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ROBERT J. POTHIER'S INFLUENCE ON THE COMMON LAW OF CONTRACT

Joseph M. Perillo†

When I started this paper, I had a four-part thesis, which I since have had to amend significantly. The thesis was: first, that Robert Joseph Pothier's writings had an enormous influence on the development of the Common Law of contract. Second, that his influence in England was mediated by decisions made and treatises written in the United States. Third, that his role was to pass on the wisdom of ancient Rome to the Anglo-American system. And fourth, that his influence was largely unknown. I have discovered that the first part of this thesis was not only correct, but that his influence was greater than I had imagined.

The whole structure of the common law of contracts and sales is based largely on Pothier's treatises on obligations and sales.[1] But my research showed that the second, third, and fourth parts of my thesis needed massive reshaping. Decisions of United States' courts and American treatises that were influenced by Pothier's writings had some, but not any determinative, roles in English Common Law courts. As to the third part, I found that Pothier's influence was very well known in nineteenth century America, and continues to be well known to legal historians and comparative law scholars, but is surprisingly little known to those of us who teach and write about contracts. As for the fourth prong of my thesis, the wisdom he passed on had its origins in ancient Rome, but was reshaped by Aristotelian thinking in the Middle Ages, the Renaissance, and the humanism of the Enlightenment, and Pothier himself, not the Romans, was the original inventor of the rule in *Hadley v. Baxendale*.[2]

The chamber of the United States House of Representatives contains twenty-three marble relief portraits of "historical figures noted for their work in establishing the principles that underlie American

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1. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 352–53 (4th ed. 2002). Baker states:

> The most influential sources of ideas, though not always followed slavishly, were the *Traité d'Obligations* (1761) by the French jurist Robert Joseph Pothier (1699–1772), published in English in 1806, and the university textbook *Principles of Moral and Political Philosophy* (1785) by William Paley (1743–1805), archdeacon of Carlisle. Both works included discussions of elementary contractual ideas so long absent from the common law. In them we find the seeds of the English law of offer and acceptance, mistake, frustration, and damages.

Id.

2. 156 Eng. Rep. 145 (Ex. 1854).

law."[3] One of the twenty-three plaques is a portrait of Robert Joseph Pothier. His portrait is accompanied by the likenesses of better-known names such as Hammurabi, Moses, Justinian, and Blackstone, yet there is no entry for Pothier in the *Encyclopaedia Britannica*, nor in the index to the *Encyclopedia Americana*. We all know that Blackstone's Commentaries were very influential in the early American republic, but we need to be aware that Blackstone's coverage of contract law was disorganized and miniscule. He treated contract rules mostly as appendages to property law, the law of persons, and the like. In America, Pothier was the Blackstone of Contract Law. Reading Pothier was part of the education of many apprentice lawyers.[4]

As to England, go back in time to 1822 and the case of *Cox v. Troy*.[5] The defendant had signed his name in acceptance of a bill of exchange.[6] But before parting with the instrument, he obliterated the signature.[7] In holding that the acceptance was not binding, three of the four judges made reference to Pothier's view.[8] Mr. Justice Best gave Pothier high praise, saying:

> But the authority of Pothier is expressly in point. That is as high as can be had, next to the decision of a Court of Justice in this country. It is extremely well known that he is a writer of acknowledged character; his writings have been constantly referred to by the Courts, and he is spoken of with great praise by Sir William Jones in his Law of Bailments, and his writings are considered by that author equal in point of luminous method, apposite examples, and a clear manly style, to the works of Littleton on the laws of this country. We cannot, therefore, have a better guide than Pothier on this subject.[9]

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3. The Architect of the Capitol, *Relief Portraits of Lawgivers*, *available at* http://www.aoc.gov/cc/art/lawgivers/lawgivers.cfm (last visited Jan. 26, 2005) (on file with the Texas Wesleyan Law Review); *see also* University of Pennsylvania Law School, *History of Penn Law—Medallions & Inscriptions*, *available at* http://www.law.upenn.edu/about/history/medallions/pothier/ (last visited Jan. 26, 2005) (on file with the Texas Wesleyan Law Review) (location of a medallion of Pothier's portrait).

4. *See* David Hoffman, A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 536–41 (photo. reprint 1968) (1836). Hoffman lays out three alternative courses of study. The first is a course of six or seven years; the second is a more limited course of four years; and the third is a still more limited course of three years. Even as to the three-year course, sections of Pothier on obligations are assigned, *id.* at 322, and a number of other references to works by Pothier can be located from Hoffman's index, *id.* at 869.

5. 106 Eng. Rep. 1264 (K.B. 1822).

6. *Id.*

7. *Id.*

8. *See id.* at 1265–67.

9. *Id.* at 1266. In the early twentieth century we find this defense of Pothier's authority in England: "Pothier has been constantly cited in our Courts, and his authority has been treated with the highest respect by our judges. He cannot be dismissed with a wave of the hand as merely 'persuasive.'" Carleton Kemp Allen, *Precedent and Logic*, 41 LAW Q. REV. 329, 330 (1925).

We can then turn to America in 1822. Justice Story, in an admiralty case, refers to "the sober judgment of Pothier"[10] and "the moral perspicacity of Pothier."[11] Near the end of the nineteenth century, the primary author of England's Sale of Goods Act wrote in his treatise that he had "made frequent reference to Pothier's *Traité du contrat de vente.* Although published more than a century ago—for Pothier died in 1772—it is still probably the best reasoned treatise on the law of sale that has seen the light of day."[12]

This conference was prompted by *Hadley v. Baxendale.* So let me first focus on Pothier in relation to rules governing damages. What was the situation in the United States before *Hadley*? In the Pennsylvania case of *Marshall v. Campbell*,[13] the report makes reference to the otherwise-unreported 1786 case of *Lewis & Sons v. Carradan*, which involved the seller's failure to deliver 1000 bushels of wheat on an agreed date, at the price of £75.[14] The court stated that, in addition to general damages:

> If the plaintiffs could prove that their mill was out of employ for want of this wheat, or that they had made a contract to deliver a quantity of flour, which, for want of this wheat, they could not comply with, and thereby sustained a loss, either in the profit they would have made, or by damages awarded against them for non-compliance, or any other special matter, it ought to be given in evidence.[15]

The court entered judgment on a jury's verdict granting plaintiff damages of £155 and costs,[16] a sum that obviously included consequential damages.

McCormick observed that "[i]n this the English law was more backward than the French, which had long since recognized that damages in contract against one who acts in good faith must be limited to the foreseeable risk."[17] But McCormick did not take note of the fact that in the early nineteenth century, prior to the decision in *Hadley*, English and American courts did struggle to find formulae for limiting consequential damages. These formulations varied. We find outright rejection of the possibility of awarding damages suffered on a collat-

10. Peele v. Merchants' Ins. Co., 19 F. Cas. 98, 113 (C.C.D. Mass. 1822) (No. 10,905).

11. *Id.* at 102.

12. M.D. CHALMERS, *Introduction to the First Edition*, *in* THE SALE OF GOODS ACT, 1893, INCLUDING THE FACTORS ACTS, 1889 & 1890, at vii, x (10th ed. 1924).

13. 1 Yeates 36 (Pa. 1791); *contra* Fox v. Harding, 61 Mass. 516, 522–23 (1 Cush. 1851) ("The rule has not been uniform or very clearly settled as to the right of a party to claim a loss of profits as part of the damages for breach of a special contract . . . . Such profits are too uncertain, remote and speculative . . .").

14. *Marshall*, 1 Yeates at 37.

15. *Id.* at 37–38.

16. *Id.* at 38.

17. CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 563 n.10 (1935) (citing Pothier and the FRENCH C. CIV.).

eral contract.[18] Less rigid were cases holding that damages should be "proximate."[19] And we find at least one case applying Pothier's test without quoting or citing him.[20]

Although the French version of Pothier's works was available and said to have been extensively consulted by Lord Mansfield,[21] the first English translation of Pothier's treatise on obligations was a little-known edition published in Newburn, North Carolina, in 1802.[22] An 1806 translation in England, by Evans, however, was widely disseminated.[23] It was so well known that in 1839, the editor of *American Jurist* could write that Pothier's "treatise on obligations . . . has become a standard work without which even a moderately sized law-library would scarcely be considered complete."[24]

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18. Bridges v. Stickney, 38 Me. 361, 367 (1854).

