

# GLOBE REFINING CO. v. LANDA COTTON OIL CO. AND THE DARK SIDE OF REPUTATION

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Why *Globe Refining*? *Globe Refining* is not the most obvious choice for a symposium on the worst Supreme Court decisions ever. It isn't even the most obvious choice for a symposium on the worst Supreme Court *contracts* decisions ever.<sup>1</sup> Indeed, when I've mentioned my topic even to contracts cognoscenti, many have had a moment of blankness before summoning up recollections of the decision—something one wouldn't see with, say, *Dred Scott* or *Korematsu*.

After that moment, however, they invariably recall its holding. By way of reminder, the common law requires that damages must be foreseeable if they are to be recovered in an action for breach of contract. This doctrine is known best through the casebook classic of all casebook classics, *Hadley v. Baxendale*.<sup>2</sup> More precisely, *Hadley* requires that damages must arise either in the ordinary course of events or as a result of circumstances that the party in breach had reason to know.<sup>3</sup> In *Globe Refining*, Holmes added another limit on the recovery of damages: that the liability “should be worked out on terms which it may fairly be presumed he would have assented to if they had been presented to his mind.”<sup>4</sup> This is the famous, perhaps notorious “tacit agreement” test.

To show how this test works, consider the facts of a representative tacit agreement case.<sup>5</sup> A farmer ordered a truck with lights, and told the dealer at the time of the purchase that he needed the lights so that he could plow his fields at night. The truck arrived without lights, and indeed the lights were not supplied for almost a year from the time of sale. The farmer refused to pay; the dealer sued for payment; the farmer counter-sued the dealer for income lost because he was unable to plant fields at night. If we apply the standard *Hadley* test, there should be no difficulty allowing damages, because the seller knew the

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<sup>1</sup> Two symposium colleagues have already claimed *Carnival Cruise Lines*, certainly a contender for that dubious honor. Another possibility, the very recent decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), was decided after I had started work on this *parvum opus*, or I might have picked that absurdly low-hanging fruit. (Anyone curious about my views on *Concepcion* might have a look at E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.28 n.52 (Larry T. Garvin & E. Allan Farnsworth supp. 2012).)

<sup>2</sup> *Hadley v. Baxendale*, (1854) 156 Eng. Rep. (Ex) 145; 9 Ex. 341.

<sup>3</sup> RESTATEMENT (SECOND) OF CONTRACTS § 351(2) (1979).

<sup>4</sup> *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 543 (1903).

<sup>5</sup> *Lamkins v. Int'l Harvester Co.*, 182 S.W.2d 203 (Ark. 1944).

intended use of the goods at the time of contracting.<sup>6</sup> The court instead affirmed the dismissal of the action against the dealer. Although these potential damages may well have been foreseeable, the court held that

there is nothing in the testimony showing circumstances surrounding and connected with the transaction which were calculated to bring home to the dealer knowledge that appellant expected him to assume liability for a crop loss, which might amount to several hundreds of dollars, if he should fail to deliver a \$20 lighting accessory.<sup>7</sup>

It thus was not enough for the farmer to tell the dealer why he needed the lights; in order to recover damages, he would have had to go further and make clear that he would hold the dealer liable were the lights not delivered on time.

This new test made some immediate headway, but soon fell under formidable and almost universal attack from such sources as *Williston on Contracts*, the two Restatements of Contracts, and Article Two of the Uniform Commercial Code.<sup>8</sup> The courts, after gingerly stepping in that direction, turned tail and ran, so that only a few jurisdictions now employ *Globe Refining's* tacit agreement test.<sup>9</sup> It was, by any measure, a resounding failure.

So this was a bad decision, but no worse than many others now that its early attractions have faded. Back to the original question: why *Globe Refining*? Because, in its modest way, it shows how a determined and brilliant judge can foul up the law with even an unpromising set of facts. And our judge here is none other than Oliver Wendell Holmes, Jr., by almost any measure one of the greatest jurists in the history of this country. So in *Globe Refining* we see Holmes, presented with a set of facts routine even by the standards of pre-*Erie* general federal common law, trampling basic principles of procedure in his eagerness to get to a nonexistent contracts issue—which he then proceeded to muck up. His affront to the law of civil procedure was quickly set aside by the Court. His affront to contract law, on the other hand, survives to this day—not just as an academic punching bag, but as the law of a few states and an influence on the law of still more.<sup>10</sup> Consider that *Globe Refining*, a pretty humdrum contracts dispute, has had over five hundred citations from courts, commentators, and practitioners in Westlaw, far more than for similarly banal cases.<sup>11</sup>

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<sup>6</sup> There may well have been other problems with the claim; causation and mitigation come to mind quickly. But our concern is with foreseeability.

<sup>7</sup> *Id.* at 206.

<sup>8</sup> See *infra* notes 126–34 and accompanying text.

<sup>9</sup> See, e.g., *Native Alaskan Reclamation & Pest Control v. United Bank Alaska*, 685 P.2d 1211, 1219–20 (Alaska 1984) (discussing earlier cases that referred to *Globe Refining*, but then holding that “[t]o the extent that prior Alaska case law suggests adoption of the ‘tacit agreement’ test, it is expressly disapproved.”). On the continued use of *Globe Refining*, see *infra* notes 164–73 and accompanying text.

<sup>10</sup> As one scholar colorfully put it, *Globe Refining* “is like the vampire from the 1930s ‘sequel’ movies. One may think it dead, but it continues to reappear to drain the lifeblood from what might have been a good case for recovery, and its sole purpose on earth has been to see that the injured party cannot recover.” Arthur G. Murphey, Jr., *Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley*, 23 GEO. WASH. J. INT’L L. & ECON. 415, 465 (1989).

<sup>11</sup> By way of illustration, the other general federal common law or diversity opinions in volume 190 of the U.S. Reports average 146 such citations, based on a citation search conducted on October 10, 2011.

How could this have happened? First, why on earth would Holmes have reached out in this unpromising case to get to the contracts issues—here, the law of foreseeability in contract damages? Second, having reached these issues, why would he have gone off in a wrong direction, and why was this direction wrong? And third, once this decision was on the books, why has it had so great an effect on contract law, particularly when its similarly peculiar reading of civil procedure vanished so soon?

The answers to these questions may prove a little surprising. In the end, though, they demonstrate two all-too-common phenomena. The first is the danger of reputation—or, rather of the following faulty syllogism: (1) Holmes was a great judge. (2) He wrote the opinion in *Globe Refining*. (3) Therefore, the opinion in *Globe Refining* is great. The other is the harm that can be caused by a judge with an agenda that he puts ahead of the actual case to be decided. Holmes did indeed have such an agenda, unfortunately for the Globe Refining Company and many who have followed in its wake. The Court has issued many unfortunate opinions, the great bulk of which are at best of historical interest. But *Globe Refining* lives on, kept alive, I think, mainly by Holmes's generally—*generally*—deserved fame.

I'll begin by tracing briefly the background to *Globe Refining*, both factual and legal. Then I'll show where and how Holmes's opinion went off the rails—and, perhaps more important, why. After this will come its consequences, mainly in the law of contract. To close will be some thoughts about the ability of great judges to make routine errors genuinely horrific.

### I. GLOBE REFINING'S TWISTED PROCEDURAL ROOTS

*Globe Refining* is on its surface a routine case. In this instance, there are no hidden depths; if anything, there are hidden shallows. The dispute arose when Globe Refining Company, a Kentucky corporation, entered into a contract with Landa Cotton Oil Company, a Texas corporation, to purchase from Landa ten tanks of crude cottonseed oil at \$0.1575 per gallon, F.O.B. the buyer's tank cars at Landa's mill in Texas.<sup>12</sup> The oil was to be shipped in late August and early September.<sup>13</sup> Accordingly, Globe Refining sent its tank cars "at great expense and trouble" to Landa's mill, ultimately at a cost of \$900.<sup>14</sup> In late August Landa filled one of the tanks fully and another partially, and in early September filled another fully. Transporting these tank cars cost Globe

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<sup>12</sup> For those who like to put faces to names, there is a photo of Landa Cotton Oil's factory at [http://sophienburg.com/blog/wp-content/uploads/2009/03/landa\\_cotton\\_oil.jpg](http://sophienburg.com/blog/wp-content/uploads/2009/03/landa_cotton_oil.jpg) (last visited Mar. 16, 2012). I have found no equivalent photo for Globe Refining. However, the home of L.K. Ferguson, president of Globe Refining at the time of this litigation (and a deponent in this action), is pictured at <http://www.oldlouisville.com/Streetscapes/ThirdAvenue/1500W/S3rd1520.htm> (last visited Mar. 16, 2012).

<sup>13</sup> Letter from Thomas & Green to Landa Oil Co. (July 30, 1897), in Transcript of Record at 23, *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (No. 241) [hereinafter R. at \_\_\_\_]. Except when otherwise noted, citations are to the plaintiff's first amended petition (in current terminology, the complaint). A tank appears to have held approximately 6,700 gallons of oil. R. at 3.

<sup>14</sup> R. at 2.

