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Meinhard v. Salmon

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Abstract

This article offers a legal history of the northwest corner of 42nd Street and Fifth Avenue, the plot of land that, among other things, was the source of dispute in *Meinhard v. Salmon*, one of the leading business law cases in American history. Using the *Meinhard* case as a lens, the paper explores New York's changing ethnic, social, and economic environment – the rise and fall of industries, the booms and busts of business conditions, the dispersal and commercialization of landed estates, the influence of immigrants, the role of yachting, horse racing, art collecting and charitable work in establishing social standing, and the importance of family and heritage in the development of New York City during the late Nineteenth and early Twentieth Centuries.

Meinhard v. Salmon

Geoffrey P. Miller¹

In New York City, a year or two after the turn of the last century, two ambitious men met to discuss a matter of mutual interest. The subject was commerce. One wanted to lease and develop a piece of commercial real estate but lacked the financing to do so; the other had funds to invest but lacked knowledge of the real estate market. The deal, once struck, turned out well for both: within twenty years the property in question had become one of the most valuable parcels of real estate in the world, and in the interim had generated spectacular profits. But too much success, perhaps more than too little, can lead to disputes and litigation. Upon the expiration of the lease the parties fought over their continuing rights. Eventually their conflict reached the highest court of the State of New York, generating one of the enduring cases in the history of American law. This chapter tells the story of that case, *Meinhard v. Salmon*, and in the process explores changing patterns of land use and social status in America's premier city during the last part of the Nineteenth and first part of the Twentieth Century.

* * *

Prior to 1845 the northwest corner of 42nd Street and Fifth Avenue belonged to the City of New York.² It appears to have been undeveloped. In that year the city sold the property to Garrit Storm, a well-heeled New York merchant,³ who used the site for a

¹ Stuyvesant P. Comfort Professor of Law, New York University. For excellent research assistance I thank my student David J. Carey and Jeanne Rehberg of the NYU Law Library. Jonathan Macey, Larry Ribstein and Jay Weiser provided helpful comments as this chapter was in preparation.

² Abstract of Title, 3 West 42nd Street.

³ Abstract of Title, 3 West 42nd Street (deed to Storm). Storm was one of 130 New Yorkers who purchased \$10,000 or more in government bonds during the 1813 subscription to fund the War of 1812. See *When New York Aided War Loans of 1812*, *New York Times*, June 10, 1917.

home, stable, and orchard.⁴ Storm also appears to have allowed part of the property to be used for a tavern.⁵ Storm's holdings passed by will to Glovinia Rossell Hoffman and Louisa Matilda Livingston as tenants in common.⁶ In 1852 the heirs partitioned their inheritance, with Glovinia and her husband Samuel Ver Plank Hoffman deeding the fee interest in the northwest corner of 42nd Street to Louisa Matilda Livingston.⁷

Louisa and her husband Robert Livingston were members of New York's elite.⁸ Robert's ancestors included Robert Livingston (1654-1728), the first lord of Livingston Manor, a 160,000 acre tract in Dutchess and Columbia Counties,⁹ and Robert R. Livingston (1746-1813),¹⁰ Chancellor of New York State, Ambassador to France, negotiator of the Louisiana Purchase, and holder (with Robert Fulton) of the purported exclusive rights to steam navigation in New York adjudicated in *Gibbons v. Ogden*.¹¹ Louisa's ancestors included Morgan Lewis (1754-1844), Attorney General, Chief Justice, and Governor of the State of New York.¹²

Some time between 1852 and 1862 the Livingstons constructed a four-story townhouse on the property.¹³ The neighborhood enjoyed no special distinction at that

⁴ See On Ave. of the Americas, the Lull is Ending, New York Times, May 4, 1980.

⁵ See Arthur Bartlett Maurice, Fifth Avenue (1918) (reporting that the lot had once been used as a tavern).

⁶ See Abstract of Title, 3 West 42nd Street; Florence Van Rensselaer, The Livingston Family in America and Its Scottish Origins 336 (1949); William B. Aitken, Distinguished Families in America, Descended from Wilhelmus Beekman and Jan Thomasse Van Dyke 184 (1949). 0

⁷ Abstract of Title, 3 West 42nd Street.

⁸ For background on the Livingston clan, see Cynthia A. Kierner, Traders and Gentlefolk: The Livingstons of New York, 1675-1790 (1992); David Maldwyn Ellis, Landlords and Farmers in the Hudson-Mohawk Region, 1790-1850 (1946); Sung Bok Kim, Landlord and Tenant in Colonial New York: Manorial Society, 1664-1775 (1978); Claire Brandt, An American Aristocracy: The Livingstons (1986).

⁹ See Robert Livingston, 11 Dictionary of American Biography 318 (1933); George Dangerfield, Chancellor Robert R. Livingston of New York 1746-1813 (1960).

¹⁰ See Robert R. Livingston, see 11 Dictionary of American Biography 320-25 (1933); James Brown Scott, Robert R. Livingston, 1 Great American Lawyers 435-472 (William Draper Lewis, ed 1907).

¹¹ 22 U.S. (9 Wheat.) 1 (1824).

¹² See II History of the Bench and Bar of New York 171-73 (David McAdam et al. eds. 1897).

¹³ See Edwin L. Dunbaugh and William duBarry Thomas, William H. Webb, Shipbuilder 129 (1989).

time. Many in old New York society still lived near Washington Square at the foot of Fifth Avenue, while the newly rich lived in the neighborhood anchored by the Astor compound on 34th Street and Fifth.¹⁴ But high-class housing was moving north.¹⁵ The opening of a cleared Central Park in the 1860s exerted an attractive force, while “virtually insatiable” demands for office and retail space were displacing houses further south.¹⁶ During the late Nineteenth Century several prominent figures built homes on or near the corner of 42nd Street and Fifth Avenue, including Levi Morton, Vice President of the United States under William Henry Harrison, “Boss” Tweed of Tammany Hall fame, and railroad financier Russell Sage.¹⁷

In October 1862 Robert and Louisa Livingston leased their property to William H. Webb (1816-1899),¹⁸ a prominent shipbuilder and naval architect.¹⁹ Webb had amassed a fortune building luxury yachts and packet ships in the 1840s,²⁰ clipper ships in the 1850s,²¹ and warships in the 1860s.²² Webb also established passenger and mail lines

¹⁴ See Robert A.M. Stern, Gregory Gilmartin and John Montague Massengale, *Metropolitan Architecture and Urbanism 1890-1915* 307 (1983); Tom Shachtman, *Skyscraper Dreams* 41 (1991).

¹⁵ Edwin G. Burrows & Mike Wallace, *Gotham: A History of New York City to 1898* 715-16 (1999); Tom Shachtman, *Skyscraper Dreams* 41 (1991).

¹⁶ See Robert A.M. Stern, Gregory Gilmartin and John Montague Massengale, *Metropolitan Architecture and Urbanism 1890-1915* 307-08 (1983).

¹⁷ Arthur Bartlett Maurice, *Fifth Avenue* (1918); Another “Bomb” for Russell Sage, *New York Times*, December 30, 1893.