19. Armstrong v. Percy, 5 Wend. 535, 538 (N.Y. Sup. Ct. 1830).

20. Miller v. Trs. of Mariner's Church, 7 Me. 51, 55 (1830).

21. *See* Daniel R. Coquillette, *Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law*, 67 B.U. L. REV. 877, 934 n.353 (1987) (focusing on bills and notes). Coquillette states: "Professor Oldham has also pointed out to me that Mansfield was a major influence on W.D. Evans's (1767–1821) translation and revision of Pothier's famous treatise on obligations." *Id.* James Oldham is an expert on Mansfield. *See generally* JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY (1992). Lord Campbell said of Mansfield:

> Expecting to be employed in appeals from Scotland, which since the Union, were decided at the bar of the House of Lords, he paid much attention to the law of that country . . . . But his true delight was to dip into the judicial waters of France, that he might see how the Roman and feudal laws had been blended in the different provinces of that kingdom; and above all to pore over the admirable commercial code recently promulgated there under the title of ORDINANCE DE LA MARINE, at which he hoped one day to introduce here by well-considered judicial decisions—a right vision which was afterwards realized.

Lord Campbell, 3 THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 221 (New York, James Cockcroft & Co. 1873). Lord Campbell also noted that Lord Mansfield could never be made to fall down and worship Lord Coke, whom we are taught to regard as the god of our idolatry. *Id.* at 220.

22. ROBERT JOSEPH POTHIER, A TREATISE ON OBLIGATIONS, CONSIDERED IN A MORAL AND LEGAL VIEW (Francois-Xavier Martin trans., 1999) (1802) (Today, Newburn is known as New Bern.). This is not to say that the French text was unknown. *See* R. Kirkland Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth-Century United States*, 38 AM. J. LEGAL HIST. 482, 506 n.130 (1994) ("Plaintiff's Points (5 handwritten pages) discuss the specifics of the case, discuss and refute precedent, and quote a French treatise (Pothier) in French." (citing Forbes v. Mfr.'s Ins. Co., 67 Mass. (1 Gray) 371 (1854))).

23. My references in this paper shall be to a later and more accessible edition. 1 M. POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS (William David Evans trans., 3d American ed. 1853) (1806) [hereinafter Evans's Pothier]. I will cite to the pagination in this edition as well as to the part, chapter, and section numbers, so that the reader can find the reference in whichever edition is at hand. Significantly, Evans truncated the title of the treatise. Martin's translation accurately captures the full title. *See* POTHIER, *supra* note 22.

24. L.S. Cushing, *Preface to* A TREATISE ON THE CONTRACT OF SALE, at v, v–vi (L.S. Cushing trans., Charles C. Little & James Brown 1839).

What did Pothier have to say about damages? As I wrote in another context, "the general principles governing the measurement of damages are quite similar in the Common Law and Civil Law systems." Joseph Pothier's *Traité des obligations* was the basis of the damages principles of the modern Civil Law and of the Common Law of England and the United States.[25] Medieval lawyers on the continent of Europe had developed a rule of recovery for breach of contract that Pothier refined. The aggrieved party could obtain a judgment for *damnum emergens* and *lucrum cessans.* This formula was translated and adopted in Section 339 of the first Restatement of Contracts as "losses caused and gains prevented."[26] The formula appears in *The UNIDROIT Principles of International Commercial Contracts* as "any loss which it suffered and any gain of which it was deprived."[27] This formula works very well in cases where there are no consequential losses.[28] Where consequential losses have occurred, as in the Pennsylvania case where the flour mill was shut down,[29] and in *Hadley* itself where plaintiff's flour mill had been shut down, the result could be disastrous for the defendant.

Grant Gilmore wrote that "*Hadley v. Baxendale* is still, and presumably always will be, a fixed star in the jurisprudential firmament."[30] The case is likely to maintain this status well into the future, although negative voices sometimes are heard.[31] The most thorough study of this fixed star is an early exercise in legal archeology by Richard Danzig, whose article explores the social and economic background against which the *Hadley* decision played.[32] If consequential damages had been allowed, Baxendale would have been personally liable to

25. Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281, 308 (1994); *see also* REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 817–33 (1990) (explaining the development of this rule).

26. This terminology was used by Judge Cardozo in *Lieberman v. Templar Motor Co.*, 140 N.E. 222, 225 (N.Y. 1923).

27. G. GREGORY LETTERMAN, UNIDROIT'S RULES IN PRACTICE: STANDARD INTERNATIONAL CONTRACTS AND APPLICABLE RULES art. 7.4.2(1) (2001).

28. *See* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 14.4 (5th ed. 2003).

29. *See supra* text accompanying notes 13–16.

30. GRANT GILMORE, THE DEATH OF CONTRACT 83 (1974). On the continued vitality of the case, see, for example, *Vitol Trading S.A., Inc. v. SGS Control Servs., Inc.*, 874 F.2d 76, 80 (2d Cir. 1989).

31. *See, e.g.*, Barry E. Adler, *The Questionable Ascent of* Hadley v. Baxendale, 51 STAN. L. REV. 1547 (1999).

32. Richard Danzig, Hadley v. Baxendale: *A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975). As an epilogue to Danzig's withdrawal from full-time teaching, he served as President Clinton's Secretary of the Navy from 1998 to 2001. 1 WHO'S WHO IN AMERICA 1051 (59th ed. 2004). Articles on the case include J. L. Barton, *Contractual Damages and the Rise of Industry*, 7 OXFORD J. LEGAL STUD. 40 (1987); Florian Faust, Hadley v. Baxendale—*an Understandable Miscarriage of Justice*, 15 J. LEGAL HIST. 41 (1994).

Hadley no matter how much profit Hadley had lost.[33] The jury verdict of £50 could have bought 300 bottles of champagne or about 15 custom-made suits.[34] In fact, Hadley's claim was six times the amount of the jury verdict.

What did Pothier have to say about consequential damages and foreseeability? This is the passage, the thrust of which was adopted by the French Code Civil and by the *Hadley* court.

> When the debtor cannot be charged with any fraud, and is merely in fault for not performing his obligation, either because he has incautiously engaged to perform something which it was not in his power to accomplish, or because he has afterwards imprudently disabled himself from performing his engagements; *the debtor is only liable for the damages and interest which might have been contemplated at the time of the contract*; for to such alone the debtor can be considered as having intended to submit.[35]

The "contemplation of the parties" test had been picked up by Chancellor Kent prior to *Hadley* and repeated in his *Commentaries*.[36] The best American text on damages states that the *Hadley* decision "diminishes the risk of business enterprise, and the result harmonized well with the free trade economic philosophy of the Victorian era . . . ."[37] A social historian of this era tells us that the major worry of the business class was failure.[38] Houghton informs us that "[i]n a period when hectic booms alternated with financial panics and there was no such thing as limited liability, the business magnate and the public investor were haunted by specters of bankruptcy and the debtor's jail."[39] The result of this "physical and mental strain [was such] that many men . . . were forced 'to break off (or to break down) in mid-career, shattered, paralyzed, reduced to premature inaction or senil-

33. Danzig, *supra* note 32, at 251. The shipping company was a partnership known as Pickford's. Baxendale doubtless would have shared payment of the judgment with his partners. It is important to know that in that era, members of the partnership could not have escaped personal liability by incorporating the shipping company. *Id.* at 263.

34. *Id.* at 252–53.

35. Evans's Pothier, *supra* note 23, at 181 [Pt. I, Ch. 2, Art. III] (emphasis added). The convergence of French law and the Common Law on this point has created confusion in those not familiar with Pothier's influence on both. Thus, we find this passage about the Convention for the International Sale of Goods: "Some authors consider the foreseeability rule outlined by the Vienna Sales Convention as being based on common law. This view has been opposed by several authors favoring the view that the foreseeability rule is based upon French law, in particular upon Pothier's teachings." Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 226 n.243 (1994) (citations omitted).

36. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *480.

