14. The Common law and the *Code civil*: the curious case of the law of contract

Warren Swain

> [The French] by a strange frenzy driven, fight for power, for plunder, and extended rule. We, for our country, our altars, and our homes. They follow an adventurer, whom they fear, and obey a power which they hate. We serve a monarch whom we love – a God whom we adore.[1]

In 1804, the year that Napoleon's great *Code civil*[2] was enacted, a state of war once more existed between Britain and France. The words above, penned by the playwright Sheridan, capture the feelings of many in Britain at a time when the threat of invasion was a very real one. Some of the population laboured under such a state of fear that they believed that the French were planning to invade in rafts a thousand foot long or over a bridge that they were building between Calais and Dover.[3] Hostilities between the two nations, if not mutual suspicion, would only cease after Napoleon's final defeat at Waterloo 11 years later.

The relationship between French law, as contained in the *Code civil*, and English law, as it had developed through the Common law, was rather less antagonistic than the diplomatic relations between the two countries might lead one to expect. The law of contract in both France and England underwent significant change during the 19th century. Neither nation's contract law was entirely re-written. The process was, in part at least, as much an end point as it was a new beginning. Jurists had long seen value in ordering and rationalising the law around principles. The fashion for intellectual order would contribute towards the

[1] Richard Brinsley Sheridan, *Pizzaro* (William Forster 1799) Act 2 Scene 2. For some detail on the play see, Matthew S Buckley, *Tragedy Walks the Streets: The French Revolution in the Making of Modern Drama* (John Hopkins UP 2006) 92–94.

[2] For ease of exposition the code is known as the *Code civil*. In 1807 it was formally titled the *Code Napoleon* until the Bourbon Restoration in 1814. The title was once more changed to *Code Napoleon* in 1852 during the time of the Second Empire. It thereafter reverted to its original name.

[3] Jenny Uglow, *In These Times: Living in Britain through Napoleon's Wars, 1793–1815* (Faber & Faber 2014) 212, 366.

creation of a code in France. In England it was no less significant even if the outcomes were different. As far as the substantive law was concerned there are even instances in which French contract law influenced developments in England. Plenty of differences still remained of course. It is, however, probably not going too far to say that French and English contract law in the 19th century was closer in some key respects than at any time before or since.

{a}1. THE JURISTS: THE SEARCH FOR ORDER IN THE 17TH CENTURY

The 19th century saw the creation of two major civil codes. Although they were quite different in methodology and conception the *Code civil* and the *Bürgerliches Gesetzbuch* (BGB) were without question both major achievements.[4] The fact that both still survive is testament enough to the men who created them. By 1900 many other European countries had followed suit and had codes of their own.[5] England and Wales are the obvious exception. The *Code civil* was as much a product of history as it was of the events of 1789. There was no single or even dominant influence on the codifiers, although some sources were more important than others. Roman law, customary law, Royal ordinances, legal writers and ideas derived from the Revolution all played a part.[6] In its final form the *Code civil* was as concerned with reform as it was with outright revolution.[7] Some articles were more innovative than others. It is sometimes said that the contract provisions fell in this category. A better view is that these too were in fact deeply rooted in the past.[8]

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[4] For a background introduction to both codes, see OF Robinson, TD Fergus and WM Gordon, *European Legal History* (3rd edn, Butterworths 2000) 262–267, 275–278; Franz Wieacker, *A History of Private Law in Europe* (Tony Weir tr, OUP 2003) 269–275, 371–386.

[5] Reinhard Zimmermann, 'Codification: History and Present Significance of an Idea' (1995) 3 European Review of Private Law 95, 101–103.

[6] RC van Caenegem, *An Historical Introduction to Private Law* (CUP 1992) 6–7; Jean-Louis Halpérin, *The French Civil Code* (Tony Weir tr, UCL Press 2006) 67–71.

[7] See CJ Frederich, 'The Ideological and Philosophical Background' in Bernard Schwartz (ed), *The Code Napoleon and the Common Law World* (Law Book Exchange 2008) 1, 4.

[8] In particular, the claim that the drafters of the *Code civil* wished to promote a *laissez-faire* law of contract does not stand up to close scrutiny, see James Gordley, 'Myths of the French Civil Code' (1994) 42 American Journal of Comparative Law 459, 469–478.

The idea of a unified, ordered and systematic statement of the law was nothing new to the French. Regional customary law started to be codified in France in the 15th and 16th centuries.[9] Jurists of the same period like Charles Du Moulin,[10] Antoine Loisel[11] and Guy Coquille[12] wished to go further in the belief that it was possible to describe a customary law for the whole of France. They also sought to limit the impact of Roman law[13] because under the influence of Humanism they believed it was not always appropriate to modern conditions.[14] There was a strong nationalistic element in their makeup.[15] Roman law was still too much a central part of European legal culture to be sidelined entirely. A version of Roman law as distilled through the work of later writers left a significant mark on the *Code civil* itself.[16] More immediately, Roman law continued to influence the authors of the large institutional works of the 17th and 18th centuries. The institutional authors admired the fact that the Romans had developed a systematic structure and thought that elements of it were worth preserving. The Roman division between persons, things and actions[17] is never all that

[9] For accounts, see René Filhol, 'The Codification of Customary Law in France in the Fifteenth and Sixteenth Centuries' in Henry Cohen (ed), *Government in Reformation Europe* (Harper & Row 1971) chap 11; John Dawson, 'The Codification of the French Customs' (1939–1940) 38 Michigan Law Review 765.

[10] *Prima Pars Commentarii in consuetudines Parisienses* (Gabriel Buon 1554).

[11] *Institutes coutumières, ou Manuel de plusieurs et diverses règles, sentences et proverbes, tant anciens que modernes, du droit coutumier et plus ordinaire de la France* (Henry Le Gras 1637).

[12] *Institution au droit des Français* (L'Angelier 1607).

[13] Randall Lesaffer, *European Legal History: A Cultural and Political Perspective* (CUP 2009) 356–357; Peter Stein, *Roman Law in European History* (CUP 1999) 83–85.

[14] Peter Stein, 'Legal Humanism and Legal Science' (1986) 54 Legal History Review 297, 302. The flip side of this approach was the view that the Roman texts should be understood in their original meaning, see Stein *ibid*, 79–82; James Gordley, *The Jurists* (OUP 2013) 118–127.

[15] For a discussion of this aspect of Du Moulin's thought, see DR Kelley, *Foundations of Modern Historical Scholarship: Language Law and History in the French Renaissance* (Columbia UP 1970) 192–193.

[16] Halpérin, *Civil Code*, *supra* note 6, at 69.

[17] *The Institutes of Justinian* (Thomas Sandars tr, Longman 1948) 1.2.12. This repeats an earlier version found in Gaius, *The Institutes of Gaius* (F De Zulueta tr, OUP 1946) 1.8, which was not rediscovered until the 19th century.

far away.[18] The most important institutional works include Gabriel Argou's, *Institution au droit François*,[19] François Bourjon's, *Le droit commun de la France et la coutume de Paris réduits en principes*[20] and Jean Domat's, *Les loix civiles dans leur ordre naturel*.[21] Domat's treatise, in particular, would play a significant part in the *Code civil* itself.

From the 16th century, a few Civilian writers in England were developing very similar ideas to their French counterparts.[22] They also saw value in an attempt to impose a system of order on the domestic law. John Cowell's, *Institutiones Juris Anglicani*[23] is one notable early example. These writers had little impact outside Civilian circles. In so far as most of the Common lawyers thought about legal ordering, it was an order derived from the forms of action based on the old writs.[24] It was not until the 19th century that the Common lawyers seriously began, at least in a sustained way, to think carefully about the way the law of contract ought to be ordered. The literature of the common law might have been 'unadventurous, technical, and above all, limited conceptually'[25] but by the 17th century the Common lawyers were in the ascendant.[26] The Civilians and their courts, on the other hand, fell into a cycle of decline from which they would never escape.[27] Such an unpropitious set of

[18] But the institutional writers did not necessarily use an identical structure. Argou mirrors Justinian to some extent. His fourfold division was 'De l'état des personnes, des choses, des obligations, des accessoires, et suites des obligations'.

