delivery of several conforming shipments should therefore have been held to be acceptance of vendee's counter-offer.

alternatives.

This description illustrates that the doctrine operated through a process of characterization, or labelling, of a writing as the last shot.[91] Characterization, a form of legal taxonomy, places the action or thing at issue into a particular "pigeon hole" or category, and that choice is usually outcome-determinative. Once a particular classification has been selected, there is usually only one result which a decisionmaker can thereafter logically attain. Applied to the typical variance case, this type of reasoning required that, as soon as a writing had been chosen as the last shot, then *any* act by the recipient would cause a decisionmaker to conclude that the contract between the parties included all of the terms of the last shot communication.

This characterization feature probably accounted for the popularity of the last shot doctrine. Faced with a factually complex case, as often occurred in the variance situation, a decisionmaker could review the writings, select one as the last shot, and then reach a decision by an apparently simple process of deductive reasoning. But it is obvious that the characterization process itself—the actual selection of the controlling writing as the last shot—was done intuitively, and it must be emphasized that this choice was outcome-determinative. The intuitive nature of the process meant that in variance situations characterization of a writing as the last shot often or usually occurred without much thought about, or examination of, competing alternative characterizations of other writings as the last shot, and this initial choice, once made, inexorably determined the outcome in a particular case. Thus, the intuitive nature of the characterization device, coupled with the fact that it was usually dispositive of the case, led to a result which had been reached without any real thought or analysis.

The characterization feature of the last shot doctrine was, therefore, subject to two serious criticisms. First, it was flawed in the same sense that any doctrine or rule which prevents or discourages accurate explanation for judicial decisions is flawed. The decisions which employed the doctrine where obscure and misleading, and they appeared to be arbitrary. Even a cursory review of the cases involving application of the doctrine reveals that different

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91. For a more extensive discussion and description of the characterization device in a different context, *see* Cook, *Substance and Procedure in the Conflict of Laws*, 42 YALE L. J. 333 (1933); WEINTRAUB, COMMENTARY ON THE CONFLICTS OF LAWS 333.1-.2C2 (2d ed. 1980).

courts—or even the same court at different times—reached apparently inconsistent or contradictory decisions in cases involving substantially similar or even identical facts.[92] Thus, the last shot rule had little value as a predictive tool.[93]

The second flaw of the characterization device was far more serious. The intuitive nature of characterization and its usual outcome-producing effect meant that the decisionmakers *themselves* did not examine the reasons for their characterizations of writings as the last shot. They did not think about, nor did they analyze the basis for the last shot rule and whether it achieved just or equitable results, or whether there were better or alternative approaches. Singly, each of these effects was serious, but cumulatively, they were disastrous. The last shot doctrine caused a fundamental dislocation of several of the basic objectives of the American system of contract law. The judicial thinking which it promoted caused decisionmakers to decide cases in a fashion which was inconsistent with acknowledged basic general values of the contract formation process. One fundamental feature of Anglo-American contract law is that it is consensual and, indeed, it is this feature which, for example, is often used in attempts to define a contract, and to distinguish the basis for contractual liability from other types of liability.[94] In cases involving problems of contract formation and interpretation, the courts have generally implemented this objective by focusing upon mutual assent through a standard which involves identification of the mutual intent of the parties to strike a bargain.[95] The last shot doctrine as it was applied by most courts totally ignored or contradicted these objectives. In addition, the body of law which the courts fashioned was self-contradictory.

These unfortunate consequences were strikingly illustrated by decisions like the *White Oak Coal* case.[96] There, the court conceded that not only did the parties understand that a fixed quantity and quality of coal had been agreed upon,[97] but it also expressed recognition that vendee "did not" agree to the exculpatory terms

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92. *Compare, e.g.*, Moorehead v. Minnesota Seed Co., 139 Minn. 11, 165 N.W. 484 (1917) *with* Vaughn's Seed Store v. Morris, 123 N.J.L. 26, 7 A.2d 868 (1939).

93. After reading the cases, one was left with the impression that it was impossible to foresee how the rule would be applied in a particular case. While the *content* of the last shot doctrine was simple and clear, its *application* varied from case to case.

94. *See* CALAMARI & PERILLO, *supra* note 81, at § 2-1.

95. *Id. See also* MURRAY, *supra* note 72, at 28-29.

96. *See supra* notes 85-89 and accompanying text.

97. The court stated, "It quite clearly appears, we think, that both parties understood that the order *required* 5x2 bar-screened large egg coal." 219 S.W. at 697 (emphasis added).

in vendor's acknowledgement form.[98] It is clear that the last shot doctrine employed by the court defeated or prevented giving effect to the concededly mutual understanding of the parties, so that the vendor's terms controlled even through vendee had objected to it.