37. MCCORMICK, *supra* note 17, at 567.

38. WALTER E. HOUGHTON, THE VICTORIAN FRAME OF MIND 1830–1870, at 61 (1957).

39. *Id.*

ity.'"[40] Similar thoughts were contemporaneously expressed by American judges. In defense of the already-existing rule limiting damages for breach of a covenant of warranty of real property, James Kent, in his judicial capacity, wrote:

> [I]t would be ruinous and oppressive, to make the seller respond for any accidental or extraordinary rise in the value of the land. Still more burdensome would the rule seem to be if that rise was owing to the taste, fortune, or luxury of the purchaser. No man could venture to sell an acre of ground to a wealthy purchaser, without the hazard of absolute ruin.[41]

This was the economic and social background. In England, as in Pennsylvania, the jury was entitled to award damages at its discretion.[42] The *Hadley* decision, of course, greatly limited that discretion. In New York, Pothier's treatment of damages had previously been the primary source of two important decisions limiting jury discretion in measuring damages. In the first, *Masterton & Smith v. Mayor of Brooklyn*,[43] reliance on Pothier's analysis led to the not surprising holding that a buyer who had repudiated after accepting delivery of only about one-sixth the marble contracted for was liable for lost profits measured by the difference between the seller's projected costs and the contract price.[44]

The "contemplation of the parties" test might have become known as the rule of *Blanchard v. Ely*,[45] a New York case that preceded *Hadley* by fifteen years. In *Blanchard*, the plaintiff sold a steamboat to the defendant and sued for the balance of the price.[46] The defendant counterclaimed seeking to recoup (1) the cost of replacing broken shafts as well as other defective parts, and (2) lost profits for the period of time the boat was undergoing repairs.[47] In denying lost profits, the court said:

> In short, it will be seen by the cases cited and many more, that on the subject in question, our courts are more and more falling into the track of the civil law, the rule of which is thus laid down by [Pothier,] a learned writer: "In general, the parties are deemed to have contemplated only the damages and interest which the creditor might suffer from the non-performance of the obligation, in respect to the particular thing which is the object of it; and not such as may

40. *Id.*

41. Staats v. Ex'rs of Ten Eyck, 3 Cai. R. 111, 113 (N.Y. Sup. Ct. 1805). Chief Judge Savage expressed similar sentiments in *Dimmick v. Lockwood*, 10 Wend. 142, 154 (N.Y. 1833). Savage's remarks were quoted in *Blanchard v. Ely*, discussed in the text at notes 46–48 *infra*.

42. *See* F.E. Smith, *The Rule in* Hadley v. Baxendale, 16 LAW Q. REV. 275 (1900).

43. 7 Hill 61 (N.Y. Sup. Ct. 1845).

44. *Id.* at 72.

45. 21 Wend. 342 (N.Y. Sup. Ct. 1839).

46. *Id.*

47. *Id.* at 343.

> have been accidentally occasioned thereby in respect to his own affairs." He illustrates the rule by the rise of value in goods which the promissor fails to deliver. He adds, if the lessor's title to a house fails, he is bound to pay to his lessee the expense of removal, and indemnify him against the advance of rents, but not against the loss of custom in a business he may have established while residing in the house. He also adverts to the distinction that the vendor may, notwithstanding, incur liability for extrinsic damages of the creditor, if it appear they were stipulated for or tacitly submitted to in the contract. One instance is that of stipulating to deliver a horse in such time that a certain advantage may be gained by reaching such a place. There the debtor shall, on default, pay for the loss of the advantage. The case of tacit submission is illustrated by a case of demising premises expressly for use as an inn. There, if the tenant be evicted, a loss of custom may be taken into the account.[48]

While the *Blanchard* court, prior to *Hadley,* relied on an applicable passage of Pothier's treatise, the New York Court of Appeals later determined that the court's analysis and holding were flawed.[49] The Court of Appeals reanalyzed *Blanchard* as a case in which the lost profits were too speculative and conjectural.[50] But Judge Selden wrote that:

> [h]ad the defendants in the case of *Blanchard v. Ely* taken the ground that they were entitled to recoup, not the uncertain and contingent profits of the trips lost, but such sum as they could have realized by chartering the boat for those trips, I think their claim must have been sustained.[51]

A third New York case, *Clark v. Brown*,[52] might have vied for being the leading Common Law case adopting the "contemplation of the parties" test. *Clark* involved the failure of the defendant properly to maintain a division fence in violation of a statutory duty.[53] Clark's cattle entered defendant's lands and feasted on too much unripe corn.[54] The wages of this feast was their death.[55] In the Court for the Correction of Errors, Senator Tracy made reference to Pothier, stated the contemplation of the parties test, and concurred in the denial of recovery.[56] The case, however, does not merit competing with *Hadley* for prestige because, as a tort case, it failed to predict the development of the tort law of damages.[57]

48. *Id.* at 347–48 (quoting Pothier) (citation omitted).
49. Griffin v. Colver, 16 N.Y. 489, 496 (1858).
50. *Id.* at 496–97.
51. *Id.* at 496.
52. 18 Wend. 213 (N.Y. 1837).
53. *Id.* at 214.
54. *Id.*
55. *Id.*
56. *Id.* at 231–32.
57. *See* McCormick, *supra* note 17, at 265. The rule has developed in the United States that once it is decided that a person has committed a tort, that person is liable

The rule might have been known as the rule of *Lobdell v. Parker*,[58] which was the first of a trio of similar cases decided in Louisiana prior to *Hadley*.[59] All three cases involved sugar mills that were inoperative either because of a defect in manufacture or because of late delivery of the mill. In each case, consequential damages were awarded pursuant to the "contemplation of the parties" test.[60] However, because Louisiana was regarded as a Civil Law jurisdiction, these cases seem to have had no impact in other American jurisdictions, but may have been among the American cases discussed in oral argument.[61]

Before Justinian, Roman scholars had wrestled inconclusively to find a formula to curtail consequential damages in contract cases. Justinian, making reference to the uncertainty caused by the scholarly discord, decreed that contract damages could not exceed twice the value of the subject matter of the contract.[62] One of Pothier's predecessors opined that this rule's rationale was that greater damages were unforeseeable.[63] Building on this thought, Pothier declared that Justinian's decree was not based on natural law and, thus, was not binding in France.[64] Instead, Pothier proposed the "contemplation of the parties" test, which subsequently found its way into the judicial firmament by enactment into the French Code Civil, and by the *Hadley* decision, into English law.[65]

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for all of the direct injury resulting from the tort even if the injury is not foreseeable. Incidentally, it has been little noticed that *Hadley* was a tort case. *See* Faust, *supra* note 32, at 48. The court treated it as if it were a contract case, despite the claimant's withdrawal of the assumpsit count.

58. 3 La. 328 (1832). *Lobdell* was decided twenty-two years prior to *Hadley*.

59. *See* Goodloe v. Rogers, 9 La. Ann. 205 (1854); Rugely v. James Goodloe & Co., 7 La. Ann. 294 (1852). Other Louisiana cases applied the test before *Hadley*.

60. *Lobdell*, 3 La. at 332; *Goodloe*, 9 La. Ann. at 276; *Rugely*, 7 La. Ann. at 297.

61. Sedgwick cited *Williams v. Barton*, 13 La. 404 (1839). 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 174 (8th ed. 1891). The *Williams* court quotes a passage from Pothier in French to the effect that ordinarily the parties contemplate only those damages that are direct. 13 La. at 410. The court denied recovery of opportunity costs. *Id.* at 411.

62. *See* CODE JUST. 7.47.1 (Justinian 530), *in* 14 S.P. SCOTT, THE CIVIL LAW 190–91 (1932).

63. James Gordley, *Why Look Backward*, 50 AM. J. COMP. L. 657, 667 (2002). Gordley states:

> In the 16th century, a French jurist named Du Moulin devised an explanation for one text which limited the damages recoverable in certain contracts to twice the contract price. Damages greater in amount, he said, might have been unforeseeable when the promise was made, and the promisor might not have been willing to contract if he had thought he might be liable for them. Drawing on Du Moulin, Pothier breezily announced that in general, a party should only be liable for damages he could have foreseen at the time he contracted.

Id. (Gordley cites Molinaeus, *Tractatus de eo quod interest* n.60 (1574)) (footnotes omitted). Molinaeus is Charles Du Moulin's Latin name. *See id.*

64. *Id.* at 667–68.

65. *Id.* at 668.