[19] (Pierre Aubouyn 1692).

[20] (Denys Mouchet 1747); Renée Martinage-Baranger, *Bourjon et le Code civil* (Klincksieck 1971).

[21] (Jean-Baptiste Coignard 1689).

[22] For accounts of the English civilians, see Daniel R Coquillette, *The Civilian Writers of Doctors' Commons, London* (Duncker & Humblot 1988); HF Jolowicz, 'Some English Civilians' (1949) 2 Current Legal Problems 139.

[23] (J Legat 1605).

[24] This is of course a generalisation. Some of the Common lawyers did think more deeply about the subject, see David J Seipp, 'The Structure of English Common Law in the Seventeenth Century', in WM Gordon and TD Fergus (eds), *Legal History in the Making* (Hambledon 1991) 61–83.

[25] Coquillette, *Civilian Writers*, *supra* note 22, at 44.

[26] Wilfred Prest, *The Rise of the Barristers* (OUP 1991).

[27] The Admiralty jurisdiction was not without some importance, see DEC Yale, 'A View of the Admiralty Jurisdiction: Sir Mathew Hale and the Civilians', in Dafydd Jenkins (ed), *Legal History Studies 1972* (University of Wales Press 1972) 87–109; George Steckley, 'Collisions, Prohibitions and the Admiralty Court in

circumstances did not encourage the Civilian writers to give up on their project. A century after Cowell, Thomas Wood was still trying to impose order on what in his *An Institute of the Laws of England in their Natural Order* he called the 'heap of good learning'[28] of English law.

A few years earlier Wood had published his *A New Institute of Imperial or Civil Law.*[29] The second edition of 1712 contained part of a translation of Domat's *Les loix civiles* that Wood had already published separately as, *A Treatise of the First Principles of Laws in General*.[30] A more complete translation of Domat's treatise by William Strahan was published as *The Civil Law in its Natural Order* in 1722.[31] Although Domat was writing about the Civil law in France, two features of his work would have wider resonance. The first of these was Domat's strong commitment to a scientific approach towards legal reasoning. He saw value in principles. This may be less because he was attracted to the philosophical agenda of the Natural lawyers, who were keen on the idea that lower-level principles could be derived from higher ones, and more that he saw in principles a good way of explaining the law as simply as possible.[32] The attraction of principles for Domat was pedagogical rather than philosophical. The second feature of Domat's work that was to prove prescient was the way in which contractual obligations were discussed in some detail. A contract was explained as the product of 'the consent of two or more persons, to enter into some engagement amongst themselves, or to dissolve a former engagement, or to make some change in it'.[33] His ideas were later adopted and refined by his disciple Robert Joseph Pothier. It was through Pothier that these concepts began to attract attention in England.

Seventeenth-Century London' (2003) 21 Law and History Review 41. The Civilian courts were not completely merged into the rest of the court system until the Judicature Act 1875.

[28] *An Institute of the Laws of England in their Natural Order* (Elizabeth Nutt 1720) vol 1, ii. Cowell was an influence on Wood, see Julia Rudolf, *Common Law and Enlightenment in England 1689–1750* (Boydell & Brewer Press 2013) 181.

[29] (Richard Sare 1704).

[30] (Richard Sare 1705).

[31] (J Bettenham 1722) 2 vols.

[32] This is the view of Gordley, *Jurists*, *supra* note 14, at 143.

[33] This translation is taken from Domat, *Civil Law*, *supra* note 31, at vol 1, 34.

{a}2. THE JURISTS: THE SEARCH FOR ORDER IN THE 18TH CENTURY

There is no evidence that Domat had very much influence on 18th-century English law. He was cited a couple of times by Sir William Blackstone in his *Commentaries on the Laws of England* as evidence of French law, but these were just points of interest rather than substance.[34] Blackstone's *Commentaries* were the standard English law books of the day. They proved immensely popular both in England and in the colonies.[35] The work also illustrates very neatly some of the challenges faced by 18th-century English writers. Although Blackstone produced a panegyric to the Common law, and was criticised by Bentham for doing so,[36] he was quite prepared to borrow from Justinian when it suited his purposes.[37] Ultimately the whole project never quite worked because Blackstone was reduced to trying to push English law into a Roman framework to which it was ill-suited.

A small number of references to Domat can be found in the English case law.[38] These were not systematic or extensive enough to have had a major impact. In so far as there was any discernible external influence on English contract law it came from the Natural lawyers.[39] Natural law ideas were fashionable across Europe by the 18th century.[40] Barbeyrac, who edited Pufendorf's *De iure naturae et gentium* and added a commentary, was Pufendorf's

[34] For example, William Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1765) vol 1, 118, 425.

[35] Wilfred Prest, *Re-Interpreting Blackstone's Commentaries* (Hart 2014).

[36] JH Burn and HLA Hart (eds), Jeremy Bentham, *A Comment on the Commentaries* (Clarendon Press 2008).

[37] John Cairns 'Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State' (1984) 4 Oxford Journal of Legal Studies 318; A Watson 'The Structure of Blackstone's Commentaries' (1988) 97 Yale Law Journal 795.

[38] Examples in argument include: *Harvy v Aston* (1740) 2 Com 726, 757; *Holdfast v Dowsen* (1747) 1 Wm Bla 8, 11; *Robinson v Bland* (1760) 1 Wm Bla 234, 235, 258; *Eyre v Lovell* (1782) 3 Doug 66, 68. References to Domat in judgments are even rarer: *Ryall v Rowles* (1750) Ves Sen 348, 370; *Miller v Race* (1758) 2 Kenyon 189, 199; *Doe on the Demise Lancashire v Lancashire* (1792) 5 TR 49, 64.

[39] D Ibbetson, 'Natural Law and Common Law' (2001) 5 Edinburgh Law Review 4.

[40] Knud Haakonssen, *Natural Law and Moral Philosophy* (CUP 1996); TJ Hochstrasser, *Natural Law Theories in the Early Enlightenment* (CUP 2000).

great populariser,[41] and both Grotius's earlier work and Pufendorf's treatise were readily accessible in English translations.[42] The Natural lawyers' analysis of contracts was based on an apparently simple proposition, that a contract was binding because it arose from an agreement formed by promising.[43] The significance of promising had long been recognised.[44] Aristotle, Thomas Aquinas and the Neo-Scholastics had all, by different routes, come to a similar conclusion.[45] The novelty lay in the way that the Natural lawyers were prepared to use these insights in order to construct a detailed framework that addressed the nuts and bolts of the contracting process. From an analytical point of view, this was an enormous advance on most English writers of the time. Even the influence of Natural law on the direction of contract law in the English courts was sporadic at best.[46]

Early attempts by legal writers to deploy Natural law principles to explain the Common law of contract were not entirely successful to modern eyes.[47] Whilst the complexity and subtlety of writers like Wood, Blackstone and others should not be underestimated[48] these were not works from which developed an original legal theory.

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[41] James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (OUP 1991) 129–130.

[42] H Grotius, *Of the Rights of War and Peace* (D Brown 1715); Samuel Pufendorf, *Of the Law of Nature and Nations* (Churchill 1703). Reference is to the modern translations: Hugo Grotius, *The Rights of War and Peace (1646 edn)* (F Kelsey tr, OUP 1925); Samuel Pufendorf, *Of the Law of Nature and Nations (1688 edn)* (Charles and William Oldfather trs, OUP 1934).

[43] Pufendorf, *Nature and Nations*, *ibid*, 3.5–6. Grotius certainly accepted the binding force of promises, but contracts were also described as acts which are 'advantageous to other men', *Rights of War and Peace*, *ibid*, 2.11.4, 2.12.1.