The flaws which have been observed in connection with the *Emmons*[99] and *White Oak Coal* cases were frequently seen in other variance decisions, although the normal course was for courts to apply the last shot rule without any explanation. The decisions simply held that a contract was formed on the basis of the last form received, regardless of what the parties knew or should have known, and regardless of what they said.[100] The choice facing the recipient was that he could only accept on the terms of the counteroffer or reject it.[101] Even acceptance of a partial shipment was acceptance of the entire counter-offer.[102] This "all or nothing" characteristic was another questionable feature of the last shot rule. If, for example, the recipient of a variant communication reasonably did not see the new or different term or did not understand or appreciate its effect, and the goods he accepted complied with the contract terms as he understood the parties had agreed, the factual inference that could be drawn from his actions is equivocal at best. If he justifiably did not see nor comprehend the additional terms in the variant form which he received, it is difficult to understand how his act can be construed to constitute consent to the other party's terms, or how he should be forced to accept the other party's terms. This aspect of the last shot rule created a *presumption* of acceptance of the variant term or terms regardless of party intent. This presumption, an integral part of the operation of the last shot rule, is one of its most significant and objectionable features.

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98. *Id.* at 697.

99. 289 F. 686 (6th Cir. 1923). *See supra* notes 76-80 and accompanying text.

100. *See* Riverside Coal Co. v. Elman Coal Co., 114 Conn. 492, 159 A. 280 (1932)(additional terms in confirmation); Johnson v. O'Neill, 182 Minn. 232, 234 N.W. 16 (1931)(change in written specifications followed by action and oral questions was acceptance of change in specifications); Midland Bank v. Security Co., 161 Minn. 30, 200 N.W. 851 (1924)(action without notice was sufficient acceptance); Hankins v. Young, 174 Iowa 383, 156 N.W. 380 (1916)(last writing controls).

101. *See* Aluminum Products Co. v. Regal Apparel, 296 Mass. 84, 4 N.E.2d 1003 (1936)(offeree cannot receive and retain goods except on terms of counter-offer); Johnson v. O'Neill, 182 Minn. 232, 234 N.W. 16 (1931)(only choice of offeree is to accept or reject counter-offer); Sneed v. Douglas, 49 Ark. 355, 5 S.W. 585 (1887)(option to either accept or reject).

102. *See* Shpetner v. Hollywood Credit Co., 42 A.2d 522 (D.C. 1945) and Caldwell v. Coast Coal, 58 Wash. 461, 108 P. 1075 (1910).

Under our system of contract law with its emphasis upon assent, the conclusion that an acceptance has occurred should not rest upon a presumption. Acceptance—and the last shot rule is only a label to describe manner of acceptance in a particular situation—involves a finding that express or implied assent has been given. The last shot doctrine involves implication of assent from an act or acts. That is, the presumption is suspect, for how fairly can it be concluded that the recipient of a variant communication intended to accept or should be held to have intended to accept variants terms where he had done nothing more than accept goods which conformed to his own justified understanding of the bargain between the parties. It is here that the harm caused by the cryptic, ritual invocation of the last shot doctrine becomes apparent. Because the courts did not explain nor analyze the last shot rule, their attention was directed away from the basic principle of contract formation that a process of implication from an act was involved in the variance area. They did not perceive that they had created a presumption nor did they inquire either generally or with respect to particular cases before them whether the presumption was justified. Thus, under the last shot regime, *any* act,[103] no matter how innocuous, resulted in a presumption of acceptance. Because this presumption was outside the experience and expectations of the normal businessman or other layman, and because it was not in accord with the basic goals of the general Anglo-American law of contract formation, it was grossly unjust.

These were not the only problems with the last shot rule, as is illustrated by *Alaska Pacific Salmon v. Reynolds Metals.*[104] In that case, after extensive oral negotiations and exchanges of various writings relative to the purchase of aluminum containers, the vendee sent a form order to the vendor. Vendor replied with an acknowledgement form which included a warranty disclaimer. Shortly thereafter, the vendor wrote a detailed letter to vendee which provided the results of various tests of the quality of the containers for the proposed use, and which also assured vendee that the containers were suitable for that use. The containers were, in fact, defective, and vendee filed an action to recover for breach of warranty.

The trial court instructed the jury that the vendor's acknowledgement form was a counter-offer, and, if it was accepted by the

103. *See, e.g.*, Blaisdell v. Bayard, 311 Pa. 6, 166 A. 234 (1933).
104. 163 F.2d 643 (2d Cir. 1947).

vendee, the contract between the parties was on the terms of the acknowledgement.[105] The jury's verdict in favor of the vendor was affirmed by the Second Circuit, whose opinion emphasized the clarity of the disclaimer language. However, there were several serious deficiencies in this analysis. One problem was that the appellate court assumed that the acknowledgement form alone was a counter-offer, and, thus, focused jury attention principally upon the subsequent conduct of the vendee. In view of the continuing communications between the parties *after* the forms had been exchanged, the assumption or suggestion that the vendor's form *alone* constituted a statement of the terms of the contract between the parties hardly seems either accurate or fair. The continuing communications between the parties may well have indicated that the parties had *not* reached agreement, at leasts on quality terms. The subsequent quality assurance letter which vendor sent to vendee furnished persuasive support for this conclusion.