In *Hadley*, the plaintiff's counsel referred to passages by Theodore Sedgwick,[66] the American author of *A Treatise on the Measure of Damages*.[67] These passages were largely based on Pothier's treatise, which Sedgwick cited and quoted. Finally, in the course of oral argument, Baron Parke, one of the judges of the three-judge court, said that the sensible rule was the rule of the French Code civil.[68] He then read aloud Sedgwick's translation of Articles 1149, 1150, and 1151 of that code. As translated by Sedgwick, the key provision, 1150, states that "[t]he debtor is only liable for the damages foreseen, or which might have been foreseen at the time of the execution of the contract, when it is not owing to his fraud that the agreement has been violated."[69] However, the *Hadley* court did not accept the notion that "fraud" should be an exception.[70]

Danzig discounts the influence of Pothier and Sedgwick on *Hadley*.[71] Danzig's thesis was that "[t]he case was shaped by the increasing sophistication of the economy and the law—and equally significantly by the gaps, the naiveté, and the crudeness of the contemporary system."[72] He rightly points out that the economic conditions in England demanded some limitation on damages for contractual breaches. But for centuries, indeed, for millennia, civil law commentators and common law judges searched for, or invented, formulas to restrict consequential damages, but only in the eighteenth century did Pothier invent the test of foreseeability.[73]

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66. Hadley v. Baxendale, 156 Eng. Rep. 145, 147 (Ex. 1854).

67. SEDGWICK, *supra* note 62.

68. *Hadley*, 156 Eng. Rep. at 147.

69. *Id.* at 147–48 (quoting SEDGWICK, *supra* note 62, at 168).

70. At any rate, "fraud" is a bad translation of the French word *dol*, a term that has no English equivalent. A better translation in the tort context would be "willful misconduct," Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1290 (11th Cir. 1999) (interpreting *dol* as used in the Warsaw Convention, and in the context of a breach of contract, "bad faith.").

71. Danzig, *supra* note 32, at 257.

72. *Id.* at 259.

73. G.H. Treitel sounds a skeptical note:

> Whether the concept [of foreseeability] was indeed imported from the French C[ode] C[ivil] into the Common Law through *Hadley* v. *Baxendale*, or was the result of subsequent interpretations of that case, is a question which it would be hard now to answer. Whatever the historical origins of the matter may be, the subsequent development of the Common Law concept of foreseeability as a test of remoteness in contract owes little or nothing to its French counterpart. It probably owes more to the analogous concept which in Common Law countries limits liability in tort, an area to which the requirement of foreseeability does not apply in French law.

G.H. TREITEL, REMEDIES FOR BREACH OF CONTRACT 152 (1988) (footnotes omitted). The implication that French law on the subject varies greatly from that of the Common Law is not proved by his ensuing discussion. *Id.* at 153; *cf.* Franco Ferrari, *Comparative Ruminations on the Foreseeability of Damages in Contract Law*, 53 LA. L. REV. 1257, 1263–65 (1993) (pointing out Pothier's influence on pre-*Hadley*, *Hadley*, and post-*Hadley* cases); *see also* A.W.B. Simpson, *Innovation in Nineteenth Century*

Pothier's influence on the common law of contracts went well beyond providing the measure of damages. Brian Simpson, a preeminent historian of the common law, has noted that the common law had no operative notion of offer and acceptance prior to the nineteenth century.[74] Contract law had been about enforcing a promise made for a consideration.[75] This was significantly different from the notion of offer and acceptance that has come to pervade analysis of contract formation.[76]

Offer and acceptance analysis appears full blown in the still-controversial New York case of *Mactier's Administrators v. Frith*,[77] in which Pothier's name appears no less than nine times in citations to his treatises on obligations and sales. In this case, *A* made an offer to *B*, stating no time limitation on acceptance.[78] Consequently, the power of acceptance was open for a reasonable time.[79] *B* sent a letter of acceptance after a reasonable time had already expired, but the acceptance crossed a letter from *A* indicating that *A* regarded the offer as still open.[80] *B* sent no other acceptance and died.[81] Had *B* accepted after receiving *A*'s second letter, it would have been easy to conclude that although the offer had lapsed, it had been revived by the second communication and thus effectively been accepted.[82] The court decided that a contract had been made and that the original offer had been accepted.[83] In so doing, it accepted Pothier's subjective notion of the concurrence of the wills of the parties. Objective evidence of the offeror's state of mind, although not known to the offeree, was sufficient to show an agreement. The result appears to be right. The objective test is designed to do justice by protecting a person who puts a reasonable interpretation on the words of another. Where, however, there is clear, objective evidence that the parties are

Contract Law, 91 LAW Q. REV. 247, 276 (1975) ("The Code Civil, Pothier, Kent's *Commentaries*, and Sedgwick together rank as the immediate sources of the rule.").

74. *See* Simpson, *supra* note 74, at 258.

75. *Id.*

76. *See* Parviz Owsia, *The Notion and Function of Offer and Acceptance under French and English Law,* 66 TUL. L. REV. 871, 873 (1992). Owsia states:

> The modern doctrine of offer and acceptance is a rather late development in both the civil- and common-law systems. Roman law lacked a formulated mechanism of offer and acceptance. Under French law, it took shape in the eighteenth century at the hand of Pothier. Offer and acceptance then worked its way, apparently under Pothier's influence, into the English law of contract around the close of the eighteenth and into the nineteenth centuries.

Id.

77. 6 Wend. 103 (N.Y. Sup. Ct. 1830).

78. *Id.* at 103.

79. *Id.*

80. *Id.* at 105–06.

81. *Id.* at 106.

82. *See* Santa Monica Unified Sch. Dist. v. Persh, 85 Cal. Rptr. 463, 467 (Cal. Ct. App. 1970); Livingston v. Evans, [1925] 4 D.L.R. 769, 771 (Alberta).

83. *Mactier's Adm'rs*, 6 Wend. at 157.

in agreement, is not justice better served by application of a subjective test?[84] The Restatement (Second) approves the result on the theory that the second letter may be used in interpreting the duration of the original offer.[85] The decision's controversial nature is revealed by the Restatement's reshaping of the case's rationale, to avoid agreeing with the subjective basis of the decision.

Mactier's Administrators involves two strains of thought influenced by Pothier: (1) the use of offer and acceptance analysis, and (2) the adoption of Pothier's subjective approach to contracting.[86] As discussed below, this second strain did not take firm hold.

At times, Pothier's words have been adopted but misunderstood by common law courts. *Adams v. Lindsell*[87] is a wonderful example. Key words in the short opinion paraphrase Pothier, but the generalization extracted from the decision is not one with which Pothier would have agreed. Modern interpreters see the case's key issue as whether an acceptance sent by mail in response to a mailed offer is effective on dispatch or on receipt.[88] The guiding, but unfortunate, precedent was *Cooke v. Oxley*,[89] where an offeror told the offeree that he had until four o'clock to decide whether to accept.[90] The offeree notified the offeror of his acceptance prior to that time, but the court held that the offer had expired because the offeree had provided no consideration to keep it open.[91] The court in *Adams v. Lindsell* borrowed from Pothier the idea of a "continuing offer," stating that "[t]he defendants must be considered in law as making, during every instant of the time their letter was traveling, the same identical offer to the plaintiffs . . . ."[92]

Adams is little noticed for its most important innovation, that an offer could be made and accepted by post, even though the offer was

84. *See* RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (1981); Melvin Aron Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 CAL. L. REV. 1127, 1152 (1994) (stating "mutually held subjective intent trumps objective interpretation").

85. RESTATEMENT (SECOND) OF CONTRACTS § 23 cmt. d, illus. 6 (1981).

86. 6 Wend. at 132.

87. 106 Eng. Rep. 250 (K.B. 1818).

88. *See, e.g.*, HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 4:15 (1999).

89. 100 Eng. Rep. 785 (K.B. 1790); *see also* Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 436–38 (2000) (analyzing Cooke v. Oxley).

90. *Cooke*, 100 Eng. Rep. at 785.

91. *Id.*

92. *Adams*, 106 Eng. Rep. at 251. Pothier's treatise stated: "[I]t is necessary that the will of the party, who makes a proposition in writing, should continue until his letter reaches the other party, and until the other party declares his acceptance of the proposition. This will is presumed to continue, if nothing appears to the contrary . . . ." R.J. POTHIER, A TREATISE ON THE CONTRACT OF SALE 18 (L.S. Cushing trans., Charles C. Little & James Brown 1839).

not supported by consideration.[93] It is much better known for the rule that an acceptance is effective on dispatch, even though it is overtaken by a rejection,[94] a conclusion with which Pothier disagreed. He posits the case of an offer that is put into the mail, followed by a letter retracting the offer. The retraction is objective evidence of the offeror's change of mind. Therefore, when the offeree dispatches an acceptance, there is no meeting of the minds.[95] However, if the offeror takes action in reliance on the apparent acceptance before the retraction is received, the offeree must be made whole, under a doctrine later known as *culpa in contrahendo,* a tort doctrine in civil law jurisdictions.[96] The disagreement does not detract from Pothier's valuable contribution. It is almost incredible to believe that courts in mercantile centers such as London and New York found no way prior to 1818 to recognize the ability of the parties to make bilateral contracts by correspondence.