[44] For broader discussion, see Martin Hogg, *Promises and Contract Law* (CUP 2011); Warren Swain, 'Contract as Promise: The Role of Promising in the Law of Contract: An Historical Account' (2013) 17 Edinburgh Law Review 1.

[45] The history of these ideas is traced by James Gordley, *Modern Contract Doctrine*, *supra* note 41, and in summary in James Gordley, *Foundations of Private Law* (OUP 2006) 292–293.

[46] A good example of the influence of Natural law can be found in Wilmot J's judgment in *Pillans v Van Mierop* (1765) 3 Burr 1663, 1670.

[47] See the comments of Ibbetson on Henry Ballow, *Treatise of Equity* (D Browne 1737): David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) 218–219.

[48] For an important reassessment, see Rudolf, *supra* note 28, at chap 5.

Neither were the treatises of Domat and Pothier.[49] In so far as there was any theoretical intent, it was largely borrowed from the work of the Natural lawyers.[50] Like their English counterparts these writers were systematisers rather than theorists in the grand manner. Domat's description of French law as 'a pile of confused material'[51] even had echoes in Wood's comment on the Common law. The approach of all of these authors reflected broader social movements.[52] The search for order and rationality was one of the legacies of the Intellectual Enlightenment.[53] Even in England such ideas began to take hold in legal analysis. The similarities between legal writers in England and France did not end there. The trace of Natural law philosophy and the legacy of Roman law are evident in all of their writings. Important though these parallels are, they were probably just that. At best this was a reflection of a common European intellectual heritage. That is not the same as direct borrowing, which would happen a century later.

{a}3. ROBERT JOSEPH POTHIER: A FRENCH JURIST IN ENGLAND

In *Foster v Wheeler*,[54] Kekewich J said that, 'Definitions of "contract" are to be found in the text-books, and I have consulted several of them … They are all founded on, and many of them simply adopt, the definition given by Pothier'. By the time he made these remarks Pothier had been familiar to English lawyers for nearly a century. Sir William Jones had

[49] Jean-Louis Halpérin, 'French Legal Science in the 17th and 18th Centuries: To the Limits of the Theory of Law' in Enrico Pattaro et al. (eds), *A Treatise of Legal Philosophy and General Jurisprudence Vol 9: A History of the Philosophy of Law in the Civil Law World, 1600–1900* (Springer 2009) 43, 48.

[50] For a detailed discussion see Gordley, *Modern Contract Doctrine*, *supra* note 41, at chap 4.

[51] These remarks are found in the preface of French versions of Domat's treatise, for example, Jean Domat, *Les loix civiles dans leur ordre naturel* (Michel Brunett 1735) vol 1, preface.

[52] As a part of the wider culture of improvement: Peter Borsay, 'The Culture of Improvement', in Paul Langford (ed), *The Eighteenth Century* (OUP 2002) 183–212.

[53] Anthony Pagden, *The Enlightenment and Why It Still Matters* (OUP 2013); Roy Porter, *Enlightenment* (Penguin 2000).

[54] (1887) 36 Ch D 695, 698.

urged his readers to consult Pothier as long ago as the 1780s.[55] Others followed suit.[56] By the turn of the century, there was even the odd reference to Pothier in the law reports.[57] He was evidently of sufficient renown to feature in John Aikin's work on 'eminent persons', where he was described as 'an estimable French writer on legal subjects'.[58] According to Lord Ellenborough, someone who is not usually seen as a progressive influence, Pothier was 'a most learned and eminent writer upon every subject connected with the law of contracts, and intimately acquainted with the law merchant in particular'.[59] His *Traité des obligations*[60] became widely known following a translation by Sir William Evans in 1806.[61]

Evans's translation of Pothier's *Treatise on Obligations* would have a significant impact on English contract law. His works as a whole were cited in the English courts on

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[55] David Ibbetson (ed), William Jones, *An Essay on the Law of Bailments* (Welsh Legal History Society 2004) 29. As a letter to Viscount Althorp in late 1780 reveals, Jones was anxious to make Pothier better known in England, Garland Cannon (ed), *The Letters of Sir William Jones* (OUP 1970) vol 1, [251].

[56] The editor of Ballow's treatise was an early champion of Pothier, J Fonblanque (ed), *A Treatise of Equity* (W Clarke 1793) vol 1, 3, 28, 115, 121, 341, 380, vol 2, 420. For another early reference: Joseph Chitty, *A Treatise on the Law of Bills of Exchange* (E Brooke 1799) 10.

[57] For examples in argument see: *Duke of Melan v Fitzjames* (1797) 1 B & P 138, 140; *Cooth v Jackson* (1801) 6 Ves Jun 12, 23; *Beale v Thompson* (1803) 3 B & P 405, 413-14; *M'Carthy v Abel* (1804) 5 East 388, 392; *Richie v Atkinson* (1808) 10 East 295, 304, 305; *Christie v Row* (1808) 1 Taunt 300, 308; *Bell v Carstairs* (1811) 14 East 374, 386; *Green v Royal Exchange Assurance* (1815) 6 Taunt 68, 69; *M'Iver v Henderson* (1816) 4 M & S 576, 581; *Young v Rowe* (1816) 5 M & S 291, 293; *Taylor v Curtis* (1816) 6 Taunt 608, 614; *Busk v Royal Exchange Assurance* (1818) 2 B & Ald 73, 77. For examples in judgments see: *Raper v Birkbeck* (1811) 15 East 17, 20 (Lord Ellenborough); *Birley v Gladstone* (1814) 3 M & S 205, 216 (Lord Ellenborough); *Butler v Wildman* (1820) 3 B & Ald 398, 402 (Abbot CJ), 406 (Best J).

[58] John Aikin, *General Biography: or Lives, Critical and Historical of the Most Eminent Persons of all Ages, Countries, Conditions, and Professions* (John Stockdale 1813) vol 8, 318.

[59] *Hoare v Cazenove* (1812) 16 East 391.

[60] (Rouzeau-Montaut 1761).

[61] Robert Joseph Pothier, *A Treatise on the Law of Obligations or Contracts* (William Evans tr, Strahan 1806). An even earlier English translation was published in America in 1802 by Francois-Xavier Martin as *A Treatise on Obligations Considered in a Moral and Legal View* (Martin & Ogden 1802). Pothier's best-known work apart from his *Traité des obligations* was probably his *Traité du contrat de vente* (Rouzeau-Montaut 1762). The later work was also translated into English, RJ Pothier, *Treatise on the Contract of Sale* (LS Cushing tr, Little and Brown 1839).

more than four hundred occasions in the 19th century.[62] Along with the *Code civil* itself, Pothier's writings would come to be the main point of contact between English and French contract law. Care still needs to be taken not to overstate the case for Pothier's role in reshaping English law.[63] At first sight it is rather surprising that a French writer of the previous century should have an impact on English law at all. In order to understand why he did so it is necessary to say a few words about legal procedure.

By the 18th century, the dominant contract action in England for informal contracts, not entered into using a deed, was the action of assumpsit.[64] Assumpsit was tried by a jury. The precise question that the jury was asked to consider was not broken down into its component parts.[65] Instead the so-called general issue pleaded by the party who wished to deny a contract was 'non assumpsit'. There may be a whole host of permitted reasons that could be used to explain why a contract was not enforceable. In pleading terms these were not differentiated, although the evidence presented would be different.[66] From the mid-18th century, judges began the long process of wrestling control from the jury.[67] One of the consequences was the firming up of the boundary between questions of law and fact.[68] Issues

[62] B Rudden, 'Pothier et la common law', in J Monéger (ed), *Robert-Joseph Pothier, d'hier à aujourd'hui* (Economica 2001) 97.

[63] For differences of emphasis compare, AWB Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 LQR 247; Warren Swain, 'The Classical Model of Contract: the Product of a Revolution in Legal Thought' (2010) 30 LS 513, Ibbetson, *Obligations*, *supra* note 47, at chap 12.