This analysis illustrates another harmful tendency of the last shot rule. The rule as employed in the *Alaska* case encouraged courts and juries to ignore the content of oral and written communication between the parties except for the last shot communication. In this case, assurance of quality and suitability of the containers made by the vendor both *before* and *after* he sent his acknowledgement form were ignored. The automatic preference, bias, or emphasis in favor of the last form directed attention away from what should have been the principal inquiry, a determination of the understanding or intent of the parties. Finally, the law and how it should have been applied was confusing and wholly unpredictable.[106]

A. *The Counter Current: Direct Refusals to Apply the Last Shot Principle to Variance Problems*

Many jurists were aware of the potential for unfairness created by the last shot rule. In numerous decisions courts avoided applying the rule directly or indirectly through a variety of devices.

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105. *Id.* at 652. The court held that "This acknowledgement [of vendor] with its new conditions constituted a counter-offer by the defendant [vendor] which required an acceptance by the plaintiff to make it effective . . . . [A]cceptance may be inferred . . . from the plaintiff's conduct . . . ." *Id.*

106. *See* Memorandum of Karl N. Llewellyn to the New York Law Revision Commission Hearings on Adoption of the U.C.C., Bound Vol. 1, 56 (1954) in which Llewellyn commented, "[t]he intricacy and confusion involved in even a fairly simple typical [last shot] case . . . appears in [the] Alaska Pacific Salmon [case] . . . . The law is uncertain." *Id.*

Some decisions expressly refused to employ the last shot rule. These decisions began their analysis by recognizing that the last shot rule was an exception to the more general rule that silence alone cannot constitute acceptance,[107] and that silence, coupled with an act by the recipient of the variant form, is required before it is possible to justifiably conclude that there is an intent to accept.[108] Even this general rule was understood to be subject to exception in several situations.[109] For example, if the purported acceptance contained a variance, then even though the offeror remained silent, he would be held to have assented to a contract if he remained silent but actually intended to accept on the terms of the variant acceptance.[110] Also, if the court concluded that the recipient of the variant acceptance had a duty to reply, his silence might constitute an acceptance.[111] Such a duty to reply might occur when the sender of the variant communication was justified in expecting a reply in case of disagreement, that is, when the offeror contributed in some way to the justified impression of the sender that he would so indicate if he did not accept.[112] Thus, in some cases where in past dealings silence had been understood by the parties to constitute acceptance, courts concluded that such a duty to reply arose, and that silence did constitute acceptance.[113] It is important to note that review of these cases is not meant to spell out all of the details of the venerable old rule that silence cannot constitute acceptance[114] and the exceptions to that rule. Rather, it

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107. *See, e.g.*, Marshall Mfg. v. Berrien, 269 Mich. 337, 257 N.W. 714 (1934) (acceptance of counter-offer is by act, not by silence); Baum's Estate, 274 Pa. 283, 117 A. 684 (1922)(silence alone not assent); Russell v. Falls Mfg. Co., 106 Wis. 329, 82 N.W. 134 (1900) (silence alone not acceptance).

108. *See, e.g.*, Todorovich v. Kinickinnic, 238 Wis. 39, 298 N.W. 226 (1941)(acceptance must be inferred from conduct); Drucker v. Oppenheim, 165 N.Y.S. 289 (1917)(silent retention of counter-offer not acceptance unless coupled with act); Columbia Malting Co. v. Clausen, 3 F.2d 547 (2d Cir. 1924)(silence not acceptance unless there is duty to speak; act is acceptance).

109. *See generally* FARNSWORTH, CONTRACTS, CASES AND MATERIALS 211-14 (3d ed. 1979).

110. *See, e.g.*, Cincinnati Equip. Co. v. Big Muddy Coal Co., 158 Ky. 247, 164 S.W. 794 (1914).

111. *See, e.g.*, Wood v. Gunther, 89 Cal. App.2d 718, 201 P.2d 874 (1949).

112. *See, e.g.*, Laredo Nat'l Bank v. Gordon, 61 F.2d 906 (5th Cir. 1932).

113. *See, e.g.*, Columbia Malting Co. v. Clausen, 3 F.2d 547 (2d Cir. 1924); Hobbs v. Massasoit Whip Co., 158 Mass. 194, 33 N.E. 495 (1893).

114. Nor is it intended to suggest that the last shot rule was not correctly applied in some cases described under the rubric of silence as acceptance. *See, e.g.*, Fry v. Foster, 179 Okla. 398, 65 P.2d 1224 (1937)(inference of acceptance justified); Union Bank v. Shea, 57 Minn. 180, 58 N.W. 985 (1854)(abundant, repeated acts show intent to accept counter-offer).

is intended to illustrate that the doctrine and its exceptions were perceived to be part of a general contract formation process, and that the focus of that process was upon the intent of the parties. Thus, in situations where the last shot rule was clearly and automatically applicable according to the *Poel* decision, the *exception* to the silence-cannot-be acceptance rule was employed. When this occurred, the inevitable focus of the decision was upon the *intent* of the parties, which was treated as a question of fact, not as a presumption. This alternative approach usually led to the opposite result from that expected under the last shot doctrine.