It is interesting to note that *Hadley* and *Adams v. Lindsell*, two English cases previously discussed, are among those cases American professors of contract law are certain to know, and which are reproduced in many casebooks. Another casebook favorite is *Taylor v. Caldwell*,[97] the case that ushered in the modern doctrine of impossibility of performance.[98] In justifying the decision, Judge Blackburn stated:

> The general subject is treated by Pothier, who in his Traité des Obligations, partie 3, chap. 6, art. 3, § 668 states the result to be that the debtor coporis certi is freed from his obligation when the thing has perished, neither by his act, nor his neglect, and before he is in default, unless by some stipulation he has taken [upon] himself the

93. Until the *Adams v. Lindsell* decision, bilateral contracts could not be formed by correspondence in common law jurisdictions. *See, e.g.*, Head & Amory v. Providence Ins. Co., 6 U.S. (2 Cranch) 127, 148 (1804) (John Quincy Adams ridicules the possibility of such contract formation); *see also* Keep v. Goodrich, 12 Johns. 397 (N.Y. Sup. Ct. 1815). *But see, e.g.*, Kennedy v. Lee, 36 Eng. Rep. 170 (Ch. 1817) (enforcing such a bilateral contract formed by correspondence).

94. In *Adams v. Lindsell*, there was no rejection. 106 Eng. Rep. at 251. The offeror merely took action inconsistent with the offer after the offeree dispatched an acceptance. *Id.* Pothier might agree that at that point the minds of the parties had met. Nonetheless, most cases that apply the mailbox rule involve a rejection that overtook an acceptance. *See, e.g.*, Morrison v. Thoelke, 158 So. 2d 889 (Fla. Dist. Ct. App. 1963); Cantu v. Cent. Educ. Agency, 884 S.W.2d 565 (Tex. App.—Austin 1994, no pet.); RESTATEMENT (SECOND) OF CONTRACTS § 63 cmt. c (1981).

95. *See* CAL. CIV. CODE § 1583 (West 1982) (attributing Pothier as the source of the Field Code, adopted in California and several other states, which enacted the rule that a revocation is effective on dispatch).

96. *See* Friedrich Kessler & Edith Fine, Culpa in Contrahendo, *Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964); Steven A. Mirmina, *A Comparative Survey of* Culpa in Contrahendo, *Focusing on Its Origins in Roman, German, and French Law as Well as Its Application in American Law*, 8 CONN. J. INT'L L. 77 (1992).

97. 122 Eng. Rep. 309 (K.B. 1863).

98. *Id.* at 312.

> risk of the particular misfortune which he has incurred. Although the Civil Law is not of itself authority in English Court, it affords great assistance in investigating the principles on which the law is grounded.[99]

It is most interesting that innovators of the nineteenth century common law were so often encouraged by Pothier's writings.

While Pothier may have been partially misunderstood in *Adams v. Lindsell*, the misunderstanding was, at worst, harmless. Another passage of Pothier was also misunderstood, this time resulting in serious damage to English contract law. The passage deals with mistake in identity, upon which Pothier wrote: "[W]herever the consideration of the person with whom I contract is an ingredient of the contract which I intend to make, an error [with respect to] the person destroys my consent and consequently annuls the agreement."[100] When this passage was quoted and adopted in England's Chancery Division, it was taken literally, without cognizance of the fact that "nullity" in this context apparently means something akin to "voidable," rather than "void."[101] As one scholar points out, "the nullity is relative. The transaction has legal effect until it is nullified; only the victim of the vice of consent can obtain nullification; the victim can affirm the transaction; and prescription can run against the action to annul."[102] England has treated *material* mistakes as to identity (usually based on misrepresentations) as creating void agreements—the bane of *bona fide* purchasers for value.[103] America has generally avoided this result, treating mistake in identity the same as other mistakes,[104] but Pothier was an early influence on American approaches to mistake.[105]

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99. *Id.* at 313. Language substantially to this effect is in § 632 of the Martin translation, *supra* note 22, and in Evans's Pothier, *supra* note 23, at 484 [Pt. III, Ch. 6, Art. III].

100. Evans's Pothier, *supra* note 23, at 113 [Pt. I., Ch. 1, Sec. 1, Art. III § 1].

101. Smith v. Wheatcroft, (1878) 9 Ch. D. 223, 230 (using a translation that is not substantially different from Evans's translation); *see also* Shogun Finance Ltd. v. Hudson, [2004] 1 All E.R. 215 (H.L. 2003).

102. Hoffman F. Fuller, *Mistake and Error in the Law of Contracts*, 33 EMORY L.J. 41, 50 (1984); *see also* J.C. Smith & J.A.C. Thomas, *Pothier and the Three Dots*, 20 MOD. L. REV. 38 (1957) (discussing the difficulty of understanding Pothier's mistake of identity rules); BARRY NICHOLAS, THE FRENCH LAW OF CONTRACT 76–80 (2d ed. 1992) (discussing current French law which accords with Hoffman Fuller's account); 2 MARCEL PLANIOL & GEORGE RIPERT, TREATISE ON THE CIVIL LAW pt. 1, No. 1054, at 605–06. (La. State Law Inst. trans., 11th ed. 1959) (1939) (stating a mistake in identity of a person is rarely material; if material, a voidable contract exists).

103. Ingram v. Little, [1961] 1 Q.B. 31 (C.A. 1960).

104. 7 CORBIN ON CONTRACTS §§ 28.31–28.32 (rev. ed. 2002).

105. *See* Markle v. Hatfield, 2 Johns. 455, 459–62 (N.Y. Sup. Ct. 1807) (following Justinian's Digest and Pothier in a case where the parties were mutually mistaken that counterfeit banknotes were genuine, although these Civil Law authorities were contrary to dicta in English sources); *see also* Val D. Ricks, *American Mutual Mistake: Half-Civilian Mongrel, Consideration Reincarnate*, 58 LA. L. REV. 663, 685–87 (1998) (discussing Pothier's influence on the Common Law of mistake).

While the heyday of Pothier's influence on Common Law courts ended over a century ago, we still find some contemporary references to his works. In a 1998 Connecticut case,[106] the court was faced with the enforceability of an installment note in the face of a six-year statute of limitations.[107] The debtor defaulted in October 1991, but the creditor did not exercise its power to accelerate the debt until February 1992.[108] The creditor brought this action in January 1998.[109] Holding that only the installments due prior to February 1992 were barred by the passage of time, the court indulged in "legal archeology" and quoted "an influential French jurist" as follows:

> When a debt is payable at several terms, I see no inconvenience in holding, that the time of prescription begins to run from the expiration of the first term, for the part then payable, and for the other parts only from the day of expiration of the respective terms of payment. For instance, if you owed me 3000 livres, payable by three yearly instalments, the prescriptions for one third of the debt would begin to run from the 1st *January*, 1735; for the second, from the 1st *January*, 1736; for the remaining third, from the 1st *January*, 1737; and the debt will be prescribed [on a thirty year statute], for the first, in 1765; for the second, in 1766, and for the last, in 1767.[110]

A Texas case decided in 1999 relies on Pothier's treatise on sales.[111] One could discuss other cases in which Pothier's work was the basis, or one of the bases, of the decision. For example, the Common Law's rule of thumb that an offer made in the course of a conversation expires when the parties change the subject, or when they part company can be traced to Pothier.[112] He may have been the source of the concept of an illusory promise.[113] His treatise influenced the creation of the Common Law rule that tender stops the running of interest.[114] The distinction between primary and secondary rights has been attrib-

106. Cadle Co. v. Prodoti, 716 A.2d 965 (Conn. Super. Ct. 1998).

107. *Id.* at 965–66.

108. *Id.* at 966.

109. *Id.*

110. *Id.* (emphasis in original) (quoting Evans's Pothier, *supra* note 23, at 496–97).

111. Tejas Power Corp. v. Amerada Hess Corp., No. 14-98-00346-CV, 1999 WL 605550, at *2 (Tex. App.—Houston [14th Dist.] Aug. 12, 1999, no pet.) (not designated for publication) ("A fundamental precept of the law of contracts is that the 'seller is bound to deliver the thing to the buyer . . . and, as a necessary consequence of this obligation, to do, at his own expense, whatever may be necessary to enable him to perform it.'" (quoting POTHIER, *supra* note 92, No. 42, at 26)).