[64] For an overview of the action, see Warren Swain, 'Assumpsit' in P Cane and J Conaghan (eds), *The New Oxford Companion to Law* (OUP 2008).

[65] This only occurred with the rise of special pleading as a result of the Hilary Rules: Reg Gen HT 4 Will IV. The rules are reproduced in (1834) LJ Repts KB 5 and John Jervis, *All the New Rules in Relation to Pleading and Practice* (S Sweet 1839) 113–140.

[66] This was a hurdle in itself given that the parties or even those with an interest in the suit were barred from giving evidence until the 19th century: An Act for Improving the Law of Evidence 1843; An Act to Amend the Law of Evidence 1851. C Allen, *The Law of Evidence in Victorian England* (CUP 1997) 96–98, 100–110.

[67] The decline of the civil jury took at least one hundred and fifty years: Michael Lobban, 'The Strange Life of the English Civil Jury, 1837–1914', in John Cairns and Grant McLeod (eds), *The Dearest Birth Right of the People of England* (Hart 2002) 173–209.

[68] This was very evident by the 1840s, see Anon, 'Of the Distinction between Law and Fact' (1844) 1 Law Review 37.

that had previously fallen under the general issue began to be unpacked as issues of law. This left judges and legal writers with a problem. It was not that substantive thinking was completely absent before 1800. For example, a doctrine like consideration was underpinned by the substantive idea of exchange. In these circumstances the need to find definitions of legal doctrines and create a framework within which the previously more fluid law of contract could be slotted became essential.

Pothier's basic premise was a simple one: 'A contract is a particular agreement … An agreement is the consent of two or more persons, to form some engagement, or to rescind or modify an engagement already made'.[69] His definition has features in common with Natural law. There was also one significant difference. The moral underpinning of Natural law promissory theories was jettisoned. It was presented as self-evidently true that a contract was binding because of a meeting of minds, without making any connection between truth-telling and keeping a promise. The Will Theory, which this insight spawned, was not only easy to understand but easy to create a framework around. It is particularly useful as a way of explaining contract formation and vitiating factors. Even here the role of the Will Theory as derived from Pothier should not be exaggerated. A good example can be found in the emergence of a doctrine of offer and acceptance in the early decades of the 19th century.[70] Offer and acceptance came to the fore independently of anything written by Pothier,[71] who was then used by English legal writers to justify the rule.[72] Whether they are successful in doing so is more doubtful. It marked a shift nevertheless. Contract formation had become a matter of law defined by rules and no longer just a question for the jury under the general issue. The emergence of a doctrine of contractual mistake at Common law is another example of the same process. Pothier was again prominent.[73] Well-established as well as emergent rules also came to be explained using the notions of will and consent. This provides a concrete link with the law in France, where Pothier, along with Domat, was one of the main

[69] Pothier, *Treatise*, *supra* note 61, at 1.1.1 § 1.

[70] One well known manifestation is the postal rule, see *Adams v Lindsell* (1818) 1 B & Ald 681.

[71] For a detailed discussion see Warren Swain, *The Law of Contract 1670–1870* (CUP 2015) 182–186.

[72] For example: Joseph Chitty, *A Practical Treatise on the Law of Contracts not Under Seal* (2nd edn, S Sweet 1834) 12; CG Addison, *A Treatise on the Law of Contracts and Rights and Liabilities Ex-Contractu* (W Benning 1847) 38.

[73] Catherine MacMillan, *Mistakes in Contract Law* (Hart 2009) chap 5.

sources for the drafters of the *Code civil*. The prominent role that these writers played is even recognised for posterity by the fact that they feature in the iconography on Napoleon's tomb.[74]

{a}4. THE *CODE CIVIL*: THE CONTRACT PROVISIONS

The basic definition of a contract can be found in Article 1101: 'A contract is an agreement which binds one or more persons, towards another or several others, to give, to do, or not to do something'. As in the writings of Domat[75] and Pothier, consent is central to the treatment of contract in the *Code civil*. It forms one of the four conditions for a valid contract.[76] The code continues, 'There can be no valid consent if such consent has been given through mistake, or has been extorted through violence or surreptitiously obtained by fraud'.[77] In addition to consent the other requirements under the code for a valid contract are capacity,[78] a certain object[79] and a lawful cause.[80] Incapacity was a well-established vitiating factor in England.[81] The second requirement does not have an equivalent at Common law. It is reflected in a number of different principles, including the rules relating to agreement and even the doctrine of mistake.[82] In modern times, the requirement of lawful *cause* or *causa* is

[74] For contemporary comment on the relationship between Pothier and the *Code civil* see Pierre Fenet, *Pothier analysé dans ses rapports avec le Code civil, et mis en ordre sous chacun des articles de ce code* (2nd edn, Paris, Alex Gobelet 1828). C Aubry and C Rau, *Cours de droit civil français d'après la méthode de Zachariae* (4th edn, Marchal and Billard 1871) vol 4, 1 stressed the role of Pothier and Domat in the contract provisions.

[75] Domat, *Civil Law*, *supra* note 31, at 1.1.1§2.

[76] Article 1108. In contrast, the Spanish Civil Code 1889 Art 1261 lists only three requirements, one of which is also consent.

[77] Article 1109.

[78] Articles 1123–1125.

[79] Articles 1126–1130.

[80] Articles 1131–1133.

[81] The details differ but the fact that minors and married women were incapable of contracting was the same: Joseph Chitty, *A Practical Treatise on the Law of Contracts Not Under Seal* (S Sweet 1826) 31–37 (infants), 37–50 (married women).

[82] For a discussion of this rule: see Barry Nicholas, *The French Law of Contract* (2nd edn, OUP 1992) 114–117.

unique to the French and those countries whose codes are derived from the *Code civil*.[83] And yet there are some parallels with the English doctrine of consideration, by which the Common law determines enforceability in the absence of a deed, meriting a separate discussion.

Portalis, one of the drafters of the code, explained some of the codifiers' thinking. The code was, he said, designed to 'fix, in broad perspective, the general maxims of the law; to lay down principles rich in consequences, and not to descend into the details of questions which may arise on each topic'.[84] There are numerous provisions relating to contract law in the *Code civil*. The order of them is significant. After some preliminary distinctions, including those between bilateral and unilateral contracts,[85] the code methodically lays down the requirements for a valid contract. This is followed by a discussion of the effect of obligations, including the question of third parties, the different species of obligations and how contracts are extinguished. Book three concludes with a discussion of proof. This scheme maps Pothier's treatise quite closely.[86] At this point the *Code civil* diverges in a different direction. Individual types of contract, including the contracts of sale, hire, partnership, loans, deposits, pledges and mortgages are then considered. Many, including the important contract of sale correspond to the consensual contracts of Roman law.[87] Others such as loan and pledge mirror the real contracts.[88] This second group is less easy to reconcile with the overarching idea that contracts are founded on an agreement. Whatever the strengths and weaknesses of this system, it had its own internal logic. It would be another generation before English lawyers came up with something as satisfactory. When they did so it would be the legal writers rather than legislators or judges who were responsible.

Even if some other English legal writers were familiar with the *Code civil*, the Anglo-Indian writer Henry Colebrooke was exceptional in this regard. His *Treatise on Obligations*

[83] Hein Kötz and Axel Flessner, *European Contract Law* (Tony Weir tr, OUP 1997) 54–56.

[84] Cited by Bernard Rudden, 'Courts and Codes in England, France, and Soviet Russia' (1973–1974) 48 Tulane Law Review 1010, 1111.

[85] Articles 1102, 1103.

[86] Even a cursory look at the table of contents demonstrates this. For a more detailed analysis, see Fenet, *supra* note 74.

[87] Articles 1387–1581.