Refining \$300. Otherwise, however, Landa failed to supply the contracted-for oil.<sup>15</sup>

Globe Refining alleged a loss of \$3,500.<sup>16</sup> It reached this amount by summing five distinct losses. First was the \$900 it had to pay the railroad for transporting its cars to Landa's plant, an expense "of which the defendant had notice."<sup>17</sup> Second, the market price of cottonseed oil at the time of breach was \$0.1875 per gallon, rising to \$0.20 per gallon when Landa notified Globe Refining of breach and \$0.25 when suit was brought; because Landa failed to give Globe Refining notice of breach, though, and because of "the disorganized condition of the market," Globe Refining was unable to cover at all.<sup>18</sup> Third, Landa, knowing that it was going to breach the contract, nevertheless "wrongfully caused, directed and instructed" Globe Refining to send its tank cars

a distance of 1000 miles at an expense and loss to plaintiff of \$1000, knowing at said time . . . that he would not fill said cars . . . and knowing that plaintiff would lose the use of said cars unnecessarily, and would lose much valuable time in arranging to procure other oil from other sources.<sup>19</sup>

Relatedly, because Landa delayed giving notice for two weeks, and did so "wilfully and maliciously," Globe Refining was put to an avoidable loss of \$2,000.<sup>20</sup> Fourth, because of Landa's breach, Globe Refining lost the use of its tanks for at least thirty days each, which, at a cost of three dollars per day, yielded \$700 in damages.<sup>21</sup> Fifth, Globe Refining had already contracted to sell the cottonseed oil to its own customers, "whereby it was subjected to the heavy damage and loss of \$740, thereby losing said customers and contracts, and suffering the loss of its credit and reputation to its damage in the further sum of \$1,000."<sup>22</sup> Finally, the parties contemplated that Globe Refining would have to arrange to send its tanks at great expense from distant points, and that doing so would require Globe Refining to pay additional freight "in order to rearrange the destination of the various tanks" in the sum of \$350.<sup>23</sup> The defendant sought dismissal on the grounds of a lack of diversity jurisdiction, stating that the amount in question was below the jurisdictional requirement of \$2,000.<sup>24</sup>

Let us pause here. Suppose this case were to come before a modern district court judge, with the defendant alleging a lack of jurisdiction as a basis for dismissal. The court might well read the complaint and conclude, as did Justice Holmes, that "the pleader has gone as far as he dared to go, and to the verge of anything that could be justified under the contract, if not beyond."<sup>25</sup> But that is not the test. Modern courts ask whether it is legally certain that the plaintiff

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<sup>15</sup> *Id.*

<sup>16</sup> How Globe Refining reached this figure is rather mysterious. If one adds up its various demands, they come to approximately \$7,700.

<sup>17</sup> R. at 2.

<sup>18</sup> R. at 3.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> R. at 4.

<sup>22</sup> *Id.*

<sup>23</sup> R. at 4-5.

<sup>24</sup> R. at 8. The diversity statute then in force was 24 Stat. 582 (1887).

<sup>25</sup> *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 542 (1903).

cannot meet the jurisdictional minimum.<sup>26</sup> Even if the judge thinks it highly unlikely that the plaintiff will recover that much, the judge is not to usurp the fact-finder's right to make that decision. There are, however, three circumstances in which it is possible to show to a legal certainty that the plaintiff will not meet the jurisdictional minimum. These are:

(1) when the terms of a contract limit the plaintiff's possible recovery to less than the required jurisdictional amount; (2) when a specific rule of substantive law or measure of damages limits the amount of money recoverable by the plaintiff to less than the necessary number of dollars to satisfy the requirement; and (3) when independent facts show that the amount of damages claimed has been inflated by the plaintiff merely to secure federal court jurisdiction.<sup>27</sup>

Only the third applies here. To be sure, the claims are duplicative. But that does not of itself destroy jurisdiction, if the residue passes the jurisdictional minimum. The judge would then look at the complaint and any facts introduced into evidence during a hearing on the motion to dismiss. In *Globe Refining*, the court would, I think, quickly decide that there is jurisdiction, though probably with some mental reservations about the likelihood of recovering that much. The direct damages—the difference between the market price at the time and place of delivery and the contract price—according to the plaintiff's figures were \$1441.60, well short of the necessary \$2000. Of the other claims for damages, some were incidental damages, such as the costs of transporting the tank cars, and some were consequential damages, such as the lost business because of Globe Refining's inability to supply its own customers. The incidental claims do overlap. For example, the plaintiff sought \$900 for payments made to the railroad for moving its tank cars to Landa's plant, but also sought \$1000 because Landa caused Globe to send its cars a thousand miles, \$350 to rearrange the destination of its tanks, and \$700 for loss of use of the tanks. Indeed, as Holmes properly observed, some of these are legally incapable of recovery. The market-contract measure of damages takes into account the routine costs of performance by the buyer, which would have been incurred had the contract been performed. The goal of expectation is to put the breached-against party in the position it would have occupied had the contract been performed. In this setting, that would give Globe Refining full tank cars of oil at Landa's plant. The expenses involved in getting the cars to the plant are thus irrelevant.<sup>28</sup>

The consequential claims overlap as well. The plaintiff asked for \$2000 for losses incurred because Landa's lack of notice made it impossible for Globe to supply itself from other sources, but also \$1740 for lost customers, credit, and reputation.<sup>29</sup> But even if the judge had completely disregarded the inciden-

<sup>26</sup> *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938) ("It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.").

<sup>27</sup> CHARLES ALAN WRIGHT ET AL., 14AA FEDERAL PRACTICE & PROCEDURE § 3713 (2011) (footnotes omitted).

<sup>28</sup> However, added expenses would potentially be recoverable. Had Globe Refining covered, for example, any added shipping costs would qualify as incidental damages. Even under the circumstances, Globe Refining could recover costs beyond those anticipated at the time of contracting. The complaint does not make clear whether there were any, or, if so, under which heading they might fall.

<sup>29</sup> *Globe Ref. Co.*, 190 U.S. at 542.

tal damages and chose the lower figure for consequential damages, those damages, added to the \$1441.60 in direct damages, would safely have exceeded \$2000.<sup>30</sup>

A turn-of-the-last-century court would have conducted the same analysis. In the words of a leading treatise,

where the alleged cause of action is one in which the law does not liquidate the damages, the amount for which the plaintiff demands judgment is alone to be considered, unless it clearly appears that the amount named is merely colorable, and beyond the amount of a reasonable expectation of recovery.<sup>31</sup>

In the leading opinion when Holmes wrote *Globe Refining*, the Court laid down what remains the test. Even should the judge

receive impressions amounting to a moral certainty that [the cause] does not really and substantially involve a dispute or controversy within the jurisdiction of the court . . . upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them.<sup>32</sup>

Furthermore, “[i]t has been said that the burden of proof that the matter in dispute is less than the jurisdictional amount, when the plaintiff’s pleading alleges that fact, rests upon the defendant.”<sup>33</sup>

<sup>30</sup> There is one important caveat here. Before the litigation *Globe Refining* sent Landa Cotton Oil a bill for \$1021.28. R. at 23–24. This is flatly inconsistent with its later insistence that its damages exceeded \$2000. *Globe Refining* might have chosen to make a modest demand early on, but a more complete one in litigation. It might also not have realized the full scope of its potential damages until it consulted a lawyer, assuming it did so for the first time after sending the letter. The uncharitably inclined might conclude that *Globe Refining* thought its real damages something like the smaller figure, and put the other items in its complaint purely in order to secure diversity jurisdiction—precisely the sort of behavior that vitiates pleadings that otherwise seem sufficient. See George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225, 1333 (1994). Certainly the bill supports a finding of fraudulent pleading, an argument vigorously made by the defendant. But without more it ought not defeat diversity jurisdiction, unless the facts presented yield the legal certainty that the jurisdictional minimum cannot be attained.

<sup>31</sup> 1 ROGER FOSTER, A TREATISE ON FEDERAL PRACTICE § 16, at 49 (3d ed. 1901) (footnote omitted).

<sup>32</sup> *Barry v. Edmunds*, 116 U.S. 550, 559 (1886). Naturally, were the complaint facially defective, the amount claimed in the *ad damnum* clause would not preserve jurisdiction. See, e.g., *Lee v. Watson*, 68 U.S. (1 Wall.) 337, 339 (1863) (“In an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed, and its amount, as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment at its conclusion, must be considered in determining the question whether this court can take jurisdiction on a writ of error sued out by the plaintiff.”); BENJAMIN ROBBINS CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 121 (2d ed. rev. & enlarged by Henry Childs Newman 1896) (“If, indeed, it is apparent on the plaintiff’s own showing, in his declaration or bill, that, even if he should prevail, the law could not give him a sum equal to the jurisdictional amount, the court will not take jurisdiction; but, on the other hand, if the sum recoverable is indefinite, then the plaintiff may fix it in his declaration or bill at an amount which it is morally impossible for him to recover.”).

<sup>33</sup> 1 FOSTER, *supra* note 31, §16 at 56–57; see also *Hilton v. Dickinson*, 108 U.S. 165, 174 (1883) (“It is undoubtedly true that until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction, but it is equally true that when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail.”).

So before *Globe Refining* and after *Globe Refining* there should have been no trouble finding jurisdiction. True, the trial judge here dismissed the action for want of jurisdiction, stating merely its conclusion “that the real matter in controversy clearly does not exceed two thousand dollars (\$2,000) and that more than that sum is claimed by plaintiff for the fraudulent purpose of conferring jurisdiction upon the court.”<sup>34</sup> No doubt the court was moved by the plaintiff’s overegging of the pudding. Many of its alleged losses were, after all, duplicative or simply unrecoverable. But not all, and not enough to warrant dismissal. Hence the apparently justified appeal.

So in light of the established law, why didn’t the Court find jurisdiction in *Globe Refining*? Because Holmes’s opinion, in the words of a leading damages scholar, “seems almost perverse in its anxiety to make all intendments against the pleader in order to reach its doctrinal point.”<sup>35</sup> For example, consider the lost business resulting from the breach. The demand is clearly duplicative; *Globe Refining* cannot receive damages both for Landa’s malicious failure to tell it of its intended breach, thus causing an unnecessary loss, and for Landa’s failure to perform, thus causing losses arising from contracts, actual or potential, with its customers. But Holmes tossed out both—remember, at the pleading stage. For the first, he said that “[t]he fact alleged has no relation to the time of the contract. Therefore it cannot affect the damages, the measure of which was fixed at that time.”<sup>36</sup> This is partly legitimate. The test for foreseeability looks to the time of the contract, not after, to determine whether an event was foreseeable. And, as Holmes properly added, motives are irrelevant for breach of contract, though they might be germane for some tort action not in this complaint.<sup>37</sup> So far, Holmes is guilty of no more than an unsympathetic reading of the complaint. *Globe Refining* alleged that because Landa failed to give it timely notice of breach, it incurred damages. That essentially seeks damages for a failure to mitigate. Were there a duty to mitigate, such a count might be understandable. But there is none, so failure to mitigate goes to the measure of damages, not breach. If *Globe Refining* meant that the delay caused damages above and beyond those caused by the breach, then without more we cannot be sure whether *Globe Refining* counted the same damages twice.