112. Akers v. J. B. Sedberry, Inc., 286 S.W.2d 617, 621 (Tenn. Ct. App. 1955) (quoting Pothier's treatise on sales as translated and quoted in Mactier's Adm'rs v. Frith, 6 Wend. 103, 114 (N.Y. 1830)).

113. "If . . . I agree with you to give you something in case I please, such an agreement is absolutely void." Evans's Pothier, *supra* note 23, at 126 [Pt. I, Ch. 1, Sec. 1, Art. IV, § 7].

114. Martindale v. Smith, 113 Eng. Rep. 1181, 1184–85 (Q.B. 1841).

uted to Pothier.[115] He has been influential in arcane areas of maritime contracts.[116] He is quoted in an early Ohio case on alternative obligations as follows: "When several things are due under an alternative, the extinction of one does not extinguish the obligation."[117]

Pothier is mentioned frequently in the context of the duty of a reinsurer to indemnify the insurer where the insurer has settled the insured's claim without the reinsurer's consent.[118] He also seems to be the source of the rule, repeated in Restatements and texts, that if the subject matter of a sale is nonexistent, no contract results.[119] However, the case law supporting this proposition is meager and the rule is often cited to be evaded. As I have written elsewhere, "[w]here the seller is negligent in having a mistaken belief, however, liability may be found on an implied warranty of existence or a negligence theory."[120]

But Pothier was not always followed. In *Offord v. Davies*,[121] a very well-known case involving a continuing guaranty, which is an offer to a series of contracts, both parties cited Pothier, but the court ruled in favor of the home-grown doctrine of consideration.[122] The most important defeat of a Pothier-inspired argument occurred in *Laidlaw v. Organ*,[123] although a careful reading of his treatise on sales shows that he reluctantly would have reached the same conclusion as the U.S. Supreme Court. The British blockade of the United States during the War of 1812 had drastically curtailed the export of tobacco, depressing

115. Bernard Rudden, *Correspondence*, 10 OXFORD J. LEGAL STUD. 288, 288 (1990).

116. E. J. Dupont de Nemours & Co. v. Vance, 60 U.S. 162, 169 (1856) ("Pothier declares (Treatise of Charter-parties, preliminary chapter on Average) that the right to contribution in general average is dependent on the contract of affreightment, which embraces in effect an undertaking, that if the goods of the shipper are damaged for the common benefit, he shall receive a due indemnity by contribution from the owners of the ship, and of other merchandise benefited by the sacrifice."). The court also relied on Emerigon and other Civil Law authorities. *Id.*

117. State v. Ex'rs of Worthington, 7 Ohio 171, 173 (1835).

118. William C. Hoffman, *Common Law of Reinsurance Loss Settlement Clauses: A Comparative Analysis of the Judicial Rule Enforcing the Reinsurer's Contractual Obligation To Indemnify the Reinsured for Settlements*, 28 TORT & INS. L.J. 659, 706 (1992); Graydon S. Staring, *The Law of Reinsurance Contracts in California in Relation to Anglo-American Common Law*, 23 U.S.F. L. REV. 1, 18–19 (1988).

119. Evans's Pothier, *supra* note 23, at 107 [Pt. I, Ch. I, Sec. 1, Art. I, § 1]; *see also* Perillo, *supra* note 28, at 362 n.8 (citing RESTATEMENT (SECOND) OF CONTRACTS § 266 (1981)); 7 CORBIN ON CONTRACTS § 28.30 (rev. ed. 2002); 13 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1562 (3d ed. 1970).

120. Perillo, *supra* note 28, at 362 n.9 (citing McRae v. Commonwealth Disposals Comm'n [1950] 84 C.L.R. 377, 386 (Austl. 1951) and *In re* Estate of Zellmer, 82 N.W.2d 891, 894 (Wis. 1957)). *See* Jan Z. Krasnowiecki, *Sale of Non-Existent Goods: A Problem in the Theory of Contracts*, 34 NOTRE DAME LAW. 358 (1959); Barry Nicholas, *Rules and Terms—Civil Law and Common Law*, 48 TUL. L. REV. 946, 966–72 (1974).

121. 142 Eng. Rep. 1366 (C.P. 1862).

122. *See id.*

123. 15 U.S. (2 Wheat.) 178 (1817).

its price in this country.[124] Plaintiff, through special circumstances, learned of the treaty of peace before news of it had reached the general public.[125] Plaintiff called on the defendant seller soon after sunrise at defendant's New Orleans trading company, and purchased a large quantity of tobacco.[126] Within hours, the news of the treaty became public, the market price rose substantially, and the defendant seller sought to avoid the sale.[127] The purchaser naturally sought to enforce the contract.[128] The defendant, relying on Pothier, argued that the purchaser had a duty to disclose his knowledge that a treaty had been signed.[129] The seller's attorney proposed a duty of disclosure "not [as] a romantic, but a practical and legal rule of equality and good faith."[130] The court, however, ruled for the purchaser. This case is very likely good law on its facts[131] and can be cited for the rule that in a bargaining transaction there is generally no duty to disclose information.[132]

How would Pothier have decided the case? He wrote his treatises in the tradition established by pre-modern Civil Law jurists. Typically, these jurists examined both the morality and the legality of conduct, distinguishing the "forum of conscience" from the "exterior forum." The former involves an examination of conduct through the lens of moral philosophy; the latter is an examination of how a court would rule on the conduct in question. As a moral philosopher, Pothier might have condemned Organ's nondisclosure of information that Organ knew would radically transform the market in an hour or so.[133] But as a legal scholar, he would have agreed that the Supreme Court's decision was correct. After devoting five sections of his treatise on

124. *Id.* at 183.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 178.
129. *Id.* at 185.
130. *Id.* at 194.
131. *But see* GEORGE E. PALMER, MISTAKE AND UNJUST ENRICHMENT 83–84 (William S. Hein & Co., Inc. 1993) (1962) ("Today, I believe many courts would reach the opposite conclusion . . . ."). The ruling is supported by Randy E. Barnett, *Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud*, 15 HARV. J.L. & PUB. POL'Y 783 (1992).
132. *See* Fisher Dev. Co. v. Boise Cascade Corp., 37 F.3d 104, 111 (3d Cir. 1994); Cambridge Eng'g, Inc. v. Robertshaw Controls Co., 966 F. Supp. 1509, 1521 (E.D. Mo. 1997); Stoner v. Anderson, 701 So. 2d 1140, 1144 (Ala. Civ. App. 1997); Houdashelt v. Lutes, 938 P.2d 665, 672 (Mont. 1997). *See generally* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 106 n.49 (4th ed. 1971); 12 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 1497–99 (3d ed. 1970).
133. American scholars with some frequency mistake Pothier's philosophical comments for statements of law. *See, e.g.*, M.H. Hoeflich, Laidlaw v. Organ, *Gulian C. Verplanck, and the Shaping of Early Nineteenth Century Contract Law: A Tale of a Case and a Commentary*, 1991 U. ILL. L. REV. 55, 56–57; Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 172–74 (1993) (discussing Pothier's and Verplanck's ideas about disclosure).

sales to the justice of requiring full disclosure of anything forming the subject of the contract,[134] Pothier states that "these principles ought to be strictly followed in the forum of conscience."[135] He then concedes that the only legally binding duty of disclosure by sellers is to reveal any defects of title of which he or she is aware and any liens on the goods or property.[136]

Pothier proceeds to examine Cicero's famous discussion of the ship laden with grain that arrived at the Isle of Rhodes at a time when the island was bereft of grain.[137] The shipmaster was aware that a whole flotilla of ships laden with grain would soon arrive, but the Rhodians did not know this.[138] Cicero deemed it the duty of the seller to make this disclosure. In contrast, Pothier concluded that Cicero's opinion "meets with much difficulty even in the forum of conscience."[139] Why the difficulty? The doubt stems from the fact that the shipmaster's special knowledge relates not to the subject matter of the sale, but to "extrinsic circumstances." The Aristotelian dichotomy between "substance" or "essence" versus "accidents" or "qualities" runs throughout Pothier's writings and has some residual consequences in American law.[140] Pothier would likely have concluded on the facts of *Laidlaw v. Organ* that the signing of the peace treaty with Britain did not relate to the "substance" or "essence" of the sale; rather, it related to an "accident" that affected the market.