[88] Articles 1865–1914 (loan), 2071–2091 (pledge).

and Contracts[89] was published in 1818. A biography of Colebrooke by his son reveals that his father intended to write an introduction on contract for the Indian Service, but that his work attracted little attention and was 'perhaps too succinct, and it is wanting in practical examples and illustrations'.[90] He may have planned to remedy this defect in the second volume, which was never finished.[91] As it stood, it was of little value for lawyers bringing a claim in contract. But as the most theoretical work then in existence it was an impressive achievement. His marginal notes contain references to a large range of sources. These go way beyond the expected references to iconic Common law writers like Blackstone. Pothier is mentioned nearly thirty times in the first ten pages alone. Alongside Roman law, Pothier was Colebrooke's main inspiration.[92] There are also marginal references to the *Code civil* throughout. It was central to Colebrooke's conception of a contractual obligation. Having defined an agreement as the product of consent with reference to Domat and Pothier,[93] he goes on to define a contract with a reference to Article 1101 of the *Code civil*.[94]

Colebrooke was not quite alone in displaying his knowledge of the *Code civil*. Owen Davis Tudor, who is better known for his volume on leading cases,[95] in a translation of Pothier's treatise on partnership,[96] made extensive reference to the *Code civil*. In doing so his stated aim was to show how much influence Pothier had wielded over the codifiers.[97] Judah Benjamin, having practised in New Orleans before arriving in England, had a more cosmopolitan background than most of his English contemporaries.[98] One of the unusual

[89] Thomas Colebrooke, *Treatise on Obligations and Contracts* (Colebrooke 1818).

[90] Thomas Colebrooke, *The Life of HT Colebrooke* (Trüber 1873) 297.

[91] *Ibid*, at 345.

[92] Colebrooke, *Life*, *supra* note 90, at 279.

[93] Colebrooke, *Obligations*, *supra* note 89, at 2.

[94] Colebrooke, *Obligations*, *supra* note 89, at 2.

[95] Frederick White and Owen Tudor, *A Selection of Leading Cases in Equity* (W Maxwell 1849).

[96] *A Treatise on the Contract of Partnership by Pothier* (Butterworths 1854).

[97] *Ibid*, at vii.

[98] Louisiana was variously a French and Spanish territory until 1803. Alongside the common law these various systems continued to be influential. A Digest was produced in 1808 and the Louisiana Civil Code was enacted in 1825. For a recent discussion see Vernon Palmer, 'The French Connection and the Spanish Perception:

features of his, *A Treatise on the Law of Sale of Personal Property; with References to the American Decisions and to the French Code and Civil Law*,[99] was the way in which a mainstream legal treatise incorporated extensive references to foreign sources, including the *Code civil*. George Blaxland's, *Codex legum anglicanarum, or, A digest of principles of English law: arranged in the order of the Code Napoléon*,[100] was an even more eccentric work, with the serious aim of rendering the laws of each country 'more known' in each jurisdiction.[101]

Educated Englishmen of the 19th century could be expected to have a reasonable knowledge of the French language. A few translations of the *Civil Code* were also produced. The earliest, attributed to George Spence, appeared in 1827.[102] E Blackwood Wright in *The French Civil Code*,[103] wrote that an understanding of the *Code civil* was 'generally impossible unless it is available in an English form, with notes specially suited to the English mind'.[104] Knowledge of the *Code civil* would prove to be of relevance not just to those trading with the French, as Wright and others hoped, nor merely to those with a scholarly bent like Colebrooke, it also began to attract attention from lawyers and judges.

{a}5. ENGLISH BORROWING AND THE *CODE CIVIL*

Few passages in the entire history of private law are as iconic as the judgment of the Exchequer Chamber in *Hadley v Baxendale*[105] in 1854, in which it was stated that:

Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law' (2002–2003) 63 Louisiana Law Review 1067.

[99] (Henry Sweet 1868).

[100] (Butterworth 1839).

[101] *Ibid*, at 3.

[102] *The Code Napoleon; or, The French civil code* (William Benning 1824). The translations used in this chapter are taken from here given that this would be the translation that English lawyers used after 1824.

[103] (Stevens and Sons 1808).

[104] *Ibid*, at iv.

[105] (1854) 9 Ex 341; 2 CLR 517; 23 LJ Ex 179; 18 Jur 358; 2 WR 302; 23 LT 69. For a detailed discussion of this case, see Ibbetson, *Obligations*, *supra* note 47, at 229–232; Richard Danzig, 'Hadley v Baxendale: A Study in the Industrialization of the Law' (1975) 4 JLS 249; David Pugsley, 'The Facts of Hadley v Baxendale' [1976]

{quotation}Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract, should be such as may fairly and reasonably be considered, either arising naturally, i.e. according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.[106]{/quotation}

Equally as important, though less obviously so, was something that was said during the course of argument by Baron Parke when he interjected, 'The sensible rule appears to be that which has been laid down in France, and which is declared in their code'.[107] He then referred to the *Code civil*, Articles 1149, 1150 and 1151. This sort of reliance on the *Code civil* itself was not unknown in the 19th century,[108] but was not an everyday occurrence.[109]

Both English and French law start from the proposition that where one party is in breach of contract the other can recover losses flowing from that breach. Loss is however defined differently in the two jurisdictions. Article 1149 makes a distinction in the Civilian manner between *damnum emergens* (actual loss) and *lucrum cessans* (lost gain). The application of the restrictions on damages set out in Articles 1150 and 1151 depends on whether the non-performance is a result of the *dol* of the debtor.[110] Only in the more unusual contract case, where non-performance arises from *dol* on the part of the debtor, does a

NLJ 420; JL Barton, 'Contractual Damages and the Rise of Industry' (1987) 7 Oxford Journal of Legal Studies 40; F Faust 'Hadley v Baxendale: An Understandable Miscarriage of Justice' (1994) 15 Journal of Legal History 41.

[106] (1854) 9 Ex 341, 354.

[107] (1854) 9 Ex 341, 346.

[108] Examples in the course of argument include: *Collins v Rose* (1839) 5 M & W 194, 198; *Revis v Smith* (1856) 18 CB 126, 132.

[109] Discussion of the *Code civil* was usually confined to decisions concerning foreign judgments or conflicts of law issues, for example: *Becquet v Mac Carthy* (1831) 2 B & Ad 951; *Alivon v Furnival* (1834) 1 CrM & R 277; Huber v Steiner (1835) 2 Bing NC 202.

[110] *Dol* is defined in Article 1116 and sometimes translated as fraud. *Dol* is broader than fraud in the sense it came to be defined in England in *Derry v Peek* (1889) 14 App Cas 337.

directness test apply. In English law a version of a directness ('arising naturally') and foreseeability are both elements of the same test that applies to every breach of contract.

Six years before *Hadley v Baxendale*, in *Robinson v Harman*,[111] it was held that the loss in contract damages was calculated by putting the innocent party in the position he would have been in had the contract been performed. It seems likely that the decision reflected earlier practice.[112] In English law, the two elements of remoteness were both means by which it could be shown that the losses were contemplated by the parties. The principle of contemplated losses, which was also found in Pothier[113] was likewise supported by a number of earlier American authorities.[114] Although these decisions were not mentioned in *Hadley v Baxendale*, they were discussed by the American writer Theodore Sedgwick. It may not be coincidental that Baron Parke relied on a translation of the *Code civil* by the same writer.[115] Sedgwick himself was perfectly well aware that in France it was important to determine whether or not the loss arose from what he termed fraud.[116] He pointed out that the application of these rules in France was uncertain.[117] Sedgwick further observed that, 'The general principles of the civil law have been repeatedly recognized in our jurisprudence, though the language employed to define the limits of damage has not been uniform'.[118] He 'very much doubted' that resorting to the Civil law or French law would 'reduce our measure of damages to fixed rules' but he concluded that 'the rule of the civil law is perhaps the best

[111] (1848) 1 Ex 850.