Fine. So *Globe Refining* was sloppy at best in that first count. But what about the second, in which it alleged that Landa’s breach cost it profits from resale and losses of customers and goodwill? That seems unexceptionable in the face of the alleged actual notice. Here Holmes went off the jurisdictional rails. He reasoned that *Globe Refining* had put its case “as high as it possibly can be put.”<sup>38</sup> From this he concluded that the complaint consisted of allegations “which, by declining to amend, the plaintiff has admitted it cannot reinforce.”<sup>39</sup> *Globe Refining* had alleged that its contracts with others were well known to Landa and that “defendant had contracted to that end with the plain-

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<sup>34</sup> R. at 16.

<sup>35</sup> CHARLES T. MCCORMICK, HANDBOOK OF THE LAW ON DAMAGES 579 (1935).

<sup>36</sup> *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 547 (1903).

<sup>37</sup> *Id.* at 547.

<sup>38</sup> *Id.* at 546.

<sup>39</sup> *Id.*

tiff.”<sup>40</sup> On its face that would seem sufficient—but not for Holmes. Rather than paraphrase, let’s let him speak for himself:

Whether, if we were sitting as a jury, this would warrant an inference that the defendant assumed an additional liability, we need not consider. It is enough to say that it does not allege the conclusion of fact so definitely that it must be assumed to be true. With the contract before us it is in a high degree improbable that any such conclusion could have been made good.<sup>41</sup>

Where to start? First, Holmes weirdly reasoned that because the complaint pushed the limits for what the plaintiff might seek, its failure to amend the complaint to provide more detailed allegations meant that it had nothing more to say. This is at best a non sequitur. One might take a kitchen-sink approach to pleading and nevertheless not provide all possible detail for any one count. From that dubious proposition Holmes decided that whether a jury might find liability was not pertinent. Really? If the test is one of legal certainty, I would have thought that if a jury might plausibly find for the plaintiff on the basis of the pleadings, there is no legal certainty that the pleadings are inadequate. And then Holmes piled Pelion upon Ossa when he stated that the complaint “does not allege the conclusion of fact so definitely that it must be assumed to be true.”<sup>42</sup> This effectively imposed a heightened pleading standard on *Globe Refining*, which flatly contradicts the looser approach generally applied by the Court when faced with disputes over jurisdictional amounts. Such a standard did not exist at the time of *Globe Refining* and did not exist after.<sup>43</sup>

So Holmes is correct that a bizarrely uncharitable reading of the allegations yields a victory for Landa. But, of course, that isn’t the test, and it wasn’t the test when Holmes wrote *Globe Refining*. The allegations are at the very least consistent with Landa’s actual knowledge at the time of contracting that *Globe Refining* was going to lose profits and customers if Landa breached, and that should have been enough.<sup>44</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Professor Cohen has advanced a cogent argument in favor of Holmes. If cover is not possible, then consequential damages are indeed available for breach, subject to *Hadley* and allied doctrines. But if cover is possible but not undertaken, then any consequential damages arising from the lack of goods cannot be recovered by the buyer, because those damages could have been mitigated and were not. Cohen, *supra* note 30, at 1338–41; *cf.* U.C.C. § 2-715(2) (2002) (“Consequential damages resulting from the seller’s breach include (a) any loss . . . which could not reasonably be prevented by cover . . . .”). And there was testimony to the effect that *Globe Refining* could have covered, albeit at an undesirable price, but did not. R. at 26 (Bill of Exceptions Nos. 2 & 3). The testimony was, however, equivocal, and the trial court made no finding on relative credibility. Under the circumstances, the Court would have been justified in remanding for further proceedings. It would also have been justified in pointing to the mixed evidence to conclude that *Globe Refining*’s claims, though improbable, were not below the jurisdictional amount to a legal certainty. It was not justified in using improbability to justify dismissal.

<sup>44</sup> To be sure, the Court had recently issued an opinion that superficially gave support to Holmes’s approach. In *North American Transportation & Trading Co. v. Morrison*, decided just three years earlier, the plaintiff contracted with a carrier to take him from Seattle to Dawson City, but the carrier took him only as far as Fort Yukon. *N. Am. Transp. & Trading Co. v. Morrison*, 178 U.S. 262, 264 (1900). The plaintiff alleged damages consisting of (a) the price of his ticket; (b) the cost of returning to Seattle; (c) \$1 in expenses and \$3 for loss

II. TOO MUCH OF A BAD THING: *GLOBE REFINING*  
AND THE LAW OF FORESEEABILITY

As I noted at the end of the last section, Globe Refining's allegations should have been enough to meet the jurisdictional minimum. More precisely, they would have been enough had Holmes applied the *Hadley* rule in an orthodox manner. Instead Holmes marched in a different direction, one adopted in a line of English cases but without any substantial support in the United States. How Holmes got to this rather lonely outpost, and why its isolation is entirely deserved, is the subject of this section.

We left Holmes in the middle of eviscerating Globe Refining's complaint. He properly brushed aside some elements of damages and less properly brushed away others—less properly because the plaintiff's allegations, read as they were supposed to be read in this posture, were sufficient to count toward the jurisdictional minimum. The main issue remaining was whether Globe Refining could recover damages for the lost profits on resale of the cottonseed oil and for lost business resulting from its downstream breaches. Here his method of reading the complaint was . . . well, imaginative would be one word for it. Absurd would be another. But Holmes then managed to cap his tower of error by stating that “it is in a high degree improbable that any such conclusion [that the defendant assumed an additional liability] could have been made good.”<sup>45</sup>

This is problematic because the *Hadley* test, as conventionally stated, does not require that the promisor have assumed additional liability. It is enough that

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of time for each day since his return; (d) \$3 per day for what he would have earned had he not left Seattle at all; (e) \$15 per day for his future earnings in Dawson City; and (f) the value of his lost baggage. The Court acknowledged that in determining jurisdiction one starts with the amount that the plaintiff claims. “But where the plaintiff asserts, as his cause of action, a claim which he cannot be legally permitted to sustain by evidence, a mere *ad damnum* clause will not confer jurisdiction . . .” *Id.* at 267. The Court then observed that most of the damages sought were remote at best. As the Court put it:

The plaintiff was traveling to a land of promise, hoping to there procure some occupation, he knew not what, or to engage in some business, he knew not what. The result of such an adventure cannot be foretold, and the plaintiff's anticipations afford no safe ground on which to base a claim for damages.

*Id.* So here the Court made judgments about the plausibility of the plaintiff's claims in the course of deciding whether the plaintiff had met the jurisdictional amount—very like Holmes's actions in *Globe Refining*.

Or was it? If one looks more closely at the complaint in *Morrison*, the cases turn out to be quite different. In *Morrison*, the plaintiff

did not allege that he had ever lived in Dawson City before, or had any previous engagement or business there or any promise of employment; that it was not alleged what, if any, occupation the plaintiff had before his departure on the journey, nor what occupation was expected at the point of destination, or that any expected occupation or employment was communicated to the defendant company.

*Id.* So the complaint in *Morrison* consisted of bare allegations, lacking any factual predicate for finding proximate cause and foreseeability. Even the most generous court in the world would not have been able to scrape together the allegations necessary to show the jurisdictional amount. In contrast, Globe Refining did make appropriate allegations; they just weren't good enough for Holmes. Furthermore, the chain of causation set forth by *Morrison* was attenuated, to say the least, which is not true of that in *Globe Refining*.

<sup>45</sup> *Globe Refining*, 190 U.S. at 546.

the damages either flow in the natural course of events from the breach or, if not, that they arise from circumstances that, though not in the ordinary course of events, were made known to the promisor at the time of contracting. It certainly was not necessary that the defendant have agreed expressly to assume the risk in question—certainly not in American case law, and not in the main strand of English case law and commentary.

Here Holmes reframed the *Hadley* rule in a way that has ensured the continued notoriety of *Globe Refining*. He first acknowledged that contracting parties contemplate performance, not breach, when they make their contracts.<sup>46</sup> But the contracts effectively allocate risk, whether the parties consider it directly or not. Holmes therefore stated that “the extent of liability in such cases is likely to be within [the promisor’s] contemplation, and, whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind.”<sup>47</sup> He added that “mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law to charge the seller with special damage on that account if he fails to deliver the goods.”<sup>48</sup>

The test thus reframed, *Globe Refining* *still* did not have to lose, but its loss was very much on the cards. Consider, for example, Holmes’s dismissal of the claim for loss of use of the tanks that *Globe Refining* had already sent to Landa’s plant. Holmes acknowledged that this “was alleged to have been in contemplation of the contract, if we give the plaintiff the benefit of the doubt in construing a somewhat confused sentence.”<sup>49</sup> Ordinarily we would stop here and count the claim as foreseeable under the second prong of the *Hadley* test. But Holmes goes on to say that “this ambiguous expression cannot be taken to mean more than notice, and notice of a fact which would depend upon the accidents of the future.”<sup>50</sup> Well, now. Under then-standard procedure, Holmes should have read the allegations generously. Even so, Holmes pooh-pooed them as nothing more than notice. That would have sufficed, as we will see, under the prevailing interpretations of *Hadley*. Nor was the fact of potential loss, rather than actual loss, pertinent—indeed, losses resulting from uncertain

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<sup>46</sup> *Id.* at 543.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 545.