¹⁸ See Edwin L. Dunbaugh and William duBarry Thomas, *William H. Webb, Shipbuilder* (1989); William H. Webb Dead, *New York Times*, October 31, 1899. Webb’s father was also a New York shipbuilder with a connection with the Livingston family, having built the steamboat *Chancellor Livingston* for Robert Fulton. William H. Webb, *New York Times*, July 11, 1897.

¹⁹ William Henry Webb, *New York Times*, July 11, 1897; Edwin L. Dunbaugh and William duBarry Thomas, *William H. Webb, Shipbuilder* (1989).

²⁰ See *The New-York Yacht Club; Dinner to Commodore Stevens*, *New York Times*, October 3, 1851.

²¹ See *The Days of the Clipper: Fast Ships that Engaged in the California Trade*, *New York Times*, September 7, 1890.

²² The frigate *Grand Admiral*, which Webb built for the Russian Navy in 1858, was then the fastest steam frigate ever built. Fred Irving Dayton, *Steamboat Days* (1925). In the 1860s Webb built two iron-clad frigates for the Italian Navy, the *Re D’italia* and the *Portogallo*. See *The Italian Iron-Clad Re D’italia: The Vessel Ashore At Long Branch*, *New York Times*, December 30, 1863; *Soiree on Board the Italian*

to the Pacific Coast and from San Francisco to Australia and New Zealand.²³ He apparently acquired the Livingston property as a home for himself and his wife, or possibly as a residence for his son.²⁴ However, no member of the Webb family ever lived there.²⁵

The New York shipbuilding industry collapsed after the end of the Civil War.²⁶ One of Webb's last major commissions was the 5,000 ton ram *Dunderburg*, the largest ironclad yet built²⁷ and, in the view of some, a factor hastening the end of the Civil War.²⁸ But the Navy lost interest in the project after the war and Webb sold the vessel (rechristened the *Rochambeau*) to France.²⁹ Webb closed his shipyard in 1870.³⁰ His passenger steamship business also failed, due in part to the construction of the transcontinental railroad (completed in 1869).³¹ By 1872 Webb had retired from maritime-related activities.

With time on his hands Webb developed the property at the corner of 42nd Street and Fifth Avenue. He leased an adjoining lot from the Livingstons and incorporated the existing townhouse into a much larger structure, the 8-story Bristol Hotel, completed in

Frigate *Re d'Italia*, *New York Times*, December 3, 1863; *The Italian Navy: The Broadside Iron-clad Frigate Portogallo Delivered to Her Owners*, *New York Times*, July 23, 1864.

²³ The New Steam-ship Line to Australia--An Enterprising Citizen of New-York, *New York Times*, August 28, 1870.

²⁴ Edwin L. Dunbaugh and William duBarry Thomas, *William H. Webb, Shipbuilder* 130 (1989).

²⁵ Edwin L. Dunbaugh and William duBarry Thomas, *William H. Webb, Shipbuilder* 130 (1989).

²⁶ Reasons for the collapse included the glut of military vessels returning to civilian service, increased costs of materials, lack of skilled workers, competition from foreign yards, and the unsuitability of New York shipyards for steel hull construction. See *Our Ship-Yards; Present Condition of the Ship-Building Trade in New-York, Brooklyn and Jersey City*, *New York Times*, January 29, 1867; Joseph Cuneo, *Who Was William Webb?* (speech given on April 7, 2006 and available at http://www.webb-institute.edu/about_webb/williamwebb.php) (visited August 12, 2007).

²⁷ Fred Irving Dayton, *Steamboat Days* (1925); *New York Times*, General News, July 23, 1865.

²⁸ Fred Irving Dayton, *Steamboat Days* (1925).

²⁹ *Local Intelligence, The Dunderberg Visitors*, *New York Times*, July 3, 1867.

³⁰ Edwin L. Dunbaugh and William duBarry Thomas, *William H. Webb, Shipbuilder* 117 (1989).

³¹ Edwin L. Dunbaugh and William duBarry Thomas, *William H. Webb, Shipbuilder* 116-25 (1989).

1875.³² The project made eminent sense. The elevated railways which had entered service beginning in 1870 had enhanced the northward movement of commerce and housing. The elevator (introduced in New York during the 1853 Crystal Palace Exhibition) permitted developers to construct larger hotels and apartment buildings.³³ Webb understood that the days of single residences in midtown Manhattan were numbered and that the property in question could generate a good income if configured for multi-family use.

The Bristol was not a hotel in the modern sense. It a high-class rooming house with long-term tenants who, for whatever reason, did not wish or could not afford to own their own residences but who desired a first-class address.³⁴ Webb entrusted the management to Captain James H. Corey, a domineering figure whose efforts to suppress scandals more than once landed him in trouble.³⁵ Under Corey's direction the hotel hosted society weddings³⁶ and maintained a reputation as one of the "best and most exclusive hosteries in New York City,"³⁷ although its prestige was eclipsed by grander institutions such as the Waldorf-Astoria, the Holland House, and the Savoy.³⁸ Aside from dealing with demanding guests,³⁹ its biggest challenge in the early days was filling

³² See Edwin L. Dunbaugh and William duBarry Thomas, *William H. Webb, Shipbuilder* 130 (1989). Good images of the hotel can be found on the New York Public Library's website. See, e.g., <http://digitalgallery.nypl.org/nypldigital/dgkeysearchdetail.cfm?trg=1&strucID=692557&imageID=805253&word=hotel%20bristol&s=1¬word=&d=&c=169,160,161,203,151,164,176,167,168,175,208,186,179,166,187,219,190,189,193,199,243,211,482&f=&lWord=&lField=&sScope=&sLevel=&sLabel=Cities%20%26%20Buildings&total=11&num=0&imgs=12&pNum=&pos=1#>.

³³ See Edwin G. Burrows & Mike Wallace, *Gotham: A History of New York City to 1898* 670 (1999) (elevator); Robert A.M. Stern, Gregory Gilmartin and John Montague Massengale, *Metropolitan Architecture and Urbanism 1890-1915* (1983).

³⁴ See *Family Troubles in Hotel Bristol*, *New York Times*, December 8, 1929.

³⁵ See, e.g., *Mr. Corey Gets a Verdict*, *New York Times*, April 20, 1883.

³⁶ *Events in the Metropolis*, *New York Times*, December 14, 1882.

³⁷ *Preparing to Raze Old Bristol Hotel*, *New York Times*, December 1, 1929.

³⁸ See Robert A.M. Stern, Gregory Gilmartin and John Montague Massengale, *Metropolitan Architecture and Urbanism 1890-1915* 253-72 (1983).