[112] There are clear statements of the expectation principle before the 19th century. For example, the unreported case of *Smee v Huddlestone* (1768), Joseph Sayer, *The Law of Damages* (W Strahan 1770) 49–52. The practice of awarding damages which reflect the promised performance is even older: David Ibbetson, 'The Assessment of Contractual Damages at Common Law in the Late Sixteenth Century' in Matthew Dyson and David Ibbetson (eds), *Law and Legal Process* (CUP 2013) chap 7.

[113] Pothier, *Obligations*, *supra* note 61, at 1.1.2.3 §§160–161.

[114] Joseph Perillo, 'Robert J Pothier's Influence on the Common Law of Contract' (2004–2005) 11 Texas Wesleyan Law Review 267, 273–275.

[115] *A treatise on the measure of damages, or, An inquiry into the principles which govern the amount of compensation recovered in suits at law* (John Voorhies 1847) 67.

[116] *Ibid*, at 71.

[117] Sedgwick, *Damages*, *supra* note 115, at 67.

[118] Sedgwick, *Damages*, *supra* note 115, at 74.

that can be adopted: that the party in default shall be held liable for all losses that may fairly be considered as having been in the contemplation of the parties at the time the agreement was entered into'.[119]

Sedgwick is frequently cited as one of the main inspirations behind *Hadley v Baxendale*.[120] Yet in the two editions of his work prior to the decision, Sedgwick expresses some scepticism about coming up with a definitive rule.[121] It was only later, after *Hadley v Baxendale*, that Sedgwick described the position stated there as the 'true rule'.[122] Sedgwick's importance, such as it was, lay in his discussion of the *Code civil* rather than his own thoughts on damages. The Exchequer Chamber still had a choice about whether to adopt remoteness rules and the form that they should take. Baron Martin, in argument, and Baron Alderson speaking for the court, made the point that without such a rule a trivial breach could result in unexpectedly large damages.[123] Their concerns fed easily into a broader desire amongst judges to promote entrepreneurial economic activity[124] and to insulate common carriers.[125]

The *Code civil* was quite different in application but the French rules provided a very convenient solution for judges anxious to place some limits around a jury's discretion to award damages in a contract case. That Baron Parke and his colleagues should co-opt the *Code civil* for these purposes is less surprising than it may first appear to be. It has to be remembered that they were starting from scratch. Whatever direction a judge may have given to a jury in earlier times, it was not, unlike the principle in *Hadley v Baxendale*, a rule of law. By ignoring the details of its application, the *Code civil* provided a ready-made solution.[126] It

[119] Sedgwick, *Damages*, *supra* note 115, at 112.

[120] *Mea culpa* in this respect: Swain, *Contract*, *supra* note 71, at 198.

[121] A second edition appeared in 1852.

[122] Theodore Sedgwick, *A Treatise on the Measure of Damages* (3rd edn, JS Voorhies 1858) 77.

[123] (1854) 9 Ex 341, 347 (Martin B), 356 (Alderson B).

[124] Danzig, 'Hadley v Baxendale', *supra* note 105, at 245–254 regards this as the prime motivation for the decision. For a contrary view, see Barton, 'Contractual Damages', *supra* note 105, at 58–59.

[125] Faust, 'Hadley v Baxendale', *supra* note 105, at 62–63.

[126] For contemporary comment on the source of the rule, see *Smeed v Foord* (1859) 1 El & El 602, 613 (Campbell CJ).

was not unknown for 19th-century English judges to draw on Civilian sources from outside the Common law. Sir William Grant observed that 'There are many instances in which principles of law have been adopted from the civilians by our English courts'.[127] Lord Blackburn was a particularly enthusiastic exponent of this method of forging new doctrine.[128] He described his credo when he said that, 'Although the Civil law is not of itself authority in an English court, it affords great assistance in investigating the principles on which the law is grounded'.[129]

{a}6. CONSIDERATION AND *CAUSE*: NOT SO VERY DIFFERENT

In English law during 19th century, the doctrine of consideration remained the cornerstone for the enforceability of informal contracts. Something like consideration in its modern form had emerged out of the action of assumpsit during the 16th century.[130] It was based around the notion of exchange.[131] *Cause* was of much greater antiquity. Its origins lay in the Roman law idea of *causa*.[132] In the decades that followed the enactment of the *Code civil* the proper scope of both consideration and *cause* came to be debated.[133] These concepts remained quite distinct, but were, in important respects, closer together than ever before. From the English perspective, this was not an accident. Once contract came to be seen as a product of the will of the parties, an additional requirement of an exchange or *quid pro quo* seems out of place. French law was changing too. The traditional doctrine of just price or *lésion* was significantly modified, bringing French law closer to the long-established English position.

[127] *Mason v Mason* (1816) 1 Mer 308, 312. Though on the facts he rejected an attempt to borrow from the *Code civil* on the use of a presumption of fact.

[128] *Kennedy v Panama, New Zealand and Australian Royal Mail Company* (1867) LR 2 QB 580; *Taylor v Caldwell* (1863) 3 B & S 826.

[129] *Taylor v Caldwell* (1863) 3 B & S 826, 835.

[130] D Ibbetson 'Consideration and the Theory of Contract in the Sixteenth Century' in J Barton (ed), *Towards a General Theory of Contract* (Duncker and Humblot 1990) chap 5.

[131] *Ibid.*

[132] Reinhard Zimmermann, *The Law of Obligations* (OUP 1996) 549–553.

[133] The relevant Articles are 1131–1133.

English law categorically rejected the idea that the price needed to be fair for a contract to be valid. It was recognised in the Common law from the 16th century that so long as some consideration was given, that was sufficient for a valid contract. The consideration need not be adequate or fair.[134] In the centuries that followed, English law remained loyal to this principle,[135] which was not confined to the Common law. In the Court of Chancery in *Nott v Hill,* Lord Nottingham is reported to have applied the rule with some reluctance: 'by the Civil Law a bargain of double the value shall be avoided, and wish'd it were so in England'.[136] An inadequate price may be evidence of fraud or some other ground to set aside a contract in Equity but in theory it was insufficient on its own.[137] Towards the end of the 18th century, Equity judges seem to have been more inclined to treat inadequacy, if very gross, as sufficient grounds for intervention.[138] Nevertheless as Lord Thurlow was also at pains to stress: 'if the court should take such a ground as to rest the case upon the market price, every transaction of this kind would come into the court of equity'.[139] In so far as the Common law recognised any principle of fairness, it lay hidden behind the decisions of juries and we are left with no more than a glimpse of how this might have played out.[140]

French law relating to contractual enforcement was quite different. It embraced the Roman idea of *laesio enormis*[141] as analysed by centuries of legal literature.[142] As elsewhere in Europe relief was granted when an unjust price was paid. This approach began to be

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[134] Ibbetson 'Consideration', *supra* note 130, at 72–77. The classic statement is found in *Sturlyn v Albany* (1587) Cro Eliz 67, 150, 1 Leon 171.

[135] JL Barton, 'The Enforcement of Hard Bargains' (1987) 103 LQR 118.

[136] (1682) 2 Chan Cas 120.

[137] *Heathcote v Paignon* (1787) 2 Bro CC 167, 175.

[138] *Gwynne v Heaton* (1778) 1 Bro CC 1.

[139] *Heathcote v Paignon* (1787) 2 Bro CC 167, 175. For similar statements, see *Nichols v Gould* (1752) 2 Ves Sen 422, 423; *Griffith v Spratlay* (1787) 1 Cox 383, 388.

[140] In transactions involving the sale of horses, juries seem to have been hostile towards horse sellers, for example: Warren Swain, 'Horse Sales: The Problem of Consumer Contracts from a Historical Perspective' in J Devenney and M Kenny (eds), *European Consumer Protection Theory and Practice* (CUP 2012) 282, 290–291.

[141] Peter Stein (ed), WW Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (3rd edn, CUP 1963) 486.