There is another reason Pothier would have concurred with the decision in *Laidlaw*. The discussion in the previous two paragraphs concerns the obligations of a *seller* to disclose inside information. In a separate discussion of the buyer's obligation of good faith, Pothier places an onerous burden on the *buyer* to disclose everything the buyer knows about the subject matter of the sale.[141] He concludes, however, that "[t]his obligation concerns only the forum of conscience; in the exterior forum a seller would not be allowed to complain that the buyer has concealed from him the knowledge which the latter possessed of his property."[142] However, the general rule to the effect that in a bargaining context each party is free to withhold information from the other has been subjected to numerous exceptions and

134. POTHIER, *supra* note 93, Nos. 234–38, at 142–44.
135. *Id.* No. 239, at 144.
136. *Id.* No. 240, at 145–46.
137. *Id.* No. 242, at 147.
138. *Id.*
139. *Id.* No. 242, at 148.
140. *See infra* text accompanying notes 176–78.
141. *Id.* Nos. 294–98, at 180–82.
142. *Id.* No. 299, at 182.

a new general rule may be emerging.[143] Pothier, the moral philosopher, would be pleased.[144]

Another area in which Pothier was ahead of his time is in the area of penalty clauses. In Civil Law systems, penalty clauses are frequently agreed-upon as deterrents to breaches. He describes a conflict among the treatise writers as to whether a court can reduce an excessive agreed-upon penalty. He sides with those who hold that a penalty can be reduced and argues that a penalty cannot exceed double the actual damages.[145] In the drafting of the Napoleonic Code, he lost this argument. Freedom of contract was deemed to be a more important value than equitable adjustment of penalties except in cases of partial performance.[146] But in 1975, the French Code civil was amended by providing: "Nevertheless, the Judge may . . . reduce or increase the agreed-upon penalty if it is manifestly excessive or ridiculously small. Any contrary stipulation will be considered not written."[147] Although the Common Law has rather rigidly condemned penalty clauses, at least one forward-thinking case has enforced such a clause, but reduced the amount.[148]

The Statute of Frauds provision of the Uniform Commercial Code may have been enriched by a borrowing from France, possibly inspired by Pothier. The Ordonnance of Moulins of 1566 was a model for the Statute of Frauds. It required written evidence for the enforcement of any contract involving the value of 100 French pounds (*livres*). This rule was revised but substantially reenacted in 1667, ten years before England's Parliament enacted the Statute of Frauds.[149] Despite the writing requirement, the Ordonnance permitted parol evidence to prove the existence of a contract if there was "a commencement of proof by writing."[150] Pothier, of course, did not invent this rule, which was enacted before he was born, but he devotes a considerable amount of space discussing what constitutes a sufficient "com-

143. Kevin M. Teeven, *Decline of Freedom of Contract Since the Emergence of the Modern Business Corporation*, 37 ST. LOUIS U. L.J. 117, 154 (1992) (referring to an emerging modern viewpoint); *see also* Perillo, *supra* note 28, at 347–54 (discussing some of the numerous exceptions to the no-duty-to-disclose rule).

144. *See* Realmuto v. Gagnard, 1 Cal. Rptr. 3d 569, 574 (Cal. Ct. App. 2003) (discussing California'a standard contract form, based on a statutory mandate, requiring a vendor of residential real property to furnish the purchaser with a disclosure statement including information about defects in the property, drainage, noise problems, etc.); *cf.* Jay Romano, *Disclosure? Seller Beware*, N.Y. TIMES, March 14, 2004, at L7 (discussing comparable but ineffective statutes in New York and Connecticut).

145. Evans's Pothier, *supra* note 23, at 283–85 [Pt. II, Ch. 5, Art. I].

146. C. CIV. arts. 1152, 1226, 1231.

147. RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW 672–73 (6th ed. 1998) (reporting and translating the 1975 Revision of the French Code civil).

148. Jordache Enter., Inc. v. Global Union Bank, 688 F. Supp. 939, 942–44 (S.D.N.Y. 1988).

149. Evans's Pothier, *supra* note 23, at 538–39 [Pt. IV, Ch. 2, Art. II].

150. *Id.* at 538.

mencement of proof by writing."[151] The concept is reminiscent of Section 2-201 of the Uniform Commercial Code.[152] Because Karl Llewellyn's attachment to Civil Law solutions was coupled with his political sagacity to conceal that attachment,[153] it is likely no coincidence that this provision of the UCC enacted 400 years after its French predecessor bore a remarkable resemblance to it.

Pothier deals with what our legal system calls unconscionability under the Civil Law concept of *lesion*, which has to do with an oppressive imbalance between price and subject matter.[154] Pothier, in his philosophical role, states that if a party pays or agrees to pay more than what the subject matter is worth, the contract is not equitable.[155] In addition to decrying the inequity of the exchange, he ties *lesion* to his constant emphasis on consent.[156] In his role as a legal commentator, however, Pothier concedes that a court can set aside a contract on the grounds of *lesion* only where the discrepancy between price and value is more than twice,[157] and only in the case of a contract to sell or a sale of real property and but few other cases. It is interesting to note that able commentators on the unconscionability doctrine of modern American law also tie that related doctrine to assent.[158]

When Pothier talks of consent, he means the actual subjective assent of the party. Yet he requires objective evidence of the party's intention. Thus, a mere change in the intention of an offeror to make an offer cannot be proved except by objective evidence such as the dispatch of a letter of revocation. Even in the Common Law, with its insistence on an objective theory of contract, the tension between actual intention and manifested intention has never been totally resolved. A third element also is present in the interpretation of language and conduct-fairness. Larry Di Matteo, in his study of the Common Law's treatment of intent, illustrates this tension by quoting this sentence from a court opinion: "The courts cannot only look to the language of the contract but must ascertain the intention of the

151. *Id.* at 544–48 [Pt. IV, Ch. 2, Art. IV].

152. U.C.C. § 2-201 requires only "some record sufficient to indicate that a contract for sale has been made." *See also* U.C.C. § 2-201 cmt. 1 (2004).

153. *See* James Whitman, *Commercial Law and the American* Volk*: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156, 171–72 (1987).

154. Evans's Pothier, *supra* note 23, at 120 [Pt. 1, Ch. 1, Sec. 1, Art. III, § 4].

155. *Id.*

156. *Id.* ("Besides, there is an imperfection in the consent of the party injured, for he would not have given what he has given, except upon the false supposition that what he was receiving in return was of equal value . . . .").

157. *Id.* at 121. In cases of partitions of real property the discrepancy can be far less. *Id.* at 121–22.

158. *See, e.g.*, JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 96(2)(b) (4th ed. 2001) (explaining unconscionability as an "absence of meaningful choice").

parties and make a construction that is fair and reasonable."[159] Language, intent, and fairness are all three seen as relevant elements in the process of interpretation.[160]

Pothier espoused a subjective approach to contract law. This subjective approach was applicable to matters as diverse as formation, consequential damages, *lesion*, etc., and of course to interpretation. However, the rules of evidence severely limited the court's ability to understand the subjective understanding of a party. The Ordonnance of Moulin was not only a kind of Statute of Frauds requiring certain kinds of contracts to be written, but also a kind of parol evidence rule, providing that if a contract is made in writing, parol evidence to contradict or supplement the writing is inadmissible unless there was a commencement of proof in writing of such a contradictory or supplementary term.[161]

Moreover, where parol evidence was admissible, parties, their relatives, their servants, and other persons having an interest were disqualified as witnesses.[162] While the legal system allowed a party to challenge the other to a decisory oath, the taking of the oath was not testimony.[163] It was rather more like the obsolete English "wager of law." A party could demand that the adversary be interrogated, but the responses so elicited could not be evidence on behalf of the responding party. The responses could be used solely as admissions against the responding party.[164]

The evidentiary rules were heavily in favor of written evidence. Thus, the interpretation of written contracts was largely based on the canons of interpretation. The first of these is "to examine what was the common intention of the contracting parties rather than the grammatical sense of the terms."[165] This is consistent with the Corbin-inspired first rule of interpretation in the Restatement (Second) of Contracts,[166] but not with the law in "plain meaning" jurisdictions.[167] The tension between objective and subjective approaches is very evident in American contract law.

159. LARRY A. DI MATTEO, CONTRACT THEORY: THE EVOLUTION OF CONTRACTUAL INTENT 55 (1998) (quoting Kreis v. Venture Out in Am., 375 F. Supp. 482, 484 (E.D. Tenn. 1973)).