³⁹ See *Family Troubles in Hotel Bristol*, *New York Times*, December 8, 1929.

rooms during the summer months when well-to-do people fled New York for Newport or the 1,000 Islands.⁴⁰ Notwithstanding these problems, the hotel proved to be a lucrative investment for Webb, yielding approximately \$40,000 in annual income.⁴¹

Webb's deal with the Livingstons was a ground lease for 18 1/2 years at an annual rent of \$1,065 with an option to renew for an additional 21 years.⁴² The lease renewal proved contentious. The Livingstons sought a greatly increased rent. Webb refused to meet their demands. Unable to settle the matter privately, the parties appointed arbitrators pursuant to the terms of the lease. But the arbitrators could not agree either – and then could not agree on the choice of a neutral arbitrator to break the deadlock. Eventually the matter wound up in court, much to the amusement of newspapers observing bickering among the elite.⁴³

Representing the Livingstons in this lawsuit was Elbridge T. Gerry (1837-1927),⁴⁴ a lawyer of considerable ability, impeccable connections, strong social conscience, and a distinct personal interest in the property in question, being also the husband of Louisa Matilda Livingston (1836-1920), Robert and Louisa Livingston's only child. Gerry's family was, if anything, even more distinguished than that of his in-laws: his ancestors

⁴⁰ In 1878 some of the yearly tenants staged a rent strike intended to avoid paying summer rents, claiming that the food in the restaurant had deteriorated. *Life in the Hotel Bristol*, New York Times, September 25, 1878. By 1879 Corey was putting out the word that the Bristol was one of the "coolest" hotels in the city and that rooms were available in the summer at greatly reduced rates. *Hotel Bristol*, New York Times, June 10, 1879.

⁴¹ Edwin L. Dunbaugh and William duBarry Thomas, *William H. Webb, Shipbuilder* 130 (1989).

⁴² *In Need of an Umpire: A Long and Futile Attempt at Arbitration*, New York Times, August 16 1883.

⁴³ See *In Need of an Umpire: A Long and Futile Attempt at Arbitration*, New York Times, August 16, 1883.

⁴⁴ See *II History of the Bench and Bar of New York 171-73* (David McAdam et al. eds 1897); Tom Shachtman, *Skyscraper Dreams* 38 (1991).

included iron merchant Peter P. Goelet (1764-1828)⁴⁵ and Elbridge Gerry (1744-1814), a signer of the Declaration of Independence, member of the Constitutional Convention, Governor of Massachusetts, Vice President of the United States – and eponym for the term “gerrymander”.

Through his law practice and personal connections Elbridge T. Gerry would also have known William H. Webb, his clients’ adversary. Gerry had served as General Counsel of the Society for Prevention of Cruelty to Animals, an organization Webb co-founded in 1866. Gerry would have also been familiar with Webb’s shipbuilding activities by virtue of his involvement in the city’s yachting community (Gerry served as Commodore of the New York Yacht Club from 1885-1893).⁴⁶ Given these connections with both sides of the dispute, Gerry was probably relieved when the parties agreed (at his suggestion) to resolve the matter by drawing the name of a neutral arbitrator out of a hat.⁴⁷

Although the crisis surrounding the renewal of the leasehold was resolved, the Bristol Hotel faced another and ultimately fatal threat: the impetuous growth of mid-town Manhattan. Between 1877 and 1881 Webb fought a successful battle against a horse-railroad which would have passed in front of the hotel along 42nd Street.⁴⁸ Later he obtained an injunction against the demolition of the Croton Reservoir,⁴⁹ a popular

⁴⁵ See Joseph Alfred Scoville, *The Old Merchants of New York City* 348-49 (1864); *II History of the Bench and Bar of New York* 171-73 (David McAdam et al. eds 1897); Sydney H. Coleman, *Humane Society Leaders in America* 65-88 (1924).

⁴⁶ *II History of the Bench and Bar of New York* 171-73 (David McAdam et al. eds 1897).

⁴⁷ See *Quibbling Lawyers: Judge Potter Decides a Point With The Aid of a Hat*, *New York Times*, August 17, 1883.

⁴⁸ *The Forty-Second-St. Job*, *New York Times*, October 19, 1878; *Restraining a New Horse Car Road*, *New York Times*, September 11, 1880; *Street Railroad Work Stopped*, *New York Times*, September 15, 1880; *Miscellaneous City News: A Railroad Company Beaten*, *New York Times*, February 2, 1881.

⁴⁹ See *Aldermanic Proceedings: The Forty-Second-Street Reservoir*, *New York Times*, October 5, 1881; *The Removal of the Reservoir: Mr. Webb’s Suit and The Powers of the Corporation Counsel*, *New*

strolling place which occupied the blocks between 40th and 42nd Streets on Fifth Avenue.⁵⁰ But Webb's struggle to preserve the ambiance of the neighborhood was doomed. Even without the convenience of a horse railway, commerce along 42nd Street was burgeoning. Webb recognized this fact, writing in 1887 that much of the property in the vicinity of 42nd Street and Fifth Avenue had "already passed from use as residences to that for business, and more is rapidly being converted for like purposes."⁵¹

As the leasehold approached its termination, midtown Manhattan was enjoying an astonishing boom in property values.⁵² In 1900 the Fifth Avenue Hotel, at 23d Street, sold at auction for the then-astounding sum of \$4,225,000.⁵³ A corner lot at Fifth Avenue and 38th Street sold for \$4,000,000 in 1901.⁵⁴ It was obvious that the site at 42nd Street and Fifth Avenue was no longer serving its highest and best use as a residential hotel. Elbridge and Louisa Gerry needed a new partner to develop the property.⁵⁵

The Gerrys identified an up-and-coming real estate developer, Walter J. Salmon (d. 1953) as a likely candidate for the leasehold. The evidence suggests that Salmon was

York Times, June 23, 1882, Fifth-Avenue Reservoir, New York Times, February 24, 1887. For background on the reservoir see Edwin Burrows and Mike Wallace, *Gotham: A History of New York City to 1898* 627 (1999).

⁵⁰ See <http://www.nypl.org/pr/history.cfm> (visited August 28, 2007). Webb opposed the demolition for technical reasons and also because he thought the project would be a source of Tammany Hall graft. Edwin L. Dunbaugh and William duBarry Thomas, William H. Webb, Shipbuilder 131 (1989). The effect of the project on his hotel would have been mixed: the demolition would have disrupted the hotel's business but the park that was planned to replace it would have been an amenity over the long term. In the event, Webb was only able to delay the project: the reservoir was replaced by the New York Public Library in 1902. Arthur Bartlett Maurice, *Fifth Avenue* (1918).

⁵¹ Fifth-Avenue Reservoir, New York Times, February 24, 1887.

⁵² Large Deals in the Last Week of a Remarkable Year, New York Times, December 29, 1901.

⁵³ Fifth Avenue Hotel Sold for \$4,225,000, New York Times, April 27, 1900.

⁵⁴ Large Deals in the Last Week of a Remarkable Year, New York Times, December 29, 1901.