[142] For a detailed discussion see James Gordley, 'Equality in Exchange' (1981) 69 CLR 1587.

challenged. One of the drafters of the *Code civil* explained that 'An adult's duty is to contract with prudence' and therefore it was wrong for the law to interfere.[143] The original intention may have been to abolish the principle of *lésion* entirely. Article 1118 of the *Code civil* states that *lésion* does not invalidate a contract 'except in certain cases or with regard to certain persons'. There were a few small exceptions.[144] A more major exception is found in article 1674, which provided for relief where the contract involved a sale of land for less than five-twelfths of its value.[145] The reaction to this change amongst French jurists was rather mixed. Some thought that *lésion* should be completely abolished.[146] Others argued that inadequacy of price should be merely evidence of a defect in consent such as fraud. This view was not unlike the position taken by the English Court of Chancery.[147] The changes of 1804 brought French law closer to English law. Although any similarity was quite coincidental, it would come to chime quite closely with the idea of freedom of contract, which also came to the fore in England as the century progressed.[148] There is no real evidence that the codifiers were motivated by *laissez-faire* ideas, but these would be used later on in order to support the reform. Writing in the 1880s, Glasson said that the old doctrine of *lésion* was difficult to justify as a matter of law.[149] It failed, he said, to give due weight to a person's autonomy.[150] Other writers stressed the practical difficulties of applying *lésion* outside of land when it was so difficult to put a precise value on things.[151]

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[143] J Locré, *La législation civile, commerciale et criminelle de la France* (1826–31) vol 12, 188, cited by Gordley, *Modern Contract Doctrine*, *supra* note 41, at 202.

[144] Articles 887, 1304, 1855.

[145] This provision resulted from the intervention of Napoleon himself, although the reasons that he gave were less about equality and more about preserving land within a family; Gordley, *Foundations*, *supra* note 45, at 203.

[146] Gordley, *Modern Contract Doctrine*, *supra* note 41, at 203.

[147] *Ibid.*

[148] Even in England this was never an absolute doctrine. Public policy was and remains an important limit on freedom of contract; see Stephen Waddams, *Principle and Policy in Contract Law* (CUP 2011) chap 6.

[149] *Éléments du droit français* (2nd edn, Pedone-Lauriel 1884) vol 1, 549.

[150] *Ibid*, at 550.

[151] Aubry and Rau, *Cours de droit*, *supra* note 74, at 414.

The doctrine of *cause* continues to be controversial.[152] Yet as with consideration in England, as Larombière in his commentary on the *Code civil* would point out, in practice most contracts were enforced without too much difficulty.[153] In fact, by the mid-19th century, it was becoming increasingly difficult to justify the existence of the requirement of *cause*.[154] Recent reform of contractual obligations in France has seen the requirement of *cause* abandoned altogether.[155] English lawyers faced a similar problem. They struggled to explain why, if a contract was formed by a meeting of wills, consideration was also required. That most Civilian of 19th-century English writers, Henry Colebrooke, conceded, as others had before, that a contract was 'an agreement upon sufficient consideration'.[156] At the same time his definition of consideration hints at a subtle shift:

> {quotation}A consideration is the material cause of a contract. It is the motive of the act which becomes the cause of the obligation … The will of a party to engage, his assent to become bound, is the essence of a voluntary engagement. The consideration is required only as evidence of his will.[157]{/quotation}

When expressed in this way the doctrine of consideration was closer to *cause* than it was to the idea of *quid pro quo*. Colebrooke went further than any judge was prepared to go. Nevertheless by the 1840s the requirement of reciprocity in consideration was stretched almost to breaking point.[158] The boundaries of consideration were further loosened in the 1850s and 1860s. In *Shadwell v Shadwell*,[159] an uncle promised to pay his nephew £150 a year on his marriage. The majority held that by marrying, the nephew had provided

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[152] See the chapters by Judith Rochfeld and Ruth Sefton-Green in John Cartwright, Sefan Vogenauer and Simon Whittaker (eds), *Reforming the French Law of Obligations* (Hart 2009).

[153] ML Larombière, *Théorie et pratique des obligations* (Pedone-Lauriel 1885) vol 1, 284.

[154] Gordley, *Modern Contract Doctrine*, *supra* note 41, at 165.

[155] Ordinance No. 2016-131 of 10 February 2016. For a discussion see, Laurent Aynès, 'The Content of Contracts: *Prestation*, *Objet*, but No Longer *la Cause*?' in John Cartwright and Simon Whittaker (eds), *The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms* (Hart 2017) 137, 141–143.

[156] Colebrooke, *Obligations*, *supra* note 89, at 2.

[157] Colebrooke, *Obligations*, *supra* note 89, at 38.

[158] In decisions like *Haigh v Brooks* (1839) 10 Ad & E 309; *Bainbridge v Firmstone* (1838) 8 Ad & E 743, 1 P & D 2, 1 W, W & H 600.

[159] (1860) 9 CB NS 159.

consideration for his uncle's promise. The finding of consideration was justified using the traditional formula. The nephew suffered a loss by marrying at the uncle's request and the uncle gained a benefit because the marriage was 'an object of interest to a near relative'.[160] Analysed in terms of genuine reciprocity, this outcome is unconvincing.

The continued survival of the doctrine of consideration can in a large part be explained by the fact that its role was much diminished. Providing a contract was seriously intended, it was difficult to argue that consideration was absent. As Leake explained, 'The object of [consideration] is to avoid the risk of giving binding effect to promises made inadvertently, and without an obligatory intention'.[161] In Leake's analysis, consideration no longer mattered in itself. It was merely a device for ascertaining whether there was an obligatory intention. Pollock's treatment was different. In the first edition of his treatise he argued that, 'Notwithstanding these differences it seems very possible that the English Consideration may be directly descended from the Roman Causa'.[162] Pollock would later reject this view as historically unsound and treat consideration as a purely home-grown doctrine.[163] Even so, the fact that a parallel with *causa* was even drawn, may be significant. It reflects the extent to which consideration came to be seen as a reason that the law recognises as generating a binding contract or one that was seriously intended,[164] rather than an idea based on exchange.

{a}7. CODES, CONTRACT AND THE COMMON LAW

The points of contact between English and French contract law in the 19th century were not just substantive. They were cultural as well. This claim may seem even more surprising. Would-be codifiers in England after all faced significant hostility. James Humphreys's

[160] (1860) 9 CB NS 159, 174.

[161] Stephen Leake, *The Elements of the Law of Contracts* (Stevens & Sons 1867) 310.

[162] Frederick Pollock, *Principles of Contract at Law and in Equity* (Stevens & Sons 1876) 149.

[163] For a discussion, see Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (OUP 2004) 205–206.

[164] The idea that *causa* has some role in the history of consideration may not be entirely without foundation, though Pollock placed too much weight on the relationship, AW Brian Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (OUP 1987) 402–404.

Observations on the actual state of the English laws of Real Property with the Outlines of a Code[165] appeared in 1826, and was based the *Code civil.*[166] Edward Sugden, the future Lord Chancellor, said that 'a greater calamity could not befall the country' than the implementation of Humphreys's code.[167] Jeremey Bentham devoted much of his life from the 1780s to his death in 1832 to putting a good case for codification in England and elsewhere without success.[168] More modest proposals for partial codification of real property[169] and criminal law met huge opposition.[170] Such was the state of affairs two years before Bentham's death in 1832 that the *Law Magazine* had already announced that 'Codification … has become a dead letter in England'.[171]

It is often forgotten that something like a contract code was actually enacted in India as the Indian Contract Act of 1872.[172] William Macpherson, one of the key figures in the Commission that drew up the Act, was even a self-confessed admirer of Pothier.[173] The

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[165] (John Murray 1826).

[166] Bernard Rudden, 'A Code too Soon. The 1826 Property Code of James Humphreys: English Rejection, American Reception, English Acceptance', in Peter Wallington and Robert Merkin, *Essays in Memory of F.H. Lawson* (Butterworths 1986) 101.