<sup>49</sup> *Id.* at 546. The sentence Holmes referred to appears only in part in *Globe Refining*. *Id.* at 542–43. The pertinent part reads:

Plaintiff further alleges that in asking for the shipment of said oil, plaintiff was under the necessity of arranging to send and sending at great expense its tanks from distant points, the defendant’s said mills to receive such oil, all of which was well known to defendant, and in contemplation of the aforesaid contract, and—was well understood by both plaintiff and defendant that at the time of making and entering into said contract that plaintiff was required to pay additional freight in order to rearrange the destination of the various tanks and other points . . . .

R. at 6. This sentence is hardly a model of clarity. In particular, it is not entirely clear whether the parties were aware of this as part of their contemplation of the contract at the time the contract was made, or whether these expenses were incurred after in *Globe Refining*’s contemplation of the contract. Elsewhere in the complaint, though, *Globe Refining* makes clear that it charges Landa Cotton Oil with knowing of these expenses at the time of contracting and that it made those contracts in order to perform the contract with Landa. R. at 3.

<sup>50</sup> *Globe Refining*, 190 U.S. at 546.

states of the world are at the core of foreseeability analysis. So by narrowing the *Hadley* test, Holmes was able to set aside an otherwise adequately pleaded demand for damages. But how did he get to this rule?

First, one place from which he *didn't* get to the rule: the defendant's brief. It is easy to review the defendant/appellee's brief to the United States Supreme Court: there wasn't one. Nor was there a brief at the district court. The closest thing to a brief on this issue is the defendant's exceptions to the plaintiff's first amended petition.<sup>51</sup> That does indeed address foreseeability. But the exceptions do not question the *Hadley* test or propose any variation on them. Rather, the exceptions take issue with the plaintiff's pleadings, arguing that they "did not state that any notice of such special damage was given to defendant at or before the time of making the contract sued upon."<sup>52</sup> True, there was oral argument at the trial court, and in the absence of a transcript we can only speculate about what the parties might have argued. But on the basis of the record as it came to Holmes, the parties seem not to have challenged the traditional *Hadley* rule. Even leaving aside whether the defendant had preserved this issue at trial or, by not filing a brief with the Court, had waived it, Holmes could have drawn no inspiration in resolving this issue from counsel. Of course, the tacit agreement test could have been so obvious a part of American law that Holmes would hardly have needed any warrant from trial. But was it?

A. *The Tacit Agreement Test in the United States: Not Just Tacit, But Silent*

In *Globe Refining*, Holmes cited to few American cases on foreseeability, and all but one of those few were part of a string cite after a statement of the *Hadley* rule.<sup>53</sup> Certainly he cited to none in support of his version of the tacit agreement test. There is a reason for this omission. The cases aren't there to be cited. True, a number of courts had made statements along lines congenial to Holmes in the decades preceding *Globe Refining*, sometimes denying consequential damages in spite of clear notice, sometimes requiring something like the tacit agreement test. These decisions were cited to often by commenta-

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<sup>51</sup> R. at 14.

<sup>52</sup> *Id.*

<sup>53</sup> *Globe Refining*, 190 U.S. at 544. The one exception was *Messmore v. N.Y. Shot & Lead Co.*, 40 N.Y. (1 Hand) 422 (1869), cited to for the unremarkable and essentially irrelevant proposition that the second prong of the *Hadley* test could be met by oral evidence, even when the contract was in writing. *Globe Refining*, 190 U.S. at 544. Just as well, perhaps, that Holmes didn't use *Messmore* any further. That court was faced with a breached contract for the sale of bullets—in 1861, when bullets were in some demand—with the result that it had to breach its own contract for resale. The court held that the usual contract-market damage rule

is changed when the vendor knows that the purchaser has an existing contract for a re-sale at an advanced price, and that the purchase is made to fulfill such contract, and the vendor agrees to supply the article to enable him to fulfill the same, because those profits which would accrue to the purchaser upon fulfilling the contract of re-sale, may justly be said to have entered into the contemplation of the parties in making the contract.

*Messmore*, 40 N.Y. (1 Hand) at 427. An inconvenient rationale for a proponent of the tacit agreement test.

tors.<sup>54</sup> But by the time of *Globe Refining* the highest courts of all those states had all declined to use the tacit agreement test, as Holmes no doubt was aware.<sup>55</sup> Nor were those states alone; even a quick look through state case law after *Hadley* shows that the courts, after some initial uncertainty, generally avoided the narrow approach ultimately favored by Holmes.<sup>56</sup> Significantly, given Holmes's persistent attacks on the general federal common law,<sup>57</sup> Texas's own case law then supported the standard *Hadley* test, not the tacit agreement test. As the Texas Supreme Court put it not quite twenty years before *Globe Refining*:

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<sup>54</sup> *Friend & Terry Lumber Co. v. Miller*, 8 P. 40, 40 (Cal. 1885); *Snell v. Cottingham*, 72 Ill. 161, 170 (1872); *Bridges v. Stickney*, 38 Me. 361, 369 (Me. 1854); *McEwen v. McKinnon*, 11 N.W. 828, 830 (Mich. 1882); *Osborne v. Poket*, 21 N.W. 752, 752 (Minn. 1884); *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N.Y. 487, 494–97 (1875); *Lindley v. Richmond & Danville R.R.*, 88 N.C. 547, 553 (1883). These were cited to routinely. For example, *Wood's Mayne on Damages*, cited to by Holmes, refers to *Snell* and *Booth*, the only two of these cases decided after *Hadley*. JOHN D. MAYNE & LUMLEY SMITH, *WOOD'S MAYNE ON DAMAGES* § 13 n.2 (3d Eng. & 1st Am. ed. adapted by H.G. Wood 1880). The edition of *Sedgwick on Damages* that Holmes also cited to contains references to almost all of them, and also to a predecessor of the Michigan case. 1 THEODORE SEDGWICK, *A TREATISE ON THE MEASURE OF DAMAGES* § 135 n.b (*Lindley*), § 148 at 210 (*Booth*), § 156 n.a (*Lindley*), § 157 n.b (*Friend*), § 159 at 223 (*Booth*), § 159 at 223–24 (*Snell*), § 187 n.b (*Snell*), § 190 n.e (*McKinnon*), § 202 at 298 (*Osborne*) (Arthur G. Sedgwick & Joseph H. Beale, Jr. eds, 8th ed. 1891); *see also, e.g., id.* at §§ 157 n.c & § 159 at 223 (referring to *Clark v. Moore*, 3 Mich. 55, 61 (1853) (stating early version of tacit agreement test)); WILLIAM REYNELL ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT AND OF AGENCY IN ITS RELATION TO CONTRACT* 408 (2nd Am. ed. from 4th London ed. 1887) (*Booth, Snell, Bridges, Friend, McKinnon, Osborne* cited); WILLIAM L. CLARK, JR., *HAND-BOOK OF THE LAW OF CONTRACTS* § 291 (1894) (*Booth, Bridges, McKinnon, Snell, Friend, Clark* cited); LOUIS L. HAMMON, *THE GENERAL PRINCIPLES OF THE LAW OF CONTRACT* § 472 n.378 (1902) (*Friend, Snell, Bridges, McKinnon, Osborne, Booth* cited); 1 J.G. SUTHERLAND, *A TREATISE ON THE LAW OF DAMAGES* § 45, at 94 (*Osborne*), § 52, at 115 n.1 (*Booth, Snell, Bridges, Clark*) (2nd ed. 1893).

<sup>55</sup> *Wallace v. Ah Sam*, 12 P. 46, 48 (Cal. 1886); *Postal Tel. Cable Co. v. Lathrop*, 23 N.E. 583, 584–85 (Ill. 1890); *S. Gardiner Lumber Co. v. Bradstreet*, 53 A. 1110, 1113 (Me. 1902); *Indus. Works v. Mitchell*, 72 N.W. 25, 27–28 (Mich. 1897); *Wilson v. Reedy*, 20 N.W. 153, 153–54 (Minn. 1884); *Swain v. Schieffelin*, 31 N.E. 1025, 1026 (N.Y. 1892); *Pender Lumber Co. v. Wilmington Iron Works*, 41 S.E. 797, 798 (N.C. 1902).

<sup>56</sup> *See, e.g., Waycross Air Line R.R. Co. v. Offerman & W. R.R. Co.*, 40 S.E. 738, 740 (Ga. 1902); *Acme Cycle Co. v. Clark*, 61 N.E. 561, 562–63 (Ind. 1901); *Hirschhorn v. Bradley*, 90 N.W. 592, 594 (Iowa 1902); *Postal Tel. Cable Co. v. Schaefer*, 62 S.W. 1119, 1121 (Ky. App. 1901); *Md. Ice Co. v. Arctic Ice-Mach. Mfg. Co.*, 29 A. 69, 71 (Md. 1894); *Nye & Schneider Co. v. Snyder*, 77 N.W. 118, 119 (Neb. 1898); *Wolcott, Johnson & Co. v. Mount*, 38 N.J.L. 496, 501 (1875); *Stranahan Bros. Catering Co. v. Coit*, 45 N.E. 634, 636 (Ohio 1896); *U.S. Tel. Co. v. Wenger*, 55 Pa. 262, 267 (1867); *Livermore Foundry & Mach. Co. v. Union Storage & Compress Co.*, 58 S.W. 270, 273 (Tenn. 1900); *Cockburn v. Ashland Lumber Co.*, 12 N.W. 49, 52 (Wis. 1882). *See generally* *McColl v. W. Union Tel. Co.*, 7 Abb. N. Cas. 151, 154–170 (Sup. Ct. N.Y. Cty. 1878) (collecting cases on notice and telegraph companies; cases in which recovery of consequential damages was denied all had cryptic or coded messages, and cases in which recovery was allowed had facially clear messages).

<sup>57</sup> *See, e.g., Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532 (1928) (Holmes, J., dissenting); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370 (1910) (Holmes, J., dissenting).