⁵⁵ Louisa Gerry was the legal owner at this time, having succeeded to the fee in 1891. *City of New York v. Gerry*, 100 Misc. 297, 165 N.Y.S. 659 (N.Y. Sup. 1917). The Gerrys chose to live north of 42nd Street, in an impressive mansion on 61st Street. See Robert A.M. Stern, Gregory Gilmartin and John Montague Massengale, *Metropolitan Architecture and Urbanism 1890-1915* 316 (1983).

an Episcopalian with family roots in England.⁵⁶ Salmon began as a young man to focus his considerable acumen and energy on the consolidation and development of commercial real estate in mid-town Manhattan. His strategy was to seek out the owners of the properties (often descendants of old and aristocratic families such as the Gerrys), and to acquire long-term net leases of the fee interests.⁵⁷ Salmon and the Gerrys agreed to a 20-year lease at an annual rental of \$45,000, together with an agreement covering the alteration of the building from a residential hotel to a commercial building at an anticipated cost of \$220,000.

But Salmon had a problem: he lacked funds to improve the premises. His resources were already stretched by another building he was renovating at the corner of 6th Avenue and 42nd Street.⁵⁸ His father had guaranteed the lease but apparently could not fund the renovation.⁵⁹ The Gerrys helped by advancing \$100,000 to be repaid at \$10,000 per year over 20 years (implying an interest rate of approximately 4%),⁶⁰ and about \$16,000 could be obtained from rentals. But this left a shortfall of \$104,000. Salmon needed money, and fast.

It is here that Morton H. Meinhard (1873-1931) enters the drama. Meinhard's ancestors were Jews from Franconia-Bavaria in South Germany.⁶¹ His father, Henry Meinhard, emigrated with his parents and four siblings to the United States sometime around 1850 and settled in Savannah, where the clan became well established (Meinhard

⁵⁶ The family name "Salmon" is typically traced to English or French origins, and Salmon's wife, Elizabeth Davy, appears to have been of English extraction. After Salmon's death she remarried in the Episcopal Church. Mrs. Salmon Wed to Francis Gillet, New York Times, March 4, 1956.

⁵⁷ Saw 42nd St. Value Thirty Years Ago: Many Choice Properties are Now Controlled by Walter J. Salmon, New York Times, October 26, 1930.

⁵⁸ In the Real Estate Field, New York Times, April 18, 1902.

⁵⁹ See Brief for Appellants, *Meinhard v. Salmon* 4.

⁶⁰ Brief for Appellants, *Meinhard v. Salmon*, at 5.

⁶¹ Private communication from Yehuda Meinhardt, August 4, 2007.

Road is still a major thoroughfare there). Henry and his brother Isaac went into a wholesale dry goods business and owned sixteen slaves.⁶² Sometime after the Civil War, Henry left for New York and there set up a business where Morton, his only son, started to work as a teenager.⁶³ Morton founded his own business in 1898. Although described in *Meinhard v. Salmon* as a “merchant” in woolen products, Meinhard’s real occupation was finance. Morton Meinhard & Co. was a factoring concern; it lent money to clothing manufacturers in the booming New York garment industry.⁶⁴

By 1902 Morton Meinhard had cash on hand. Salmon needed money. A profitable business arrangement was to be had, and both men recognized it. How Meinhard and Salmon met is not clear. They did not travel in the same religious or business circles. Nonetheless the two had something in common: each was an ambitious young man eager to make a mark on New York City. In some fashion they met and developed a trust between them. Salmon’s brief to the Court of Appeals refers to Meinhard as a “friend,” and there is no reason to doubt that they enjoyed cordial relations.

The deal between Salmon and Meinhard, which closed on May 19, 1902, was ostensibly separate from the lease between Salmon and the Gerrys. The lease made no reference to Meinhard and gave the Gerrys no control over how Salmon was to raise the renovation funds. Nevertheless the Gerrys had an interest in knowing that Salmon would

⁶² Marc I. Greenburg, *Becoming Southern: The Jews of Savannah, Georgia, 1830-70*, 86 *American Jewish History* 55-75 (1998).

⁶³ Executive’s Estate Contributes Million for Columbia Gym, *New York Times*, October 9, 1963; Simple Funeral for M.H. Meinhard, *New York Times*, May 14, 1931.

⁶⁴ For discussion of the importance of the garment industry in the Nineteenth Century New York economy, see Edwin G. Burrows & Mike Wallace, *Gotham: A History of New York City to 1898* 664-66 (1999). In the 1890s New York supplied almost two thirds by value of ready-to-wear women’s clothing and more than a quarter of the men’s market. Factoring Firms Bought Out by Merger, *New York Times*, November 13, 1931; Norma M. Rantisi, *The Ascendance of New York Fashion*, *International Journal of Urban and Regional Research* 86, 89-92 (2004).

find the money, and they probably were informed about Salmon's plans. It is also likely that Salmon and Meinhard had worked out the essential terms of their deal in advance – an inference supported by the referee's finding that Meinhard gave Salmon \$5,000 on April 7, three days before the leasehold closing.⁶⁵

The Salmon-Meinhard contract had the following terms. Meinhard would contribute half of the funds necessary to renovate the property; in return Salmon would pay Meinhard forty percent of the net profits for five years and fifty percent thereafter. The parties would share equally in losses. Salmon was given full authority to manage the property.

The deal turned out to be a spectacular success. As Salmon predicted, mid-town Manhattan prospered, and with it came demand for commercial office space. The Bristol commanded good rents from the start and increased in profitability over the years. A tax case involving Meinhard reported that the enterprise lost money only in the first year and showed ever-increasing profits thereafter.⁶⁶ In *Meinhard v. Salmon* Cardozo states that the enterprise lost money for a few years before turning a profit. Regardless, the venture prospered. Over the life of the lease Meinhard and Salmon each received over \$550,000 on their investments of slightly more than \$52,000.

All this felicity did not extend to relations between Meinhard and Salmon. Meinhard questioned charges that Salmon was making for expenses and complained that Salmon was not informing him about management decisions. The parties resolved the issues in 1908: Salmon promised to brief Meinhard on request about the affairs of the venture, and Meinhard agreed to allow Salmon a fixed charge of 6% of the rentals for

⁶⁵ Brief for Appellants, *Meinhard v. Salmon*, at 5.

⁶⁶ Appeal of Meinhard, 3 B.T.A. 612, 1926 WL 783 (B.T.A. 1926).

management expenses.⁶⁷ But this compromise didn't heal the wounds. Relations between Meinhard and Salmon deteriorated to the point that they had essentially no contact after 1917.⁶⁸

By the time the Bristol Hotel lease came up for renewal in 1922 the property was one of the most valuable pieces of real estate in the world.⁶⁹ In anticipation of the ending of the lease Elbridge T. Gerry and his son Robert Livingston Gerry (who managed the family properties after 1910),⁷⁰ had astutely purchased adjoining properties with a view towards future consolidation.⁷¹ Despite Salmon's success with the Bristol Hotel the Gerrys shopped around for developers.⁷² Eventually they settled on Salmon, executing a lease in January 1922, three months before the expiration of the old one. The new lease encompassed not only the Bristol Hotel site but also the adjoining lots owned by the Gerrys. The agreement called for demolition of the existing buildings and erection of a 25-story tower on the consolidated parcel.⁷³ The lease was for an initial term of 20 years (with options to renew) with annual rentals beginning at \$350,000 and raising to \$475,000 after ten years.