Other cases did not bother to replace or displace the last shot approach with another doctrine. Instead, they flatly refused to apply the principle because they expressly recognized that the doctrine should be invoked in a manner consistent with its rationale only when the offeror *intended* to accept.[115] Accordingly, some of these cases suggest that in a variance situation, examination of all of the conduct of the parties is necessary, and attention cannot focus merely upon the writings nor upon the last form.[116] One case even expressly held that acts relative to the subject matter of the transactions performed by the recipient of a variant acceptance would *not* constitute acceptance when it was not the intent of the offeror to accept.[117]

It is not surprising that opinions in this line of cases carefully analyzed the basis of the last shot doctrine and concluded that the intent of the parties was the rationale for that rule. For example, when there existed evidence which justified the conclusion that the intent of the offeror was to accept the counter-offer, then that intent to accept, fairly implied and justified by the offeror's acts, furnished the basis for the holding that a contract which included offeree's terms existed.[118] It is evident that the courts employed an objective theory and held that an offeror who received a variant

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115. *See, e.g.*, Georgia State Highway Dept. v. Wright, 107 Ga. App. 758, 131 S.E.2d 808 (1963) (inference of assent must be based on sufficient conduct); Fox v. Lisman, 208 Wis. 1, 237 N.W. 267 (1931),*rev'd*, 209 Wis. 1, 240 N.W. 809 (1932)(recognized that last shot rule based on what must be justified evidence of intent); McKell v. Chesapeake & O. Ry., 175 F. 329 (6th Cir. 1910)(course of conduct showed intent).

116. This approach was demonstrated in McKell v. Chesapeake & O. Ry., 175 F. 329 (6th Cir. 1910).

117. *See* Georgia State Highway Dept. v. Wright, 107 Ga. App. 758, 131 S.E.2d 808 (1963).

118. *See, e.g., id.*; Todorovich v. Kinickinnic, 238 Wis. 39, 298 N.W. 226 (1941); Drucker v. Oppenheim, 165 N.Y.S. 289 (1917); McKell v. Chesapeake & O. Ry., 175 F. 329 (6th Cir. 1910); Union Bank v. Shea, 57 Minn. 180, 58 N.W. 985 (1854).

acceptance would be bound by its terms only if the "reasonable and fair deduction"[119] (that is, inference) from the offeror's conduct was that he had accepted. The impression of acceptance which the offeror's acts created in the offeree was of crucial importance in drawing this inference.

Other cases directly refused to apply the last shot doctrine because of the subject matter of the variance. One case, *Celanese v. John Clark Co.*,[120] held that it was avoiding the last shot rule. After plaintiff wrote to defendant to inquire about nonflammable hydraulic fluid for use in plaintiff's factory, the sales manager wrote to plaintiff recommending a particular type of fluid which he assured was "nonflammable."[121] Plaintiff then sent his order form, to which defendant replied with an acknowledgement form containing a prominent warranty disclaimer.[122] Relying on *Halliburton v. Millican*,[123] the court held that a contract had been formed prior to dispatch or receipt of the variant acknowledgement form.[124] The court refused to apply the last shot principle because of the substantive nature or content of the disclaimer and the understanding of the offeror.[125] This approach was neither a rare or infrequent occurrence.

Some cases flatly refused to apply the last shot doctrine whenever warranty disclaimers were involved in the variance. In *Moorehead v. Minneapolis Seed Co.*,[126] oral negotiations between buyer and seller did not result in a contract at that time. Subsequently, the vendor sent a confirmation letter to the vendee which

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119. *See, e.g.*,, Keith v. Aztec Land Co., 21 Ariz. 634, 643, 193 P. 535, 538 (1920). *But see* Boston Lumber Co. v. Pendelton, 102 Conn. 626, 129 A. 782 (1925).

120. 214 F.2d 551 (5th Cir. 1954). This case did not apply the U.C.C.

121. *Id.* at 552 n. 2.

122. The acknowledgement form clearly stated that the defendant was willing to contract only on its own terms and conditions. The court expressly recognized that the form prominently referred to its terms and conditions, one of which stated: "Warranties and Claims. Seller makes no warranty of any kind, express or implied, except that materials sold hereunder shall be of Sellers standard quality, and buyer assumes all risk and liability whatsoever resulting from the use of such materials . . . ." *Id.* at 554 n. 4.

123. 171 F.2d 426 (5th Cir. 1948).

124. 214 F.2d at 554-55. The court enumerated that:

> (1) the acknowledgement relied on was not contradicted, the contract having already been made before the acknowledgement was sent to the plaintiff's office; and (2) if it was a part of the contract and should be given effect as a covenant against warranting, it did not purport to, it did not, contract against its negligence and gross negligence.

Id.

125. *Id.* at 555 n.7.

126. 139 Minn. 11, 165 N.W. 484 (1917).

contained a warranty disclaimer and shipment and acceptance of the delivery followed. The seeds failed to germinate, and the vendee filed suit on a breach of express warranty theory. Although the case involved the classic example of a situation to which the last shot doctrine had been applied in the past,[127] the court flatly refused to do so,[128] and held that: "If a warranty was actually made during the negotiations, and not withdrawn or modified, it should be given effect irrespective of the printed disclaimers."[129] Although the court employed the device of finding that the contract was formed by oral conversations prior to the dispatch of the form, a policy reason against warranty disclaimers was also given as a reason for this conclusion. That policy reason is significant for it is normative: it implied that the court refused a last shot analysis because of perceived unfairness. Such action was flatly contradictory to the last shot rule.