160. *Id.*

161. Evans's Pothier, *supra* note 23, at 539 [Pt. IV, Ch. 2, Art. II].

162. *Id.* at 554–57 [Pt. IV, Ch. 2, Art. VIII].

163. *Id.* at 593–605 [Pt. IV, Ch. 3, Sec. 4, Art. I].

164. *Id.* at 601–02 [Pt. IV, Ch. 3, Sec. 4, Art. II].

165. *Id.* at 148 [Pt. I, Ch 1, Sec. 1, Art. IV].

166. RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (1981).

167. *See* Rodolitz v. Neptune Paper Prods., Inc., 239 N.E.2d 628, 630 (N.Y. 1968) ("While the Appellate Division's conclusion as to the real intent of the parties may be correct, the rule is well settled that a court may not, under the guise of interpretation, make a new contract for the parties or change the words of a written contract so as to make it express the real intentions of the parties if to do so would contradict the clearly expressed language of the contract . . . .").

I have pointed out some of the areas of the Common Law of contracts that were influenced by Pothier, as well as some of the particulars of his view of contracts. In dwelling on the particulars, I may have neglected to apprise the reader of some generalizations that may be made about his work. Pothier had a strong belief in natural law in the tradition of Aristotle and Aquinas. Although he worked in the natural law tradition, he very significantly embraced a central idea of the Enlightenment—human autonomy. His confident belief in natural law is revealed in the opening sentence of the first part of his treatise on sales, in which he states that "[t]his contract [of sale] is entirely of natural right; for not only does it owe its origin to that right, but it is governed solely by rules drawn therefrom."[168] The certainty of his belief in natural rules of law has been compared to the certainty of the formalists who derived their rules from court decisions.[169] But despite the natural law framework of his writings, Pothier granted that positive law could override the natural law, writing that "the civil law can restrict that which natural law only permits."[170]

Although Pothier worked in the natural law tradition, he also espoused the Enlightenment's credo of human autonomy. It has already been mentioned that he equated *lesion* and mistake with the lack of consent. He is also responsible for the Common Law's analysis, until recently, of mistake, duress, fraud, and undue influence in the framework of the "reality of consent,"[171] which has now largely been abandoned.[172] In substitution is the notion that the consent is real enough. The vice is that it has been produced by polluting the individual's autonomy.[173]

Another illustration of the central role of consent in Pothier's thinking involves choice-of-law clauses. These were once deemed encroachments upon sovereign power. His predecessor, Du Moulin,

168. POTHIER, *supra* note 93, No. 2, at 3; for further development of the natural law basis of Pothier's thinking, see Francesco Parisi, *Alterum non Laedere: An Intellectual History of Civil Liablity,* 39 AM. J. JURIS. 317, 348 (1994).

169. Clark A. Remington. *Llewellyn, Antiformalism and the Fear of Transcendental Nonsense: Codifying the Variability Rule in the Law of Sales*, 44 WAYNE L. REV. 29, 51–52 (1998).

170. Geer v. Conn., 161 U.S. 519, 524 (1896) (quoting Pothier, Traité du Droit de Propriété, Nos. 27–28).

171. *See, e.g.*, WM. L. CLARK, JR., HANDBOOK OF THE LAW OF CONTRACTS 264 (4th ed. 1931) (title of Chapter 7 is "Reality of Consent"); *cf.* FREDERICK POLLOCK, PRINCIPLES OF CONTRACT 390–92 (4th ed. 1888) (oscillating between "reality of consent and "apparent assent" on the one hand and assent that is "true, full and free" on the other hand).

172. But not totally. *See* Arato v. Avedon, 858 P.2d 598, 602 (Cal. 1993). It is very much alive in Louisiana. *See* Rhoads v. Signature Lincoln-Mercury, 866 So. 2d 1035, 1039 (La. Ct. App. 2004) ("We agree with the Rhoads that the sale should be rescinded *for lack of consent* based on Signature's failure to tell the Rhoads that the car had been previously wrecked." (emphasis added)).

173. The turning point seems to have been Holmes's opinion in *Silsbee v. Webber*, 50 N.E. 555, 555–57 (Mass. 1898).

argued that the parties had the autonomous power to determine the governing law; Pothier is credited with disseminating the idea throughout most of the world.[174]

The Aristotelian dichotomy between substance (or essence) and accidents (or qualities) was central to Pothier's analysis. One's reading of common law cases can be enriched by noting how often this dichotomy has worked its way into the rationales of the decisions. In the famous case of *Sherwood v. Walker*,[175] the court employed this Aristotelian dichotomy when it said of a cow that was with calf, but was believed to be barren, "It is true she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature." Then the court used language that was reminiscent of Pothier's, saying:

> Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk.[176]

That there was a mistake as to identity was, of course, a fiction. Only in relatively recent times has the law's emphasis shifted from this faction to the issue of whether the parties have been mistaken as to a "vital existing fact."[177]

It is no secret that the Common Law is now relatively insular. Today, it would be most unusual to cite a French treatise in a brief to an English or American court unless the French law was applicable. As Lord Mustill recently pointed out in a talk on Marine Insurance, the early and mid-nineteenth century was a period of globalization.[178] He gives a number of reasons for the creation during that period of a solid international body of law governing Marine Insurance.[179] Not the

174. *See* Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 U. KAN. L. REV. 471 (1989); Ernest G. Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L.J. 565, 573 (1921); Richard J. Bauerfeld, Note, *Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination?*, 82 COLUM. L. REV. 1659 (1982).

175. 33 N.W. 919, 923 (Mich. 1887).

176. *Id.* Whether this dichotomy entered the Common Law from Pothier is difficult to prove, but here is Pothier's language: "Error annuls the agreement, not only when it affects the identity of the subject, but also when it affects that quality of the subject, which the parties have principally in contemplation, and which makes the substance of it." Evans's Pothier, *supra* note 23, at 113 [Pt. I, Ch. 1, Sec. 1, Art. III, § 1].

177. *See* Perillo *supra* note 28, at 361. The Michigan Supreme Court has disavowed the analytical framework of *Sherwood* and has adopted the test of whether the mistake was as to a "basic assumption." Lenawee County Bd. of Health v. Messerly, 331 N.W.2d 203, 209 (Mich. 1982).

178. *See* Lord Mustill, *Convergence and Divergence in Marine Insurance Law*, 31 J. MAR. L. & COM. 1 (2000).

179. *Id.* at 5–6.

least of the reasons was "the cosmopolitan character of the learning."[180] He continues:

> Recently, while leafing almost at random through the treatment of the topic [of marine insurance] by Chancellor Kent, I found references to the Consolato del Mare; the Ordinances of Stockholm, Hamburg, Bilbao, and the States General, amongst others; Bynkershoek; Le Guidan; Emerigon; Valin; Pothier; Boulay Paty; Roccus; Pardessus; Santerne; and Majens. Kent, like his exemplar Mansfield, drew on the civil law to fill the gaps in his common law sources. Later writers on both sides of the Atlantic drew on these and similar authorities, and drew on each other without discrimination of origin . . . . In a real sense a contract of marine insurance was underpinned by the law and usage of nations; as Pothier described it, a contract "du Droit des Gens." It was truly a "transnational" contract before that jargon was invented.[181]

The awesome amount of knowledge of other legal systems displayed by Kent and his colleagues, even if at times taken second hand,[182] is a cause for wonder. One explanation is that most of the authors listed in Lord Mustill's speech wrote in Latin or French, languages known to the educated classes. Today, the dominant foreign language known to the younger generation of non-English speaking peoples is English. Thus, we find scholars of commercial law from all continents publishing works in English, making viewpoints from all sectors of the globe accessible to lawyers, judges, and scholars everywhere. International organizations such as UNIDROIT and UNCITRAL produce conventions, model laws, and standard contract forms suitable for use or adaptation throughout the world. We are in a new era of legal globalization. The Enlightenment was another. In between the era of the Enlightenment and the present period of globalization, lawyers in the Common Law tradition became more insular and nationalistic, a state of mind that is still too prevalent, but which is slowly changing. In a very small way, this paper on the influence of Pothier on the Common Law may serve to remind the Common Law reader of an era in which members of our profession were not too narrow minded to look beyond their political borders for solutions to legal questions.

180. *Id.* at 6.
181. *Id.*
182. John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 570 n.112 (1993) (citing an unpublished paper by Alan Watson).