To authorize a recovery for the loss of profits . . . it was essential for the appellees not only to prove [causation], but also that such facts had been communicated to appellant as would have reasonably indicated the result which would or might have been expected to flow from a [breach of this sort].<sup>58</sup>

Even more pointedly, the Court had dealt with similar issues in the thirty or so years preceding *Globe Refining*, and had consistently opted for a reading of *Hadley* not entirely consistent with the tacit agreement test. For example, in *Western Union Telegraph Company v. Hall*,<sup>59</sup> a telegraph company had failed to transmit an uncoded message instructing the recipient to deliver goods.<sup>60</sup> The case turned on whether the miscarried telegram was so equivocal that damages could not be proven with sufficient certainty (it was).<sup>61</sup> But on the way to that conclusion, the Court dealt with a foreseeability argument thus: “the loss of a market may be made an element of damages against a carrier for delay in delivery, where it was understood, either expressly or from the circumstances of the case, that the object of delivery was to get the benefit of the market.”<sup>62</sup> A far cry from the tacit agreement test, surely.<sup>63</sup>

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<sup>58</sup> *Pac. Express Co. v. Darnell Bros.*, 62 Tex. 639, 641 (1884); *see also* *Tex. & Pac. Ry. Co. v. Hassell*, 58 S.W. 54, 55 (Tex. Civ. App. 1900) (“[S]pecial damages will not be considered as being in the contemplation of the parties, unless the conditions out of which such damages might ordinarily arise are made known to the carrier at the time the contract is made”); *Int’l & Great N. R.R. Co. v. Hatchell*, 55 S.W. 186, 187 (Tex. Civ. App. 1900) (for consequential damages, “it is essential that the carrier should understand the extent of the responsibility he assumes, and the consequences of failure on his part to deliver the goods within the required time; and, if no special circumstances are communicated to him, he can only be held responsible for the consequences which might ordinarily be supposed to flow from his breach of the contract”); *Gulf, C. & S.F. Ry. Co. v. Gilbert*, 23 S.W. 320, 321 (Tex. Civ. App. 1893) (“If the facts and circumstances put the carrier upon notice, or conveyed to it knowledge of the purpose and intended use of the machine, then it would become liable for the damages that may result to the shipper as a consequence of delay . . .”).

Holmes’s own court was somewhat ambivalent on the issue. One sees statements that special damages may not be recovered “unless the special circumstances which made it reasonable to expect that the greater damage would naturally ensue were, at the time when the contract was made, within the knowledge of both parties.” *Loneragan v. Waldo*, 60 N.E. 479, 480 (Mass. 1901). On the other hand, one sees statements that damages of that sort could be recovered where the defendant knew of the special circumstances “and that the contract was made for the very purpose of preventing [the events that ensued].” *Manning v. Fitch*, 138 Mass. 273, 277 (1885). How Holmes might have weighed the opinions may be inferred from his authorship of *Manning* but not of *Loneragan*.

<sup>59</sup> *W. Union Tel. Co. v. Hall*, 124 U.S. 444 (1888).

<sup>60</sup> *Id.* at 454–55.

<sup>61</sup> *Id.* at 458.

<sup>62</sup> *Id.* at 456. Holmes did cite to *Hall* in *Globe Refining*, but only for its restatement of the *Hadley* test. *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 544 (1903).

<sup>63</sup> *See also* *Primrose v. W. Union Tel. Co.*, 154 U.S. 1, 33 (1894) (coded telegram transmitted with error that caused the recipient to incur substantial losses; damages disclaimed on back of message blank, but Court cited approvingly to cases holding that the sender’s failure to explain to the telegraph company “the nature, importance, or extent of the transaction to which [the message] related” barred the sender from consequential damages”).

*B. The Tacit Agreement Test in England: Not Tacit, But Also No Agreement*

Holmes instead relied almost entirely on English precedent. Easily the most important for him was *British Columbia & Vancouver's Island Spar, Lumber, & Saw-Mill Co. v. Nettleship*.<sup>64</sup> There the plaintiffs delivered crates containing machinery to the defendant, a carrier, for delivery to a sawmill under construction.<sup>65</sup> When the ship's master, a part-owner of the ship, agreed to carry the crates, he knew that they contained machinery intended for the construction of a sawmill.<sup>66</sup> The carrier lost one of the crates, so the mill could not be completed until replacements were sent from England to Vancouver, which took over eleven months, during which the mill-owners lost potential profit.<sup>67</sup> The defendant sought to limit its damages to the cost of replacement (that is, to exclude consequential damage).<sup>68</sup>

The Court of Common Pleas ruled for the defendant.<sup>69</sup> The reasons given, however, varied. Chief Justice Bovill applied conventional *Hadley* analysis to find that the defendant did not know enough to make it liable for special damages.<sup>70</sup> The defendant knew that the missing box contained part of the machinery for the mill; it did not know that the mill otherwise could not be operated, thus subjecting it to possible liability for the mill's closure.<sup>71</sup> In the principal opinion, though, Justice Willes went much further. He agreed that the defendant lacked full notice, adding that it did not know that the part could not be replaced save by shipment from England.<sup>72</sup> But he rested his opinion on the idea that if this potential liability "had been presented to the mind of the ship-owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it."<sup>73</sup> Although the ship-owner knew the purpose of the shipment, "the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it."<sup>74</sup> To decide this requires looking at what facts the promisor had and did not have, but knowledge "can only be evidence . . . of an understanding by both parties that the contract is based upon the circumstances which are communicated."<sup>75</sup> Holmes found this language most congenial, and quoted from it at length in *Globe Refining*.<sup>76</sup>

<sup>64</sup> *British Columbia & Vancouver's Island Spar, Lumber & Saw-Mill Co. v. Nettleship*, (1868) 3 L.R.C.P. 499, 505.

<sup>65</sup> *Id.* at 499.

<sup>66</sup> *Id.* at 500-01.

<sup>67</sup> *Id.* at 501.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 510.

<sup>70</sup> *Id.* at 507 (Bovill, C.J.).

<sup>71</sup> *Id.* at 506 (Bovill, C.J.).

<sup>72</sup> *Id.* at 509 (Willes, J.).

<sup>73</sup> *Id.* at 508 (Willes, J.).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 545 (1903).

*Nettleship* gave rise to a line of similar cases. For example, in *Horne v. Midland Railway Company*<sup>77</sup> the court reviewed a decision by Justice Willes that relied on his opinion in *Nettleship*. The court affirmed Willes, and the opinion by Justice Blackburn is often referred to as the holding of the case. That opinion did not refer to *Nettleship*, but followed the same path and even extended it a bit: in Justice Blackburn's words, "in order that the notice may have any effect, it must be given under such circumstances, as that an actual contract arises on the part of the defendant to bear the exceptional loss."<sup>78</sup> Nor were the commentators silent. Willes's approach in *Nettleship* was ringingly affirmed in a leading English damages treatise, *Mayne on Damages*.<sup>79</sup> And again Holmes quoted approvingly.<sup>80</sup>

But there was another line of English cases, one flatly contrary to *Nettleship* and the like. As a future Lord Chancellor observed:

[I]f the liability to pay damages for breach of contract in truth rests on the duty to contemplate certain results, a man who contracts with knowledge imposing upon him the duty of such contemplation does in fact agree to be liable within the limits covered by his knowledge. The law says he is liable if he contemplates the results of breach; notice of the circumstances made it his duty to contemplate such results.<sup>81</sup>

This point was made not long after *Nettleship* in a Court of Appeal decision, *Hydraulic Engineering Co. v. McHaffie, Goslett, & Co.*<sup>82</sup> The plaintiffs contracted with the defendant to make part of a pile-driver, which the plaintiffs told the defendant was needed by its client by the end of August.<sup>83</sup> The defendant instead tendered the part at the end of September, and the plaintiffs rejected it as untimely.<sup>84</sup> As a result of this tardy delivery, the plaintiffs alleged that they lost their profit on the sale of the pile-driver, the costs incurred in making the other parts of the machine, the cost of painting it in order to preserve it, and the cost of warehousing it.<sup>85</sup> Because the pile-driver was specially designed for the plaintiff's client, the part that was complete was otherwise merely scrap iron.<sup>86</sup> At trial the court awarded all the damages save the cost of warehousing.<sup>87</sup> To reach this result, the court had to determine that the plaintiffs' notice was sufficient to place the risk of non-performance of the main contract upon the defendant, a foreseeability question squarely within the second prong of conventional *Hadley* analysis.<sup>88</sup>

<sup>77</sup> *Horne v. Midland Ry. Co.*, (1873) 8 L.R. 131 (Ex.).

<sup>78</sup> *Id.* at 141 (Blackburn, J.). Holmes cited to this in *Globe Refining*, 190 U.S. at 545.

<sup>79</sup> JOHN D. MAYNE & LUMLEY SMITH, *MAYNE'S TREATISE ON DAMAGES* 42 (7th ed. 1903) ("Where there are special circumstances connected with a contract, which may cause special damage to follow if it is broken, mere notice of such special circumstances given to one party will not render him liable for the special damage, unless it can be inferred from the whole transaction that he consented to become liable for such special damage.").

<sup>80</sup> *Globe Refining*, 190 U.S. at 545.

<sup>81</sup> F.E. Smith, *The Rule in Hadley v. Baxendale*, 63 L.Q. REV. 275, 284 (1900) (author was later Lord Birkenhead).

<sup>82</sup> 2 *Hydraulic Eng'g Co. v. McHaffie, Goslett, & Co.*, (1878) 4 Q.B.D. 670 (C.A.).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 671.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 672.