Salmon did not inform Meinhard of these negotiations. Meinhard's response, on learning of the new lease, was to sue. The trial court held for Meinhard, finding that he had established an entitlement to an equitable share in the Bristol Hotel portion of the new leasehold. The Appellate Division agreed that Meinhard was entitled to a share of

⁶⁷ Brief for Appellants, *Meinhard v. Salmon*, at 17.

⁶⁸ Brief for Appellants, *Meinhard v. Salmon*, at 23.

⁶⁹ See *Bristol Building Coming Down: Tenants to Vacate Nov. 30*, *New York Times*, November 21, 1929. By 1929 the property had the second-highest per-front foot tax value in Manhattan. *Skyscraper to Rise in 5th Av. at 42d St.*, *New York Times*, July 15, 1929.

⁷⁰ See Peter G. Gerry, Ex-Senator, Dies Hours Before His Brother Robert, *New York Times*, November 1, 1967.

⁷¹ Brief for Appellant, *Meinhard v. Salmon*, pp. 21-22.

⁷² Brief for Appellant, *Meinhard v. Salmon*, p. 22.

⁷³ See *Meinhard v. Salmon*, 223 A.D. 663, 229 N.Y.S. 345 (App. Div. 1928).

the lease, but held that his share was half the entire new lease, not just half the portion attributable to the Bristol Hotel.⁷⁴

In this posture the case came to the New York Court of Appeals. Here we meet the last major personage in the drama, Benjamin Cardozo, the author of the celebrated opinion.⁷⁵ Cardozo's ancestors were Sephardic Jews who had immigrated to the United States from Portugal before the Revolutionary War. Albert Cardozo, Benjamin's father, had been a judge of the New York Supreme Court (the court of general jurisdiction) but resigned to avoid impeachment amid accusations of favors done for Tammany politicians. Notwithstanding, Benjamin chose a career in law and joined his father's law firm, becoming a successful trial and appellate lawyer.⁷⁶

As Chief Judge of the Court of Appeals, Cardozo assigned himself the majority opinion in the *Meinhard* case.⁷⁷ Writing for a divided court,⁷⁸ he upheld the Appellate Division's judgment in favor of Meinhard subject to a modification that allowed Salmon to control the operation and management of the enterprise. The basis for the holding was that Salmon had breached the fiduciary duty that one "co-adventurer" owes another.⁷⁹

⁷⁴ *Meinhard v. Salmon*, 223 A.D. 663, 229 N.Y.S. 345 (App. Div. 1928). Two of the five judges dissented on the ground that Meinhard should have received a smaller share.

⁷⁵ The leading biographical treatment is Andrew L. Kaufman, *Cardozo* (1998). For a study of Cardozo's influence, see Richard A. Posner, *Cardozo: A Study in Reputation* (1990).

⁷⁶ See Richard A. Posner, *Cardozo: A Study in Reputation 2* (1990).

⁷⁷ For discussion of Cardozo's opinion, see William E. Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York 1920-1980* 60-61 (2001); Andrew Kaufman, *Cardozo*, 238-42 (1998).

⁷⁸ Three judges joined Cardozo's majority opinion, and two joined Judge Andrews' dissent.

⁷⁹ Both the majority and dissenting opinions declined to characterize Meinhard and Salmon as "partners." This reticence appears odd at first. Certainly their agreement of 1902 satisfied the traditional definition of a partnership, as an "association of two or more persons to carry on as co-owners a business for profit." Uniform Partnership Act § 6(a) (1914). This answer to this puzzle is that Meinhard had assigned his rights under the Salmon-Meinhard agreement to his wife in 1917 for tax planning reasons (her income would have been taxed at a lower bracket). *Appeal of Meinhard*, 3 B.T.A. 612, 1926 WL 783 (B.T.A. 1926). Meinhard's counsel had also provided a written opinion concluding that, for tax purposes, the agreement between Meinhard and Salmon was not a partnership. Salmon's counsel attempted to use these facts to demonstrate that the agreement with Meinhard was not a partnership and therefore not subject to the fiduciary duties attendant on the partnership relationship. Cardozo's refusal to characterize the

The holding is questionable. The lower court judges had felt obligated to rule for Meinhard in light of an earlier decision presenting similar facts.⁸⁰ But Cardozo was not so constrained (a “dissection of the precedents,” he remarked, would generate “little profit.”)⁸¹ In the absence of precedent, a number of cogent reasons favored Salmon over Meinhard:

1. The contract between Meinhard and Salmon clearly contemplated an arrangement limited by the term of the original lease.
2. It is unlikely that the parties would have required Salmon to share a new lease with Meinhard had they bargained over the issue. All Meinhard brought to the table was money, and Salmon had good reason to expect that he would have alternative sources of financing twenty years down the line.
3. Meinhard was not tricked. He knew that the lease was due to expire and must have understood that Salmon was a natural candidate for the new project. Salmon had agreed in 1908 to keep Meinhard informed about developments, but only if Meinhard asked – and Meinhard did not ask.⁸²
4. Salmon’s negotiations with the Gerrys were undertaken in good faith with no intent to mislead.⁸³
5. Meinhard had no experience in the design, construction, or management of commercial real estate. Salmon, in contrast, had been in the business for more than 20

Meinhard-Salmon relationship as a partnership was nothing more than a means for avoiding this technical issue.

⁸⁰ Mitchell v. Read, 61 N. Y. 123 (1874).

⁸¹ 249 N.Y. at 466.

⁸² Jonathan Macey argues, in comments on this paper, that such a limitation on Salmon’s obligation to keep Meinhard informed would have been unenforceable under then-prevailing law.

⁸³ 249 N.Y. at 467-68 (“[w]e have no thought to hold that Salmon was guilty of a conscious purpose to defraud. Very likely he assumed in all good faith that with the approaching end of the venture he might ignore his coadventurer and take the extension for himself.”)

years, had successfully operated the Bristol Hotel, and had constructed and managed other buildings. The Gerrys had already considered and rejected other candidates with substantial real estate experience. By the time they turned to Salmon there were only four months left in the lease. It is ludicrous to suppose that Meinhard, in that time frame, could have persuaded the Gerrys to entrust him with the crown jewel of their real estate holdings.

6. The 500 Fifth Avenue project was separate and distinct from the Bristol Hotel venture. The old lease was to expire in 1922. The Bristol Hotel was to be demolished and all its tenants evicted. The new building was to be on a substantially larger plot and was, even as initially contemplated, to be three times taller than the old building.

7. The equities favored Salmon. Meinhard, as Cardozo recognized, had already been richly rewarded for his initial investment, substantially due to Salmon's capable management. Meinhard had done nothing other than cash checks. It hardly seems equitable, in those circumstances, to impose an unwanted partner on Salmon, on the same terms, for a period of up to eighty years.