Many other cases also recognized the unfairness of the last shot doctrine in warranty disclaimer situations and refused to apply it. In *Edgar v. Breck*,[130] a case which clearly developed this exception, after brief and cursory conversations about the qualities of a particular species of bulb, a retailer placed an order for lily bulbs which were "true to increase."[131] A notice or bill which contained a warranty disclaimer arrived at the same time as the bulbs. The bulbs were defective and the vendee filed suit for breach of warranty, to which the defendant interposed a defense of warranty disclaimer. The court held that even though a writing was not executed until later, the time of formation of the contract was when the parties *orally* reached agreement. Thus, the court reasoned, the warranty disclaimer was an attempt to add to or change a contract which was already in existence. Such a change could only occur if the parties rescinded the oral contract and entered into a

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127. For the typical last shot response in this situation, *see* Vaughan's Seed Store v. Morris, 123 N.J.L. 26, 7 A.2d 868 (1939), where on virtually identical facts it was held, as a matter of law, that the seller's terms, which eliminated virtually all remedies for defects, controlled. *See also* Seattle Seed Co. v. Fujimori, 79 Wash. 123, 139 P. 866 (1914)(sack contained card with warranty disclaimer); Blizzard Bros. v. Growers' Canning Co., 152 Iowa 257, 132 N.W. 66 (1911)(package had disclaimer printed upon it).

128. The court recognized that the sale was confirmed in the "usual" fashion by a letter at the top of which appeared the following disclaimer: "We give no warranty, express or implied, as to description, quality, productiveness, or any other matter, of any seeds we send out, and we will not in any way be responsible for the crop . . . ." 139 Minn. at 13, 165 N.W. at 485.

129. *Id.* Moreover, the court held that the question was one for the jury.

130. 172 Mass. 581, 52 N.E. 1083 (1899).

131. *Id.* at 582, 52 N.E. at 1084.

new contract with the warranty disclaimer term.[132]

Other cases developed this basis for rejection of the last shot rule without even bothering with the pretext of finding agreement prior to the exchange of forms. *Davis v. Ferguson Seed Farms*[133] is a good example. In that case, during what where conceded to be merely negotiations, the vendor and vendee discussed a warranty. However, after vendee placed his order, vendor's acknowledgement, notice of shipment, and several other written communications included prominent warranty disclaimers. The Texas Court of Civil Appeals, holding that the question of warranty disclaimer was a question for the jury, emphasized that the descriptions of the goods given by the vendor during negotiations, if "not withdrawn or modified . . . should be given effect, *irrespective of the printed disclaimers.*"[134] The language from the *Davis* decision strongly suggested that, when warranties are disclaimed in later communications, the last shot doctrine should not be applied as a matter of law. Under this approach, it was not necessary to hold that the contract had been formed prior to the dispatch of vendor's forms in order to avoid application of the last shot principle. Instead, if the vendee justifiably and reasonably understood that a warranty was being given as a result of preliminary negotiations, then in spite of later repeated and clear written disclaimers in vendor's forms, the disclaimer would be part of the contract only if the vendee in fact knew of and consented to it.[135] There were a fair number of cases which flatly refused or came very close to express refusal to apply the last shot doctrine in various situations involving warranty disclaimers.[136]

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132. *Id.* at at 582-83 52 N.E. at 1084. The court held that:

> The contract was made when the parties made their oral agreement. It does not matter that at that time it was not evidenced by a memorandum in writing . . . . The general printed warning . . . that the defendant did not warrant seeds could have no effect unless it led to the inference that the old contract had been rescinded . . . .

Id.

133. 255 S.W. 655 (Tex. Civ. App. 1923).

134. 255 S.W. at 662 (emphasis added).

135. *See also* Ingraham v. Associated Oil Co., 166 Wash. 305, 6 P.2d 645 (1933)(jury verdict ignoring disclaimer upheld); Smith Bros. Grain Co. v. Windsor, 242 S.W. 350 (Tex. Civ. App. 1922)(statements in description entitled to reliance).

136. *See* Bell v. Mills, 78 A.D. 42, 80 N.Y.S. 34 (1902); Landreth v. Wyckoff, 67 A.D. 145, 73 N.Y.S. 388 (1901). In *Landreth*, the warranty was clear and prominent:

> D. Landreth & Sons give no warranty, express or implied, as to the description, quality, and productiveness, or any other matter, of any seeds they send out, and they will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms, they are at once to be returned.