On appeal the judgment was affirmed.<sup>89</sup> Although the Court of Appeal was presented with *Nettleship* as authority, that decision went uncited.<sup>90</sup> Instead, Lord Justice Bramwell stated flatly that

where the contractee states that he wants the article agreed to be made in order to help him to carry out another contract, the contractor if he commits a breach in the delivery of the article is liable for the loss sustained by the contractee if he becomes unable to carry out that other contract.<sup>91</sup>

It was not necessary that the parties agree, tacitly or otherwise, that the defendant assume the risk; as long as both parties “know and contemplate that if a breach of the contract is committed some injury will accrue, in addition to the natural and ordinary consequences of the breach, the person committing the breach will be liable to give compensation in damages upon the occurrence of that injury.”<sup>92</sup> The other opinions in the case were to the same effect: that notice of the special circumstances was sufficient to put on the defendant the risk that the plaintiffs would be unable to perform their contract if the defendant did not perform its contract.<sup>93</sup>

*McHaffie* was not alone. Consider, for example, the Court of Appeal decision in *Grébert-Borgnis v. J. & W. Nugent*.<sup>94</sup> Here the aggrieved buyer sued for damages resulting from the loss of its resale contract, a contract made known to the seller before the buyer and seller entered into their own contract.<sup>95</sup> The buyer sought its lost profit; the seller sought to avoid that loss by invoking foreseeability doctrine.<sup>96</sup> The Court of Appeal ruled unanimously for the buyer.<sup>97</sup> In the principal opinion, Lord Brett stated that

where the sub-contract was fully made known to [the seller] in all its terms, in my opinion the defendant would be liable; and the proper inference . . . would be that he had contracted with the plaintiff upon the terms that if he broke his contract he should be liable for all the consequences of a failure by the plaintiff to perform his sub-contract.<sup>98</sup>

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<sup>89</sup> *Id.* at 678.

<sup>90</sup> *Id.* at 672.

<sup>91</sup> *Id.* at 674.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 676 (opinion of Brett, L.J.: holding that “I do not think that we can say that the contract of the defendants was entered into upon the basis of their paying penalties if they did not fulfill it,” but rather that the defendant was liable because “the facts are sufficient to satisfy the rule that notice must be given at the time of entering into the contract”); *id.* at 677–78 (opinion of Cotton, L.J.: “[W]here the breach has occasioned a special loss, which was actually in contemplation of the parties at the time of entering into the contract, that special loss happening subsequently to the breach must be taken into account. . . . [T]he defendants knew that [the buyer] might refuse to take the machinery if it should be delivered by the plaintiffs too late; the defendants therefore are liable for the consequences of their default.”).

<sup>94</sup> 4 *Grébert-Borgnis v. J. & W. Nugent*, (1885) 15 Q.B.D. 85 (C.A.).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 86.

<sup>97</sup> *Id.* at 94.

<sup>98</sup> *Id.* at 88, 90 (opinion of Brett, M.R.); *see id.* at 92, 93 (opinion of Bowen, L.J.: “[H]ow much of the damages claimed may be supposed to have been in the contemplation of the parties at the time of the making of the contract depends in every case upon how much of the real situation of the parties was so disclosed by the purchaser to the vendor at the time the contract was made”); *see also* *Hammond & Co. v. Bussey*, (1887) 20 Q.B.D. 79 (CA) 90

And there is a structural dimension to these cases. The British judicial system underwent much change in the late nineteenth century. In particular, the Judicature Act of 1875 reorganized the appellate courts, eliminating appeals within the several divisions of the trial courts and substituting a Court of Appeal.<sup>99</sup> The panels of the Court of Exchequer that heard *Hadley* and *Horne* were among the courts thus supplanted, as was the panel of the Court of Common Pleas that heard *Nettleship*.<sup>100</sup> So the decisions in *Nettleship* and *Horne* were effectively from the same court as those in *McHaffie* and *Grébert-Borgnis*, only earlier. *Stare decisis* did not require that the later courts follow the former; it was only in the middle of the twentieth century that decisions of the Court of Appeal were held binding on future courts.<sup>101</sup> One might therefore ask whether *Nettleship* and *Horne*, though perhaps not reversed even *sub silentio*, might have been called into question by subsequent authority.<sup>102</sup>

### C. Why the Tacit Agreement Test? And Why Here?

So Holmes's use of the tacit agreement test was hardly dictated by precedent; American case law was almost entirely against him, and English case law and commentary was at best divided. So why adopt it? Obviously not because the tacit agreement test fit best with the rest of the common law. Instead, Holmes had his own special approach to contracting, one that dictated something like a tacit agreement test as part of the law of damages. As Holmes famously observed in *The Path of the Law*:

The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference.<sup>103</sup>

If a contract does no more than assign the risk of an event failing to occur, then any such assignment would require more than mere notice, but rather some type of assent. As Holmes put it, “As the relation of contractor and contractee is voluntary, the consequences attaching to the relation must be voluntary.”<sup>104</sup> Assigning risk then becomes a question of construction. What the

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(opinion of Esher, M.R.: where seller knew that the buyer would enter into contracts for the sale of the coal to be supplied under its contract with the buyer, and that the coal had to be of a particular quality, consequential damages for breach of the downstream contracts within the contemplation of the parties under the second prong of *Hadley*); *id.* at 95 (opinion of Bowen, L.J.: same); *cf.* *Wilson v. Lancashire & Yorkshire Ry. Co.*, (1861) 9 C.B. (N.S.) 632 (C.P.) 645 (opinion of Byles, J.: no recovery of consequential damages because “the defendants here knew nothing about the nature of the goods or of the plaintiff’s occupation, [so] profits which might have accrued . . . were not within the contemplation of both parties at the time they made the contract”).

<sup>99</sup> J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 51, 138 (4th ed. 2002).

<sup>100</sup> *Id.* at 51; Patrick Polden, *The Courts of Law*, in 11 OXFORD HISTORY OF THE LAWS OF ENGLAND 523, 763–64 (John Baker ed. 2010).

<sup>101</sup> BAKER, *supra* note 70, at 200. *But see* A.L. Goodhart, *Precedent in English and Continental Law*, 50 L.Q.R. 40, 55 (1934) (Court of Appeal precedents considered binding as early as 1916).

<sup>102</sup> Certainly Smith thought as much in his 1900 article. Smith, *supra* note 81, at 280.

<sup>103</sup> O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

<sup>104</sup> O.W. HOLMES, JR., THE COMMON LAW 302 (1881).

parties knew at the time of contracting is relevant to construing their agreement, but “is not necessarily conclusive”; instead, the court “is to work out, from what is expressly said and done, what would have been said with regard to events not definitely before the minds of the parties, if those events had been considered.”<sup>105</sup> Holmes thus approved of *Nettlehip* and disparaged the idea that “if, in the course of performance of the contract the promisor should be notified of any particular consequence which would result from its not being performed, he should be held liable for that consequence in the event of non-performance.”<sup>106</sup>

Holmes’s amoral views of contracting have been the subject of much commentary, and I do not propose either to add to it or to attempt to sum it up. Certainly his views are consistent with the economic approach to law, at least in its most neo-classical form. It is not coincidental that when Richard Posner, the high priest of law and economics, put together an anthology of Holmes’s writings, he included *Globe Refining*.<sup>107</sup> In 1903, Holmes’s abolition of duty, as conventionally considered, was not much followed. In the United States it has been rejected by most of those who do not employ the economic analysis of law.<sup>108</sup> In Britain it “has been regarded by virtually all as a brilliant but wholly unsound paradox.”<sup>109</sup> To be sure, Holmes’s approach does clear away some cobwebs, as he intended, and forces us to look closely at what exactly we mean by a contractual duty. But as a source of positive law, it has had fairly modest effect.

Consider, then, a part of *Globe Refining* that I have not mentioned until now. After Holmes stated the facts and allegations but before he began picking away at them, he laid out a compressed view of his theory of contract. (Not so compressed, really; it fills almost a page of the U.S. Reports.<sup>110</sup>) We find his comparison of contract with tort. We find his view that contract is merely an election to perform or pay damages.<sup>111</sup> We find his corollary that whether a contract transfers a risk becomes an issue of construction. We find his conclusion that the issue is whether the terms “may be presumed [that the promisor] would have assented to if they have been presented to his mind.”<sup>112</sup> Or, more pointedly, whether the plaintiff should recover in this case “depends on what liability the defendant fairly may be supposed to have assumed consciously, or

<sup>105</sup> *Id.* at 303.

<sup>106</sup> *Id.* at 301 (referring to *Nettlehip* as “the opinion of a very able judge, which seems to be generally followed”). Note that Holmes puts up a straw man. Practically no one contended that notice *after* contract formation could give rise to liability. The real question was whether notice *before or during* contract formation could do so.

<sup>107</sup> *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903), reprinted in *THE ESSENTIAL HOLMES* 266–69 (Richard A. Posner ed., 1992).

<sup>108</sup> See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE* 14–17 (1981); T.M. Scanlon, *Promises and Contracts*, in *THE THEORY OF CONTRACT LAW* 86 (Peter Benson ed., 2001); Peter Linzer, *On the Amoralism of Contract Remedies – Efficiency, Equity, and the Second Restatement*, 81 *COLUM. L. REV.* 111, 138–39 (1981).

<sup>109</sup> P.S. ATIYAH, *Holmes and the Theory of Contract*, in *ESSAYS ON CONTRACT* 57, 59 (1986). But see STEPHEN WADDAMS, *DIMENSIONS OF PRIVATE LAW* 143–145 (2003) (noting limited adoption of Holmesian approach by courts).

<sup>110</sup> *Globe Refining*, 190 U.S. at 543.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made.”<sup>113</sup>

This dissertation on the principles of contract law is a little out of place in a routine diversity case. Indeed, it even was a little out of keeping with Holmes’s decisions on the Massachusetts Supreme Judicial Court, from which he had only just come.<sup>114</sup> Holmes had not been a remarkably venturesome contracts judge when in Massachusetts, though from time to time he did depart from well-trodden paths. Possibly Holmes was taking advantage of his new position to expound more generally on the nature of the law. But there is, I think, another explanation, one less jurisprudential and more personal.

As I noted, the English reaction to Holmes’s theory of contract was less than overwhelming. Perhaps the most pertinacious of his opponents was Sir Frederick Pollock, Corpus Professor of Jurisprudence at Oxford, editor of *The Law Quarterly Review*, editor-in-chief of *The Law Reports*, and author of the leading English treatise on torts and one of the leading English treatises on contracts.<sup>115</sup> Pollock’s contracts treatise states his commonsensical view that

[a] man who bespeaks a coat of his tailor will scarcely be persuaded that he is only betting with the tailor that such a coat will not be made and delivered . . . within a certain time. What he wants and means to have is the coat, not an insurance against not having a coat.<sup>116</sup>

A promisee is thus entitled, not merely to the promisor’s election of performance or damages, but to performance, with damages as a remedy if the promisor fails in his duty.