These factors, taken together, suggest reasons to doubt the court's judgment. But the opinion is remembered today not so much for its facts as for its rhetoric.⁸⁴ Cardozo, a virtuoso stylist, outdid himself in *Meinhard v. Salmon*, serving up a spicy bouillabaisse of metaphor and allusion to describe the nature of the fiduciary duties of a managing co-adventurer – hyperbolic phrases that are etched today in the memories of countless attorneys who encountered the case in law school. Judge Posner – himself no mean

⁸⁴ On Cardozo's rhetorical style, see Richard A. Posner, *Cardozo: A Study in Reputation* (1990); Francis Bergen, *The History of the New York Court of Appeals, 1847-1932* (1985).

judicial craftsman – remarked that “[n]o judge seems ever to have come up with a better formula with which to express the concept of fiduciary duty.”⁸⁵

Although the opinion’s enduring importance lies in its language, there is a connection between Cardozo’s rhetoric and the facts. Had this been an easier case, had Meinhard not seemed, in a sense, so undeserving of the bounty being bestowed on him, Cardozo would not have needed to reach so deeply into his reserves of eloquence. But given the facts, it would not have been wholly satisfying if Cardozo had justified a judgment for Meinhard with the language that Judge Posner suggests as a more informative statement of a partner’s duty: “while normally a party to a contract is entitled, with certain exceptions, to take advantage of the other party’s ignorance, a fiduciary is not; he must treat the other party’s interests as if they were his own.”⁸⁶ Cardozo’s words get the blood flowing and evoke in the reader a visceral sense that, notwithstanding Meinhard’s apparent overreaching, the judgment should still go in his favor.

A close analysis reveals the care with which Cardozo constructed the opinion. Interwoven in the text are metaphors drawn from distinct realms of human culture. Take the dictum that “[n]ot honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”⁸⁷ “Punctilio” connotes a fine point of exactness in conduct, ceremony, or procedure. It has roots in the Italian renaissance, and in concepts of chivalry and honor. Cardozo reinforces the metaphor by referring to a “tradition . . . unbending and inveterate” and to behavior “higher than that trodden by the crowd.” The allusion is to the high nobility of a bygone era whose standard of conduct was more

⁸⁵ Richard A. Posner, *Cardozo: A Study in Reputation* 104 (1990).

⁸⁶ Richard A. Posner, *Cardozo: A Study in Reputation* 104 (1990).

⁸⁷ 249 N.Y. at 464.

exacting than that demanded of common folk. Co-adventurers, Cardozo suggests, should behave with similar refinement and courtesy in their mutual affairs.

Cardozo enlists a second metaphor in describing the consequences of allowing persons in Salmon's place to negotiate deals behind their partners' backs: "[h]e might steal a march on his comrade under cover of the darkness, and then hold the captured ground. Loyalty and comradeship are not so easily abjured."⁸⁸ Here the image is one of military operations and warfare. Cardozo suggests that co-adventurers, like soldiers, must sacrifice for one another and not take advantage of a comrade's trust.

Elsewhere Cardozo remarks that Salmon had "put himself in a position in which thought of self was to be renounced, however hard the abnegation."⁸⁹ The "rule of undivided loyalty" imposed in such a situation is "relentless and supreme." Conduct short of that standard, Cardozo observes, would not receive from equity a "healing benediction."⁹⁰ The image is one of religion, transcendence and mysticism. The connotation is that when it comes to dealings with co-partners, a person must behave with monastic purity, placing always the other's interests above his own.

Each of these metaphors has the common feature that the protagonist— a knight on a chivalric quest, a soldier behind enemy lines, a monk devoting himself to prayer and contemplation — is called, by virtue of his role, to suppress his own selfish interests in favor of some greater good. The images have a powerful resonance. They evoke a pronounced (if somewhat misty) sense that duties partners owe to one another really are important.

⁸⁸ 249 N.Y. at 466.

⁸⁹ 249 N.Y. at 468.

⁹⁰ 249 N.Y. at 468.

These images also have subtle ethnic connotations. They relate more to Christians than Jews: the latter were not involved in chivalry, did not enter monasteries, and historically did not perform military service. But the opinion does contain language pertinent to Jews. There might be, Cardozo says, something “grasping” about Meinhard’s behavior.⁹¹ The image of the grasping Jew is a classic ethnic stereotype. In juxtaposing the Christian duties that devolved on the Episcopalian Salmon against the grasping demands of the Jewish Meinhard, Cardozo paints a tableau reminiscent of the *Merchant of Venice*. Cardozo’s reasons for evoking these stereotypes are hard to fathom but may perhaps have been a product (possibly unconscious) of complex feelings about his own religious heritage.⁹²

* * *

The years held different fates for the participants in this drama. William H. Webb, in addition to building the Bristol Hotel, invested in real estate and securities,⁹³ collected contemporary art,⁹⁴ and spearheaded political opposition to Tammany Hall.⁹⁵

⁹¹ 249 U.S. at 268.

⁹² The adult Cardozo rarely attended religious services but kept a kosher home, maintained a family pew at Shearith Israel, accepted appointments with Jewish civic organizations and served many Jewish clients. See American Jewish Historical Society, Justice Cardozo, Sephardic Jew, at <http://ajhs.org/publications> (visited June 6, 2007); Richard A. Posner, Cardozo: A Study in Reputation 2 (1990); Andrew L. Kaufman, Cardozo 69-70 (1998).

⁹³ See Edwin L. Dunbaugh and William duBarry Thomas, William H. Webb, Shipbuilder 127-132 (1989).

⁹⁴ Webb’s collection included works by Jan David Col (Belgian), Carl Becker (German), Emmanuel Leutze (American), Jehan Georges Vibert (French), and Ignacio de Leon Escosura (Spanish). Sales of Paintings: The Webb Collection to be Sold Today, New York Times, March 29, 1876.

⁹⁵ See, e.g., The Costigan Bill, New York Times, February 9, 1875; Opposition To Tammany Hall, New York Times, October 27, 1876; The Taxpayers Movement, New York Times, October 13, 1877; Trying to Reduce the Estimates, New York Times, December 28, 1877; The East River Bridge: Will It Be Legal, Useful, Practicable, Or Safe? Why Its Erection Is Opposed By The Council Of Political Reform, New York Times, October 20, 1878 (letter to the editor from William H. Webb); The Washington Market Bill: Protest Against Its Passage By The Council of Political Reform and Others, New York Times, April 20, 1880; Constitutional Amendment: Work of The Committee of The Council of Reform, New York Times, November 22, 1884; Edwin G. Burrows & Mike Wallace, Gotham: A History of New York City to 1898 830 (1999). Webb repeatedly refused entreaties to run for mayor. William Henry Webb, New York Times, July 11, 1897.