67 A.D. at 146-47, 73 N.Y.S. at 389. Although this disclaimer was received by the purchaser

B. *Indirect Refusals to Employ the Last Shot Doctrine*

In the above decisions, the refusal to apply that last shot doctrine was rather direct. In other cases the courts did not directly refuse to apply the doctrine, but instead used several devices to avoid the outcome which application of the last shot rule required. One such device was simply to recognize that in many situations the parties had reached agreement and formed a contract *before* the last form was received.[137] For example, when shipment and receipt of the variant form occurred at the same time, several cases held that the act of shipment alone was acceptance.[138] This meant, of course, that the variant terms did not become part of the contract between the parties. Although this result could have been reached under the last shot doctrine, other cases made it clear that they were using a fundamentally different theory. One good example is *Meadow River Lumber Co. v. Black*.[139] There, the plaintiff's form order was for a specific quantity of lumber free of heart, but the defendant's acknowledgement provided that the lumber would be of "average 8" wood. The wood delivered was not free of heart. Recognizing that the issue of deciding the terms included in the contract involved determining the intent of the parties,[140] the court stated that, "[W]here the order . . . is made in writing the order must be accepted or rejected according to its terms, and when [the vendor] undertook to fill the order for the lumber, without a modification being agreed to, *such act was an acceptance of the order as written.*"[141] This decision and explanation are wholly inconsistent with the last shot rule, because although the *vendor* had fired the last shot, that is he sent the last form, the contract was formed upon the terms in *vendee's* earlier writing. Similarly, other cases held that when telegrams were exchanged, if the parties understood that the telegrams were the basis of their bargain, then a subsequent variant non-telegraphic confirmation would be of no effect because the contract was already in existence when the exchange of telegrams concluded.[142] In several of these decisions the

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prior to delivery, he did not read it. The court held that the disclaimer was ineffective. *Id.* at 147, 73 N.Y.S. at 389.

137. *See* Davis v. Ferguson Seed Farms, 255 S.W. 655 (Tex. Civ. App. 1923).

138. See *Meadow River Lumber Co. v. Black, 26 Ala. App. 28, 153 So. 290 (1933),* aff'd, *228 Ala. 279, 153 So. 293 (1934); Stokes v. Hinton, 197 Ala. 280, 72 So. 502 (1916).*

139. 26 Ala. App. 28, 153 So. 290 (1933), aff'd, *228 Ala. 279, 153 So. 293 (1934).*

140. 26 Ala. App. 28, 153 So. at 292.

141. Id. *(emphasis added)*

142. See, e.g., *Panhandle Refining Co. v. Bennett, 13 S.W.2d 923 (1924).*

courts apparently reasoned that if the offeree *began* any act of performance before receipt of a variant form by the offeror, it was still a question of fact whether the variant terms were part of the contract and the crucial question was the understanding or intent of the offeror.[143] The important feature which must be emphasized about all of these cases was that virtually every one of them involved a situation in which the last shot rule was patently applicable, and that rule, if applied, would have led to a different result.

Other cases emphasized the idea that the last shot principle involved an objective theory of implication or inference. This theory or approach recognized that finding acceptance involved a factual conclusion which had to be justified.[144] Thus, even though many of the opinions claimed that they were following the *Poel* version of the last shot doctrine which provides that the writings control, and that the variance-acceptance problem is solved mechanically as a matter of law, their methods of applying the last shot doctrine and explanations were diametrically opposed to the *Poel* approach. In these cases the last shot doctrine was employed only when the factual inference that the recipient of the last communication intended to accept, or created the impression that he accepted, was justified. On one hand, the *Poel* version of the doctrine held that the last variant form was a counter-offer and that the court would determine the significance of acts by the recipient subsequent thereto as a matter of law. As has been pointed out, this doctrine also provided as a rule of law or presumption that any act of the recipient thereafter constituted acceptance regardless of the knowledge or intent of the recipient. On the other hand, in the cases just examined, the courts employed the term or label "matter of law" in a profoundly different fashion. They meant that the question of whether acceptance had occurred is for the court, *but in deciding that question, the courts treated it as an issue of fact*, and did not confine its examination to the four corners of the writings involved.[145] This approach in turn meant that the decisionmaker did not confine his attention to the last writing and the

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143. See, e.g., *Halliburton Oil Well Cementing Co. v. Millican, 171 F.2d 426 (5th Cir. 1948).*

144. See, e.g., *Keith v. Aztec Land & Cattle Co., 21 Ariz. 634, 193 P. 535 (1920). In* Keith, *the court explained the "*deduction *to be drawn from defendants' conduct . . . is that they were satisfied . . . . '[A]cceptance may be* inferred *where the parties enter on the execution of the contract . . . .'"* Id. *at 643, 193 P. at 538 (quoting 13 C.J.* Contracts *§ 87)(emphasis added).*