Pollock was also one of Holmes’s oldest friends, as shown in their long and affectionate correspondence.<sup>117</sup> A running theme of their exchanges was their profound difference in the role of duty in contract, particularly its application to damages. Indeed, Pollock pressed this point for over fifty years—from his very first letter to Holmes in 1874, well before Holmes had published *The Common Law*, to a letter in 1927.<sup>118</sup> Thus, for example, Pollock pointing out to Holmes that Holmes’s approach is inconsistent with the existence of the tort of inducing a breach of contract<sup>119</sup> or specific performance.<sup>120</sup> Most vigorous was Pollock’s last attack:

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<sup>113</sup> *Id.* at 544.

<sup>114</sup> Holmes took his seat on the United States Supreme Court on December 8, 1902. *Globe Refining* was argued on April 16, 1903 and decided on June 1, 1903.

<sup>115</sup> See generally NEIL DUXBURY, *FREDERICK POLLOCK AND THE ENGLISH JURISTIC TRADITION* (2004).

<sup>116</sup> FREDERICK POLLOCK, *PRINCIPLES OF CONTRACT* xix (3d ed. 1881); see also FREDERICK POLLOCK, *PRINCIPLES OF CONTRACT* 3 (6th ed. 1894) (“The specific mark of contract is the creation of a right, not to a thing, but to another man’s conduct in the future. He who has given the promise is bound to him who accepts it, not merely because he had or expressed a certain intention, but because he so expressed himself as to entitle the other party to rely on his acting in a certain way.”).

<sup>117</sup> See generally *HOLMES-POLLOCK LETTERS* (Mark DeWolfe Howe ed., 1941).

<sup>118</sup> Letter from Frederick Pollock to Oliver Wendell Holmes, Jr. (July 3, 1874), in 1 *HOLMES-POLLOCK LETTERS*, *supra* note 117, at 3; Letter from Frederick Pollock to Oliver Wendell Holmes, Jr. (June 13, 1927), in 2 *HOLMES-POLLOCK LETTERS*, *supra* note 117, at 200, 201.

<sup>119</sup> Letter from Frederick Pollock to Oliver Wendell Holmes, Jr. (Sep. 17, 1897), in 1 *HOLMES-POLLOCK LETTERS*, *supra* note 117, at 79, 80.

If the promise in a contract were held to be in the alternative—perform *or* pay damages—then (1) there could be no decrees for specific performance: (2) there would be no reason for allowing any implied exception of frustration or the like: (3) (and chiefly) it would not answer reasonable expectations of promisees. Those are my reasons: I don't see where moral phraseology comes in. No doubt it might be the law in some other planet.<sup>121</sup>

On foreseeability in particular, Pollock stated that the tacit agreement test would “cast doubt on the rule of *Hadley v. Baxendale*” and on the more general concept that the range of liability for breach of contract encompasses that which is “a natural and probable consequence of the act . . . the judgment of what is natural and probably being taken as it would have been formed by a reasonable man in the defendant's place at the . . . conclusion of the contract.”<sup>122</sup>

So how did Holmes respond? He amiably engaged Pollock from time to time.<sup>123</sup> But the most important letter came in 1904, soon after *Globe Refining* and even sooner after Holmes had received the latest edition of Pollock's tort treatise, which made Pollock's point yet again.<sup>124</sup> Let Holmes speak for himself:

I fear me we are not at one on the limit of damages in contract. I adhere to my old tendencies, *The Common Law*, and highly approve of Willes in *British Columbia Saw Mills Co. v. Nettleship*. I had a chance to fire off my mouth in *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, & *I done it*.<sup>125</sup>

What are we to make of this? Perhaps Holmes is playfully mentioning to Pollock that he had indeed made his views public, in nothing less than a judicial opinion. Or did Holmes decide to take the next chance he could to respond to Pollock, whether the facts really warranted it or not? It is easy to make too much of a few sentences in a letter, but one gets the sense of a bit of one-upsmanship in Holmes's phrasing—just a little bit of “neener, neener, neener,” perhaps. One would hate to think that Holmes's opinion was driven significantly by his desire to make a jurisprudential point independent of the merits of a case, but under the circumstances it is hard to resist that conclusion.

<sup>120</sup> Letter from Frederick Pollock to Oliver Wendell Holmes, Jr. (July 3, 1874), *supra* note 118, at 3.

<sup>121</sup> Letter from Frederick Pollock to Oliver Wendell Holmes, Jr. (June 13, 1927), *supra* note 118, at 201.

<sup>122</sup> FREDERICK POLLOCK, *THE LAW OF TORTS* 538–39 (6th ed. 1901).

<sup>123</sup> See, e.g., Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Mar. 25, 1883), in 1 HOLMES-POLLOCK LETTERS, *supra* note 117, at 19, 21; Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Sept. 26, 1920), in 2 HOLMES-POLLOCK LETTERS, *supra* note 117, at 55, 55 (mentioning *Globe Refining*).

<sup>124</sup> FREDERICK POLLOCK, *THE LAW OF TORTS* 547 (7th ed. 1904). Pollock had made the point in the preceding edition—the one Holmes would have had when he wrote *Globe Refining*. FREDERICK POLLOCK, *THE LAW OF TORTS* 539 (6th ed. 1901). Among the pleasant ironies of this case: Pollock dedicated his Torts treatise to two judges. One was the judge for whom he clerked, Justice Willes, who wrote the opinion in *Nettleship* that Pollock so decried. The other was Justice Holmes.

<sup>125</sup> Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Oct. 8, 1904), in 1 HOLMES-POLLOCK LETTERS, *supra* note 117, at 119, 119 (emphasis in original).

D. *What's So Bad About Tacit Agreement?*

Well, so what if Holmes wrote *Globe Refining* out of a desire to best a friend in debate? He might nevertheless have stated a sound legal principle, applied sensibly to the facts before him. Using what we might call an objective test of opinion assessment, was this a bad decision? Obviously I think it was, or you have been led here under false pretenses. More to the point, we can reach that conclusion using any of a wide range of jurisprudential approaches.

The two most obvious are both appeals to authority—namely, whether *Globe Refining* has been accepted by commentators or followed by courts. It is fair to say that the contracts clerisy long ago rejected *Globe Refining*, a rejection if anything rendered more emphatic over time. Consider, for example, Samuel Williston. In his magisterial contracts treatise, he stated that asserting the tacit agreement theory “is to assert a fiction which obscures the truth and invites misapprehension which may lead to error.”<sup>126</sup> Or Arthur Corbin, who criticized Holmes’s history<sup>127</sup> and declared that foreseeability “does not require that the defendant should have had the resulting injury actually in contemplation or should have promised either impliedly or expressly to pay therefor in case of breach.”<sup>128</sup> Or Allan Farnsworth, who observed that it “has been generally rejected as overly restrictive and doctrinally unsound.”<sup>129</sup> Or Karl Llewellyn, who wrote that Holmes’s “*Globe Refining* opinion started out after the mirage of ‘perfect compensation, not a penny more,’ and came out with as harsh a result as could a commercial woodenhead.”<sup>130</sup> Or Article Two of the Uniform Commercial Code, which expressly casts it aside.<sup>131</sup> Or the Restate-

<sup>126</sup> SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 1357, at 2422 (1922).

<sup>127</sup> ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS* § 1010, at 70 n.10 (1951) (“The two cases . . . cited by the learned justice, are quite inadequate to establish that the old law regarded the promisor as having an election.”).

<sup>128</sup> *Id.* § 1009, at 67. Corbin elsewhere makes clear not only that notice ordinarily suffices, but that notice is not even needed. *Id.* § 1010, at 69 (“If there are special circumstances, it is not even necessary that the defendant should have known them; it is enough that a reasonable man in his position would have known them.”).

<sup>129</sup> E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 12.14, at 258 (3d ed. 2004); see 56 A.L.I. PROC. 337 (1979) (discussion of the corresponding section of the draft Restatement (Second) of Contracts; Professor Farnsworth, the reporter, said of the tacit agreement test, “That view is now wrong.”); see also, e.g., *Rexnord Corp. v. DeWolff Boberg & Assocs.*, 286 F.3d 1001, 1004 (7th Cir. 2002) (“[T]he great Holmes favored” the tacit agreement test, but it “has fallen into disuse.”) (Posner, J.); GRANT GILMORE, *THE DEATH OF CONTRACT* 92 (Ronald K.L. Collins ed., 1995) (the tacit agreement test “has not been heard of these fifty years past”); Murphey, *supra* note 10; Steven Walt, *For Specific Performance under the United Nations Sales Convention*, 26 TEX. INT’L L.J. 211, 239–49 (1991). *But see* Cohen, *supra* note 30, at 1331–41; Richard Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105 (1989) (defending *Globe Refining*). Cf. Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 316–17 (1986) (finding the results of the tacit agreement test consistent with his consent approach to contract, but observing that its unfortunate fictions could be avoided were clauses allocating liability more generally enforced).

<sup>130</sup> KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 188–89 (1960) (footnote omitted).

<sup>131</sup> U.C.C. § 2-715 cmt. 2 (2004) (“The ‘tacit agreement’ test for the recovery of consequential damages is rejected.”).

ment (Second) of Contracts, which does the same.<sup>132</sup> Or the Restatement of Contracts, which does the same, albeit less bluntly.<sup>133</sup> Or, for that matter, most English courts and commentators, whose early opinions and statements provided practically all of the doctrinal support for *Globe Refining*.<sup>134</sup> Nor have the courts ultimately adopted *Globe Refining*'s tacit agreement test, though, again as shown below, there are some distressing exceptions.<sup>135</sup>

The simplistic positivist might be willing to stop here, content with proof that *Globe Refining* is not *the law* in the great majority of the common-law

<sup>132</sup> RESTATEMENT (SECOND) OF CONTRACTS §351 cmt. a (1981) ("Furthermore, the party in breach need not have made a 'tacit agreement' to be liable for the loss."); see also *id.* at rptr's note to cmt. a ("This Comment rejects the 'tacit agreement' test of *Globe Ref. Co* . . . ." (emphasis added)).