Webb was also active in the Society for the Prevention of Cruelty to Animals, an organization he co-founded in 1866.⁹⁶ His family life held disappointments: his older son was an invalid confined to the home and his younger son died of pneumonia at age 43 without leaving an heir.⁹⁷ Webb gave most of his money to a school for shipbuilders and home for retired shipyard workers which he established in 1890.⁹⁸ Webb died in 1899. But his legacy lives on in the Webb Institute, now located in Glen Cove, Long Island, which, consistent with Webb's original plan, still offers tuition-free undergraduate degrees in naval architecture and marine engineering.⁹⁹

Elbridge T. Gerry died in 1927 at the age of 90, eulogized for his service as founder and president of the New York Society for the Prevention of Cruelty to Children¹⁰⁰ and his work on capital punishment reform.¹⁰¹ His mansion on 5th Avenue and 61st Street was demolished and replaced by the Pierre Hotel.¹⁰² One of his children, Peter Goelet Gerry (1879-1957), married a Vanderbilt heiress and became a United States Senator from Rhode Island.¹⁰³ His other son Robert Livingston Gerry (1877-1957) married the daughter of railroad tycoon E.H. Harriman and managed the Gerry real estate holdings.¹⁰⁴ Robert Livingston Gerry's son, Elbridge T. Gerry (1908-1999), who also lived to 90, was a polo star, an investment banker at Brown Brothers Harriman, and for

⁹⁶ American Society for the Prevention of Cruelty to Animals, New York Times, April 24, 1866.

⁹⁷ Edwin L. Dunbaugh and William duBarry Thomas, William H. Webb, Shipbuilder 129-132 (1989).

⁹⁸ See Editorial, New York Times, July 17, 1890; Good Use for His Wealth: William H. Webb's Academy and Home for Shipbuilders, New York Times, July 17, 1890. The original facility was built on 13 acres overlooking the Harlem River on Sedgewick Avenue in the Bronx.

⁹⁹ See http://www.webb-institute.edu/about_webb/williamwebb.php (visited August 12, 2007).

¹⁰⁰ See Sydney H. Coleman, Humane Society Leaders in America 65-88 (1924).

¹⁰¹ Elbridge T. Gerry Dies in 90th Year, New York Times, February 19, 1927.

¹⁰² See Robert A.M. Stern, Gregory Gilmartin and Thomas Mellins, New York 1930: Architecture and Urbanism between the Two World Wars 217 (1987).

¹⁰³ <http://politicalgraveyard.com/bio/gerry.html#R9M0IXWHE>.

¹⁰⁴ See Peter G. Gerry, Ex-Senator, Dies Hours Before His Brother Robert, New York Times, November 1, 1967.

63 years a trustee for the New York Society for the Prevention of Cruelty to Children which his grandfather founded in 1875.¹⁰⁵ In 1955 the Gerry family sold the property on 42nd Street and Fifth Avenue to the Metropolitan Life Insurance Company, which still owns the fee.¹⁰⁶

Walter Salmon continued to acquire properties at the intersection of 42nd Street and Fifth Avenue. He eventually obtained 858 feet along 42nd Street and substantial frontage along Fifth Avenue.¹⁰⁷ Many estates of Gilded Age elites passed under his control, including, in addition to the Gerry holdings, those of Levi Morton, Russell Sage, and John Watts de Peyster.¹⁰⁸ In 1927 Salmon built the 32-story Salmon Tower just west of the Bristol,¹⁰⁹ and in 1931 he completed a much larger building at 500 Fifth Avenue that included the Bristol Hotel plot. Salmon and his wife were active in New York society¹¹⁰ and established themselves as breeders and owners of race horses, with entries under their salmon-pink silks winning the Preakness Stakes in 1926 and 1929.¹¹¹ The Depression, however, brought significant challenges. With a glut of office space on the market, including the Empire State and Chrysler buildings as well as Salmon's buildings at 42nd Street and Fifth Avenue, the drop-off of business activity spelled vacancies and cash flow problems. Salmon's building at 500 Fifth Avenue weathered the storm, although it incurred significant losses. Ironically, it appears to have been saved by cash

¹⁰⁵ Elbridge T. Gerry, 90, Polo Star and Banker who Bred Trotters, *New York Times*, March 6, 1999; *O'Reilly v. Gerry*, 249 A.D. 850, 292 N.Y.S. 533 (A.D. 2 Dept. 1937).

¹⁰⁶ See Abstract of Title, 3 West 42nd Street.

¹⁰⁷ Saw 42nd St. Value Thirty Years Ago: Many Choice Properties are Now Controlled by Walter J. Salmon, *New York Times*, October 26, 1930.

¹⁰⁸ Saw 42nd St. Value Thirty Years Ago: Many Choice Properties are Now Controlled by Walter J. Salmon, *New York Times*, October 26, 1930.

¹⁰⁹ See Salmon Tower, <http://www.emporis.com> (visited June 6, 2007).

¹¹⁰ See, e.g., Coming Charity Events, *New York Times*, March 10, 1929; Benefit for the Navy Club, *New York Times*, February 4, 1929.

¹¹¹ Display Captures Preakness Stakes, *New York Times*, May 11, 1926; Walter J. Salmon, Realty Man, Dies, *New York Times*, December 26, 1953.

contributions from Meinhard mandated as a result of the Court of Appeals' decision (Salmon reportedly sent Cardozo a bouquet of flowers on each anniversary of the opinion).¹¹² Salmon's other big project was not so fortunate. The Salmon Tower at 11 West 42nd Street failed and went through reorganization.¹¹³ Salmon never again developed a major building. He died in 1953 as a respected figure in New York real estate circles, succeeded in business by his son (also named Walter Salmon).¹¹⁴

Morton Meinhard built his business into one of the major garment factors in the country. He married the spirited Carrie Wormser, a member of one of New York's richest Jewish families.¹¹⁵ The Meinhards collected Renaissance art¹¹⁶ and were major donors to Jewish charities.¹¹⁷ But Meinhard did not have much time to savor his victory in the Bristol Hotel case. He died childless in 1931 at age 58 of pernicious anemia while on an ocean tour in the Sea of Japan.¹¹⁸ By then the stock market crash had wiped out much of his wealth.¹¹⁹ His firm, Morton H. Meinhard & Co., was sold to C.I.T. Financial Corp. – undoubtedly for less than it could have commanded a few years before.¹²⁰ His

¹¹² See Nicholas L. Georgakopoulos, *Meinhard v. Salmon* and the Economics of Honor, 1999 Columbia Business Law Review 137, 144 n.11 (1999) (quoting private correspondence with C. Robert Morris, Professor of Law at Minnesota Law School, Feb. 2, 1998).

¹¹³ Asks Interest Rate Cut: Salmon Appeals to Bondholders on 11 West Forty-second St., New York Times, June 12, 1934; Fight Reorganizing Plan, New York Times, October 28, 1938.

¹¹⁴ See Space Deal Made at 500 Fifth Ave., New York Times, April 16, 1960; Lights Improved at Bryant Park, New York Times, June 19, 1962; Walter Salmon, Jr., Horseman and Real-Estate Executive, New York Times, January 29, 1986.

¹¹⁵ See Miss Wormser Attacks A Burglar In Her Room; Was Scared Till She Found He Wasn't a Mouse. Saved Valuable Property But the Thief Got Away with \$5,000 In Jewels -- Then Mr. Wormser Shot at the Milkman, New York Times, February 8, 1906.

¹¹⁶ See, e.g., A Hitherto Unknown Panel by Simone Martini, 102 Burlington Magazine 66-68 (1960); Photographic Evidence, 60 Burlington Magazine 289 (1932).