[167] *Ibid*, at 103.

[168] JR Dinwiddy, *Bentham* (OUP 1989) chap 4; David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (CUP 1989) 257–290; P Schofield, 'Jeremy Bentham: Legislator of the World' (1998) 51 Current Legal Problems 115.

[169] Stuart Anderson, 'Property', in William Cornish, Stuart Anderson, Raymond Cocks, Michael Lobban, Patrick Polden and Keith Smith, *The Oxford History of the Laws of England, Vol XII 1820–1914: Private Law* (OUP 2010) 49–78.

[170] Lindsay Falmer, 'Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833–45' (2000) 18 Law and History Review 397; Keith Smith, 'Criminal Law', in William Cornish, Stuart Anderson, Raymond Cocks, Michael Lobban, Patrick Polden, Keith Smith, *The Oxford History of the Laws of England. Vol XIII 1820–1914: Fields of Development* (OUP 2010) 193–205.

[171] Anon, 'Events of the Quarter' (1830) 4 Law Magazine 237, 244 cited by Smith, *ibid*, at 192.

[172] For a discussion see, Warren Swain, 'Contract Codification and the English: Some Observations from the Indian Contract Act 1872' in James Devenney and Mel Kenny (eds), *The Transformation of European Private Law* (CUP 2013) 172–195.

[173] William Macpherson, *Outlines of the Law of Contract as Administered in the Courts of British India* (RC Lepage 1860) xi.

legislation was the nearest that English lawyers came to adopting Pothier's views wholesale. Significant segments of English contract law also came to be legislated for.[174] With the exception of the Partnership Act, which was drafted by Frederick Pollock, these Acts were the creations of one man, Mackenzie Chalmers.[175] This process had a direct parallel in the way in which legal writers played a major role in codification in civil law jurisdictions. Despite the success of the legislation, there was never any realistic chance of anything approaching scale of the *Code civil* finding favour in England.[176] In much the same way the debates in America showed that those schooled within the Common law tradition were resistant to codification.[177] Instead, the driving force behind the creation of the so-called classical model of contract law were legal writers rather than legal writers acting in conjunction with legislators.

Stephen Leake's *The Elements of the Law of Contracts*,[178] published in 1867, was a new sort of contract treatise. The author made his intentions clear in the preface:

> {quotation}The present work professes to treat of the elementary rules and principles of the law of contracts, exclusively of the detailed applications of that law to specific matters; such applications of the law being referred to only occasionally, as subsidiary to the main object of the work, for the purposes of proof, argument, and illustration.[179]{/quotation}

Leake was more successful than his predecessors, with the exception of Colebrooke, in presenting the law of contract as a single body of doctrine rather than an accumulation of individual types of contract all with their own special rules. But unlike Colebrooke, Leake

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[174] Bills of Exchange Act 1882; Partnership Act 1890; Sale of Goods Act 1893; Marine Insurance Act 1906.

[175] Steve Hedley, 'Chalmers, Sir Mackenzie Dalzell', *Oxford Dictionary of National Biography*. For Chalmers's own thoughts on the matter, see MD Chalmers, 'Codification of Mercantile Law' (1903) 19 LQR 10.

[176] Warren Swain, 'Codification of Contract Law: Some Lessons from History' (2012) 31 University of Queensland Law Journal 39, 41–44.

[177] Aniceto Masferrer, 'Defense of the Common Law against Postbellum American Codification: Reasonable and Fallacious Argumentation' (2008–2010) 50 American Journal of Legal History 355.

[178] Leake, *Contracts*, *supra* note 161. For a helpful discussion, see Catharine MacMillan, 'Stephen Martin Leake: A Victorian's View of the Common Law' (2011) 32 Journal of Legal History 3, 17–24.

[179] Leake, *Contracts*, *supra* note 161, at v.

intended his treatise to be useful to practitioners.[180] A legal treatise is of course quite a different thing from a code. Yet the English contract literature of the period shared some of the characteristics of a code.[181] It had an order and structure. The law was no longer seen as just a 'heap of good learning'. There was now an underlying premise: contracts were formed by a meeting of wills. From that premise, a whole edifice was created. For a period, legal writers played a significant role in shaping the direction of contract law as well as just reporting on it. In an area like contractual mistake this was a creative process that sometimes distorted what the courts actually decided.[182] Just as in civil law jurisdictions, legal writers were active participants, the difference was that their contribution did not usually result in legislation.

The great works of the classical period of English contract law in the late 19th century by Sir Frederick Pollock[183] and Sir William Anson followed a set pattern. In his *Principles of the Law of Contract*, Anson explained that:

> {quotation}The main object with which I have set out has been to delineate the general principles which govern the contractual relation from its beginning to its end. I have tried to show how a contract is made, what is needed to make it binding, what its effect is, how its terms are interpreted, and how it is discharged and comes to an end.[184]{/quotation}

The reality was never as neat as the legal writers might have their readers suppose. The point is rather that the writers of the classical period helped to create a particular mindset. As with a code, this particular way of thinking developed a momentum of its own. It is still reflected, to some extent, in the way in which contract law is taught in many English

[180] *Ibid*, at vi.

[181] This connection is also made, in a different context, by Lindsay Farmer, 'Of Treatises and Textbooks: The Literature of the Criminal Law in Nineteenth-Century Britain' in Angela Fernandez and Markus Dubber (eds), *Law Books in Action Essays on the Anglo-American Legal Treatise* (Hart 2012) 145, 164.

[182] MacMillan, *Mistakes*, *supra* note 73, at chap 7.

[183] Pollock, *Contract*, *supra* note 162.

[184] (Clarendon Press 1879) at v.

universities[185] even if it does not entirely match the reality of how modern business people actually think.[186]

The French codifiers and the English treatise writers before Pollock drew upon similar sources. Pothier was particularly prominent. By the late 19th century the intellectual bonds between English and French law began to weaken. It was Von Savigny the German, not Pothier the Frenchman, who was Pollock's main source of inspiration.[187] Having been used to helping establish a legal framework for the law of contract, the influence of Pothier began to wane. English law would now go its own way. The idea that contract law could be seen as a coherent system built around the idea of will began to be challenged. A wider variety of opinions and approaches in the literature and in the courts would begin to emerge. Eventually this would even lead some to claim that contract law was dead.[188] The new breed of French doctrinal writers who appeared in the 19th century were less deferential towards the *Code civil*.[189] The growing body of case law inevitably diluted some of the purity of the original project. In France too, contract law no longer seemed quite so simple. Modern French law is not merely a conceptual project. It is a pragmatic exercise as well.[190]

The modern law of contract in both France and England was forged in the 19th century. Both jurisdictions made extensive use of what was already there. In England, this exercise involved more than using earlier Common law authorities. For a brief moment it tapped into a deeper European intellectual tradition. The structures that were created in the two jurisdictions shared some common features. These coalesced around the idea of the will. Pragmatic English judges were also willing to appropriate aspects of the *Code civil* for their

[185] Most English contract courses follow the pattern of formation, terms, vitiating factors and remedies.

[186] There has emerged a significant body of literature on this subject since the seminal contribution of Stuart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 American Sociological Review 1.

[187] Duxbury, *Pollock*, *supra* note 163, at 190–191.

[188] Grant Gilmore, *The Death of Contract* (Ohio State UP 1974).

[189] On French doctrinal writing in the 19th century see, Jean-Louis Halpérin, 'French Doctrinal Writing' in Paul Mitchell (ed), *The Impact of Institutions and Professions on Legal Development* (CUP 2012) chap 3 and Paula Giliker, 'The Impact of Institutions and Professions in France' at 89, 95–100 in the same volume.

[190] John Bell, *French Legal Cultures* (Butterworths 2001) 99–101.

own, and quite different purposes. Either way, for a few decades, something quite fundamental was shared.