145. See, e.g., *Lamis v. Des Moines Elevator & Grain Co., 210 Iowa 1084, 229 N.W. 756 (1930).*

subsequent act of the recipient, and the decisionmaker certainly did not treat the doctrine as involving a presumption of acceptance. In the cases under consideration, the courts recognized no such limits, and invoked the last shot doctrine only where on *all* the facts the inference of acceptance was justified. Thus, these cases adopted an approach to the variance situation which simply involved shifting the function of finding facts and making inferences from the jury to the court. This process is familiar, for most lawyers are aware of the variety of devices which have been used to control lay juries.[146] The objective of controlling the jury, however, should not obscure the principle that, even though the determination of acceptance was assigned to a judge, many judges treated the determination as a purely factual one involving the totality of party acts and circumstances, not as a question of law involving only the writings or the last writing. Some cases, such as *Atlantic Terra Cotta Co. v. Chesapeake Terra Cotta Co.*,[147] appeared to have expressly recognized this approach by reasoning that where variance problems occurred it was necessary to determine " 'the intention of the parties as gathered from the language used [when interpreted] in the light of the surrounding circumstances.' "[148] In another case where the controversy involved terms of payment, which in past dealings had always been in cash, insertion of payment terms in a variant acceptance was held binding because it represented the actual intent or understanding of the parties.[149] Similarly, in *Wheeler v. Klaholt*,[150] the court held that after the parties had engaged in business for many years on the basis of oral orders which were followed by confirmation, the inference of acceptance of variant terms in the confirmation was justified.[151] In *Massachusetts Bonding & Insurance Co. v. Bins & Equip. Co.*,[152] it was held that the question of which terms controlled in case of variance was a factual matter for the *jury*.

Finally, the courts also employed adverse construction in some cases involving warranties. They held that warranty disclaimers

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146. See F. James & G. Hazard, Civil Procedure 227-345 (2d ed. 1977).

147. 96 Conn. 88, 113 A. 156 (1921).

148. Id. *at 97, 113 A. at 159 (quoting Garber v. Goldstein, 92 Conn. 226, 227, 102 A. 605, 606 (1917))*.

149. See, e.g., *Tulane Hardwood Lumber Co. v. Singer Lumber Co., 168 So. 368 (La. 1936)*.

150. 178 Mass. 141, 59 N.E. 756 (1901).

151. Id.

152. 100 Ga. App. 847, 112 S.E.2d 626 (1959). Although the case was decided after the Code was adopted, it did not involve the U.C.C.

are disfavored and against public policy and therefore, knowledge of disclaimer had to be clearly and affirmatively brought to the attention of the offeror.[153] This approach was one which was definitely not hospitable to the last shot regime. When coupled with the admonition adopted by some courts that warranty disclaimers will be construed against their makers,[154] application of the last shot principle was, as a practical matter, wholly prevented.

IV. Conclusion

The analysis of the case law above establishes that courts, analysts, and commentators were incorrect or misleading in describing how pre-Code decisions dealt with the variance problem. In spite of widespread assumptions to the contrary, many pre-Code decisionmakers perceived the harshness and unfairness of the mirror image and last shot doctrines, and they directly or indirectly avoided them.

Because of the perceived unfairness of the mirror image rule, many decisionmakers created exceptions in situations to which that rule appeared to be patently applicable. Although many writers described these refusals to employ the standard approach as minor exceptions involving mere details, requests, suggestions, or implied terms, these exceptions contradicted the mirror image approach at a fundamental level. Instead of emphasizing the mere existence of a variance, the focus in these cases was upon the actual intent, understanding, or expectation of the parties, which was objectively determined from the entire factual context. These cases also employed the concept of material variance.

The corollary of the mirror image rule known as the last shot doctrine created even more serious problems. First, review of the cases where that rule was employed illustrates that it was impossible to ascertain how it would be applied in a given case. Although the content of the last shot doctrine was apparently clear, simple and almost self-executing, the way in which that doctrine would be applied in a particular case was impossible to predict. Nor did courts employing the doctrine not explain why or how a particular writing was chosen as the last shot. The last shot doctrine was

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153. See, e.g., *California & Hawaiian Sugar Refining Corp. v. Harris, 27 F.2d 392 (S.D. Tex. 1928). This is a familiar situation to which the unconscionability doctrine is also often applied.*

154. See *Fairfax Gas & Supply Co. v. Hadary, 151 F.2d 939 (4th Cir. 1945)*. See also *Ingraham v. Associated Oil Co. 166 Wash. 305, 6 P.2d 645 (1933).*

merely a process of classification or characterization.

Characterization involved an intuitive categorization or choice of one writing—which might or might not be chronologically the last communication—as the last shot, and the focus of the decision-makers' inquiry thereafter shifted to whether there had or had not been any action by the recipient which could constitute acceptance. Decision-makers, often faced with several plausible choices to constitute the last shot, any of which apparently could have been chosen with equal persuasiveness, selected or characterized one and then recited the language of the last shot doctrine to justify their choice. The flaw of this approach was that it did not explain *why* the particular choice of a communication as the last shot prevailed over other plausible and equally tenable choices. Characterization is a process which operates in an intuitive fashion. The intuitive nature of the characterization process probably prevented courts from fashioning a coherent body of substantive principles in the variance area, and probably contributed to their failure to develop any consistent manner of application of the doctrine. The most damaging consequence of this type of reasoning, however, was that it caused decision-makers to lose sight of the basic and fundamental goals of the contract formation process, of which the variance problem was merely one part. That goal was to ascertain the terms to which parties had assented.

A related feature of the last shot doctrine also contradicted the basic goals of determining the mutual intent of the parties through the creation of two presumptions. First, under that doctrine, it was presumed that *any* variance in a writing was material in the sense that the writer intended to contract only if his terms were included. Second, it was presumed that *any* act relative to the subject matter after receipt of the writing with the variance was intended as an acceptance by the recipient. These presumptions often operated in a manner which was inconsistent with party intent. In many cases where the last shot doctrine was employed, the recipient of the communication chosen as the last shot was held to be bound by terms of a counter-offer even though the sender knew that the recipient did not know of the additional or different term. In many of the same cases, it was equally clear that the varied term, at the time information was sent, was not material to the sender, who in no way intended to condition formation of a contract upon inclusion of his new term. These were serious flaws. Merely to list them illustrates why so many courts hesitated or refused to employ the last shot rule.