¹¹⁷ Simple Funeral for M.H. Meinhard, New York Times, May 14, 1931; M.H. Meinhard Honored: Dinner of Settlement Board is Tribute to His 25 Years' Work, New York Times, May 3, 1928 (reporting that Meinhard gave more than \$1 million to charitable causes in his lifetime).

¹¹⁸ Simple Funeral for M.H. Meinhard, New York Times, May 14, 1931.

¹¹⁹ M.H. Meinhard Left \$1,678,798 Estate; Debts Reduce it from \$3,172,420 – Inadequate to Provide 124 Bequests in Will, New York Times, July 3, 1934.

¹²⁰ C.I.T. Financial Corp. – Company History, available at http://quincy.hbs.edu:8080/lehman/company_histories/c/companyHistory.html.

victory in *Meinhard v. Salmon* proved pyrrhic as well. By 1934 his estate owed \$845,000 on the 500 Fifth Avenue property and could not satisfy its charitable bequests.¹²¹ Walter J. Salmon bought out the estate's interest at a bargain price.¹²² But Meinhard enjoyed a posthumous redemption: thirty-two years after his death his estate made the single largest gift – \$1,000,000 – towards the construction of Columbia University's new gym.¹²³

Benjamin Cardozo went on to the Supreme Court of the United States, where he served with distinction and renown from 1932 until his death in 1938. He enjoys today one of the best reputations of any American judge, due in no small measure to the capacities for eloquence displayed in such fulsome measure in *Meinhard v. Salmon*.¹²⁴

What about the property over which the parties had fought such a battle? In 1929 Salmon negotiated a new lease with the Gerry Estates (successor to Elbridge T. Gerry).¹²⁵ In July 1929 Salmon announced plans for an impressive office tower with stores on the street level, banking facilities at the second level and office floors above.¹²⁶ By October 1929 he had filed plans for an art deco building, costing \$2,350,000, designed by Shreve, Lamb & Harmon Associates. Tenants were evicted in November and by December wreckers were demolishing the building, Salmon himself knocking the first hole.¹²⁷ Twenty-two hundred workers were employed in the construction.¹²⁸ The new tower, rising 60 stories, opened with great ceremony in March 1931. The building, however,

¹²¹ M.H. Meinhard Left \$1,678,798 Estate; Debts Reduce it from \$3,172,420 – Inadequate to Provide 124 Bequests in Will, *New York Times*, July 3, 1934.

¹²² See Nicholas L. Georgakopoulos, *Meinhard v. Salmon* and the Economics of Honor, 1999 *Columbia Business Law Review* 137, 144 n.11 (1999) (quoting private correspondence with C. Robert Morris, Professor of Law at Minnesota Law School, Feb. 2, 1998).

¹²³ Executive's Estate Contributes Million for Columbia Gym, *New York Times*, October 9, 1963.

¹²⁴ See generally Richard A. Posner, *Benjamin Cardozo: A Study in Reputation* (1990).

¹²⁵ Skyscraper to Rise in 5th Av. at 42d St., *New York Times*, July 15, 1929.

¹²⁶ Skyscraper to Rise in 5th Av. at 42d St., *New York Times*, July 15, 1929.

¹²⁷ Razing Bristol Building, *New York Times*, December 3, 1929.

¹²⁸ New Skyscraper Opened by Salmon, *New York Times*, March 3, 1931.

never quite lived up to expectations. Its prestige was overshadowed by the 102-story Empire State Building, also designed by Shreve, Lamb and Harmon and opened in 1931. Like other commercial properties, 500 Fifth Avenue faced a challenging rental environment during the Depression. The building remains a feature of the midtown landscape today.

Lastly, what about the case? Cardozo himself rarely mentioned the opinion; there appears to be no reference to it in the Cardozo papers at Columbia University. His only recorded comment is in a letter to Felix Frankfurter noting that “*Meinhard v. Salmon* is one of the cases in which some of my colleagues think that my poetry is better than my law. I think its law is better than its poetry (which, indeed I cannot discover).”¹²⁹ But if Cardozo would not celebrate the opinion, others did. *Meinhard v. Salmon* became and remains today a fruitful source for citations in judicial opinions. By the summer of 2007, according to Westlaw™, the case had been cited 1,021 times, including 296 New York cases, 120 cases in the Second Circuit, 591 decisions from other federal and state courts, and 14 international cases. The case also achieved recognition in the legal academy. It was excerpted in contemporary casebooks including Clark and Douglas’s *Cases on the Law of Partnership* and Mechem’s *Cases on the Law of Partnerships*.¹³⁰ Today virtually every casebook on corporations or business organizations contains an excerpt.¹³¹ Yet

¹²⁹ Letter from Cardozo to Felix Frankfurter, Feb. 23, 1929, quoted in Andrew L. Kaufman, Cardozo 241.

¹³⁰ Charles E. Clark & William O. Douglas, *Cases on the Law of Partnerships: Joint Stock Associations, Business Trusts, and Other Noncorporate Business Associations* 504-14 (1932); Floyd R. Mechem, *Cases on the Law of Partnership* 479-88 (1935).

¹³¹ For a sampling, see William T. Allen, Reinier Kraakman & Guhan Subramanian, *Commentaries and Cases on the Law of Business Organizations*, 2d ed. 45 (2007); Jesse H. Choper, John C. Coffee, Jr. & Ronald J. Gilson, *Cases and Materials on Corporations* 731 (6th ed. 2004); Melvin Aron Eisenberg, *Corporations and Other Business Organizations* 71 (9th ed. 2005); William A. Klein, J. Mark Ramseyer & Stephen M. Bainbridge, *Agency, Partnerships, and Limited Liability Entities: Unincorporated Business Associations* 202 (2nd Ed. 2007); William A. Klein, J. Mark Ramseyer & Stephen M. Bainbridge, *Business*

even *Meinhard v. Salmon* has not survived untarnished. Its demanding standard of fiduciary duty does not, in fact, govern many cases. Citations to the punctilio are usually no more than perfunctory bows to authority. The current version of the Uniform Partnership Act defines a partner's duty to co-adventurers in modest and limited terms distinctly unlike the gaudy prose of Cardozo's opinion.¹³²

Nevertheless *Meinhard v. Salmon* stands as a monument that is likely to survive even after the brick, mortar and steel of 500 Fifth Avenue have been reduced to rubble. Through the opinion and the facts surrounding it we gain a fascinating glimpse of New York's changing ethnic, social, and economic environment – the rise and fall of industries, the booms and busts of business conditions, the dispersal and commercialization of landed estates, the influence of immigrants, the role of yachting, horse racing, art collecting and charitable work in establishing social standing, the importance of family and heritage, and the enduring constancy of a plot of land that provided a commodious stage for all the sound and fury that went on above.

Associations: Agency, Partnerships, and Corporations: Cases and Materials 109 (6th ed. 2006); Robert W. Hamilton and Jonathan R. Macey, Cases and Materials on Corporations including Partnerships and Limited Liability Companies 67-71 (9th ed. 2005).

¹³² See Uniform Partnership Act § 404 (1997).