The cases refusing to apply the last shot approach either did so expressly or resorted to a wide variety of obvious subterfuges and flanking devices to avoid its application. Several features stand out in these cases. Because the courts treated the problem as one of mutual assent, a question of fact, the type or style of reasoning employed was strikingly different from the standard last shot approach. The courts identified the basis or rationale of the last shot doctrine and, in doing so—or perhaps because of doing so—treated the problem of variance in a fashion which was consistent with the basic objectives of the Anglo-American contract formation process. These cases recognize that the conclusion of acceptance is premised upon a process of *implication* of assent from the actions of the recipient of the variant communication. Recognition that this was a process of implication led naturally to the conclusion that acceptance could not be mechanically presumed. Instead, it was necessary to determine the intent of the recipient as a question of fact. Moreover, these decisions recognized that it was illogical and arbitrary to presume that the mere existence of a variant term in a writing *ipso facto* led to the conclusion that inclusion of that new or different term was a condition of contracting. What this meant was that the impression or expectation of the sender and of the recipient of the counter-offer were relevant; that past dealings, course of dealings, and performance of both parties, including negotiation, had to be taken into account; and that the subject matter of the contract, and the subject of the variant term were also relevant. It is almost superfluous to point out that this factually oriented, contextual approach fundamentally contradicted the last shot doctrine.

Warranty disclaimer cases were another area where different reasons for refusing to apply the *Poel*, last shot approach developed. There were many indirect evasions of the last shot principle in warranty disclaimer cases. These cases also furnished the most direct and explicit refusals to apply both the mirror image and last shot doctrines. In fact, these cases announced an alternative rule which flatly contradicted the *Poel* jurisprudence. In some cases, a warranty made by a vendor during *negotiations* was held to be a term of the contract, even though the court conceded that no contract was formed until after written forms had been subsequently exchanged. The principal basis for this rejection of the standard last shot doctrine appeared to be the unfairness of applying that doctrine to permit warranty disclaimer. The courts made it clear that public policy was against disclaiming warranties or against

misleading the other party by appearing to give a warranty when, in fact, none was being created. This rationale rested squarely upon the idea fundamental to American contract law that party assent freely and knowingly given is essential to contract formation and inclusion of terms. Other decisions explained that, because warranty disclaimers were disfavored, they would be construed against the maker of the disclaimer. Some decisions went further and held that warranty disclaimers had to be clearly and affirmatively brought to the attention of the vendee. This group of decisions strongly suggested that, in a warranty disclaimer situation, as a matter of law the last shot principle was not applicable.

This was a novel approach to variance. The focus in this line of cases was upon the subject matter of the additional material warranty disclaimers. One result of this approach was the recognition that materiality or the presumed materiality of the variance to the vendee was an important consideration in the analysis of problems of this type, and materiality is affected by the *subject* of the variance. Standing in stark contrast to the standard last shot approach, this last development sought to implement the general objectives of the law of contracts on the subject of consent to new terms in deciding variance questions.

This review of the common law cases which were precursors to the Code fundamentally contradicts what common law and Code writers described as the law of variance. Many cases decided prior to the Code recognized the difficulty inherent in resolving the variance problem. They recognized that variance is a complex problem, which may occur for a variety of reasons, which may occur in a myriad of ways, and which may involve a diversity of subjects. Accordingly, they fashioned a number of alternative approaches or solutions to the variance problem. These alternative approaches were consistent with the goals of the contract formation process and the policies sought to be served by that process.

Drawing upon inaccurate analysis of common law approaches to variance, many courts and modern writers have made a number of unjustified assumptions. These writers assume that at common law, the variance problem was perceived as simple and treated accordingly. In the view of these writers, prior to the Code, the mechanical, simplistic approach of the mirror image and last shot doctrine reigned supreme and unchallenged in the variance area. Those who are unaware of history are doomed to repeat it. It is submitted that modern treatment of the variance problem is more likely to be effective if those incorrect assumptions about the na-

ture of the variance problem and its common law solutions are dispelled. It is also submitted that modern approaches to variance, and especially section 207 of the Code, recognize the complexity of the variance problem and seek to bring treatment of the problem into line with the basic goals of the agreement process and the general substantive policies of the Code. Many of these modern Code goals have been ignored because of reliance on common law ways of thinking about variance and its solutions. If the goals of the Code and other modern approaches to variance are to be accomplished, the pernicious effects of the common law conceptualizations of the variance problem must by identified and avoided.

If the Code solution to the variance problem is interpreted and applied by the courts in the rigid and doctrinaire fashion of the mirror image and last shot rules—and there is considerable evidence that it has been—then the Code will be no improvement in resolving variance problems. A subsequent article will analyze the new process, goals and approaches of the Code to the variance problem.