<sup>133</sup> RESTATEMENT OF CONTRACTS §330 cmt. a (1933) ("One who has committed a breach of contract is bound to pay damages only for such injury as he had reason to foresee when he made the contract. This does not mean, however, that the defendant must have had the resulting injury actually in contemplation or that he promised either impliedly or expressly to pay therefor in case of breach.").

<sup>134</sup> See, e.g., *Koufos v. C. Czarnikow Ltd. (The Heron II)*, [1969] 1 A.C. 350, 420 (H.L.) ("If parties enter into the contract with knowledge of some special circumstances, and it is reasonable to infer a particular loss as a result of those circumstances that is something which both must contemplate as a result of a breach. It is quite unnecessary that it should be a term of the contract.") (opinion of Upjohn, L.J.); see also, e.g., CHITTY ON CONTRACTS ¶ 26-055 (H.G. Beale et al. eds., 29th ed. 2004) ("It is submitted, however, that it is unnecessary to hold that the defendant's assumption of liability for unusual loss (in the special circumstances made known to him) can be enforced only where there is an express or implied term of the contract to that effect; but that it is sufficient if, on the basis of his knowledge of the special circumstances, the reasonable man in the defendant's position at the time of contracting would have understood that, by making the promise in those circumstances, he was assuming responsibility for the risk of the type of loss in question." (footnotes omitted)); 12(1) HALSBURY'S LAWS OF ENGLAND ¶ 1031 (Lord Mackay of Clashfern gen. ed., 4th ed. reissue 1998) ("The contract-breaker's liability for a particular type of loss does not depend on his having expressly or impliedly assented to, or having voluntarily assumed, an obligation to answer for that particular type of loss. Any former principle to that effect is now substantially relaxed."); HARVEY MCGREGOR, MCGREGOR ON DAMAGES ¶ 6-198 (18th ed. 2009) ("it goes too far to require that the defendant's assent to take the risk of the extra liability must be made a term of the contract, for it is then approaching the status of a warranty, and seems dangerously near to destroying the whole doctrine of notice"); Andrew Tettenborn, *Hadley v. Baxendale Foreseeability: A Principle Beyond Its Sell-By Date?*, 23 J. CONTRACT L. 120, 135-36 (2007) (Austl.) ("[T]he suggestion that a contractor should have to pay damages for a given loss only if she has expressly or impliedly agreed to do so has been severely and rightly questioned, not least because it is implausible, and also arguable because it confuses primary rights (to performance) with secondary rights (to damages if performance is not forthcoming)." (footnote omitted)).

Even *Globe Refining*'s few defenders are rather half-hearted. A good example is Professor McCormick in his treatise on damages. After pointing to Williston and other foes of the tacit agreement test, he commented:

The 'implied agreement' theory, however, if properly ridden, need never carry the court to an unjust result. It adds the fiction of a tacit promise to the original fiction of 'contemplation,' and seldom is there anything in the situation more definite and mandatory than the judge's sense of justice to tell him to find the presence or absence of this silent promise to assume the risk. The recurrent cropping up of the idea in the opinions of the courts indicates that some of the judges have found the conception useful in giving expression to this sense of the justice of the situation.

If so, this serves as its justification.

With friends like that . . . MCCORMICK, *supra* note 35, § 141, at 580 (footnotes omitted).

<sup>135</sup> See *infra* notes 164-73 and accompanying text.

world. Beyond that, though, *Globe Refining* may be weighed in many jurisprudential balances, and is found wanting in all. To establish this in the degree of detail customary in law journals would turn this Essay into an article—a long and tedious article—so perhaps sketching the reasons will suffice here.

First, the tacit agreement test fits badly with theories of contract that take contractual duty seriously. Those theories are antithetical to Holmes's contract-as-option-to-perform-or-pay approach, as has already been observed. That which those other contract theories find repellent about Holmes's general approach to contract is precisely what they find repellent about the tacit agreement test. Recall that under Holmes's theory, liability for breach does not arise from a contractual duty to perform but instead from an assumed obligation to perform or pay damages. The promisor must therefore have agreed to be conditionally liable for damages, as distinct from agreeing to perform. Where is this agreement? If the parties made no express agreement, Holmes concluded that they must at least have made an agreement implicitly; after all, mere notice does not ordinarily create contractual liability absent assent. So the tacit agreement test is necessary only because Holmes denied the existence of a contractual duty to perform. Indeed, theories of contract that do put the duty to perform at the core of contracting require that one who breaches that duty be liable for the consequences of the breach, which at least means all foreseeable losses.<sup>136</sup> Holmes tried hard to detach the law from morality, but for those who see a moral component to contract law, looking at duty as little more than the terms of a wager is insupportable.<sup>137</sup>

Second, even utilitarian theories of contract commonly reject the tacit agreement test. It might be thought that the economic approach to contract law would find the tacit agreement test congenial. After all, it has derived considerable comfort from Holmes's general view of contracting, which shifts our focus from whether a contract creates a duty to what the consequences of making a contract might be—the sole interest of the Holmesian bad man. But most analysts of contract damages have concluded that the *Hadley* test is an efficient default term.<sup>138</sup> Under one line of analysis, *Hadley* is efficient because it minimizes transaction costs by setting forth the liability rule that most parties would prefer were they to have bargained fully about it. Under another, *Hadley* is efficient because it obliges promisees with uncommon risks to divulge those

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<sup>136</sup> I say “at least” because some, most importantly Professor Eisenberg, have come out against foreseeability analysis in favor of a tort-like proximate cause test. See Melvin Aron Eisenberg, *The Principle of Hadley v. Baxendale*, 80 CAL. L. REV. 563 (1992).

<sup>137</sup> See, e.g., ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 178 (2000) (summing up the Holmesian approach, but noting that “[i]f our social judgment is that contractual default remains objectionable even when the defaulting party pays damages, the alternative theory of contract is inappropriate. We might better speak of duty.”; refers to Pollock as leading exponent of the moralistic position); cf. Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 FORDHAM L. REV. 1085 (2000) (arguing that Holmes actually did see a moral element in contract and would have rejected efficient breach).

<sup>138</sup> I sum up this literature in Larry T. Garvin, *Disproportionality and the Law of Consequential Damages: Default Theory and Cognitive Reality*, 59 OHIO ST. L.J. 339, 360–88 (1998); see also, e.g., ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 247 (6th ed. 2011) (discussing *Hadley* test).

risks, lest they not shift the liability; the consequence is a contract that takes this uncommon risk into account.

Even those law-and-economics scholars who are not fond of *Hadley* generally do not think the tacit agreement test is sound. In some cases, the problem with *Hadley* is not that it is too generous, but that it is too narrow; *a fortiori*, any further narrowing would make the law even more problematic. In others, *Hadley* is indeed considered too generous, but not for reasons that favor a tacit agreement test. If, for example, *Hadley* allows damages inappropriately because of our imperfect and uneven abilities to assimilate information and assess risk, the answer is to look directly at how the risk is priced, or at least at proxies for that, rather than at a non-existent agreement.<sup>139</sup>

### III. THE AFTERMATH OF *GLOBE REFINING*

Holmes's procedural gaffe influenced the law of procedure very little. The Court soon made another foray into reading complaints to determine amounts in controversy. In *Smithers v. Smith*,<sup>140</sup> the Court was faced with a complaint alleging that the defendants had deprived the plaintiff of land worth \$5,000.<sup>141</sup> The defendants answered with the argument that the land was worth less than \$2,000, the jurisdictional minimum, and that the plaintiff had fraudulently overstated his loss in order to secure federal jurisdiction.<sup>142</sup> The trial court granted the defendants' motion to dismiss, stating that the plaintiff had indeed magnified its claim fraudulently and that the losses alleged to have been caused by each individual defendant did not exceed \$2,000.<sup>143</sup> The Court in the end held that the plaintiff could sum the claims against the defendants for the purposes of jurisdiction, at least pending the findings of fact at trial.<sup>144</sup> On the way there, it reaffirmed the pre-*Globe* law that a trial court was not to take the place of the jury in the guise of ruling on jurisdiction.<sup>145</sup> The proper inquiry was whether it would be "legally possible for [the plaintiff] to recover the jurisdictional amount."<sup>146</sup>

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<sup>139</sup> To be sure, Professor Cohen has suggested that *Globe Refining* should be read as an attempt to limit recovery to market damages in the case of opportunistic behavior by the promisee. Cohen, *supra* note 30, at 1331–41. This derives some support from the facts of *Globe Refining*. Certainly *Globe Refining's* behavior after breach is peculiar, as are its *post hoc* explanations for that behavior. Ultimately, though, one has to remember that this is a jurisdiction case, not a remedies case. If *Globe Refining's* arguments for damages are facially not unreasonable, then it is hard to see why it should be kept out of court. There was no doubt, after all, that *Globe Refining* was entitled to *some* damages. Time enough to prune away opportunistic claims using standard damages doctrine—under these facts, mitigation comes to mind.

<sup>140</sup> *Smithers v. Smith*, 204 U.S. 632 (1907).

<sup>141</sup> *Id.* at 633.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 634.

<sup>144</sup> *Id.* at 646.

<sup>145</sup> *Id.* at 644–45.

<sup>146</sup> *Id.* at 642; *cf.* *Schunk v. Moline, Milburn & Stoddard Co.*, 147 U.S. 500, 504 (1893) ("Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute.").

What about *Globe Refining*? The Court did not quite ignore its quite recent decision. It stated, rather, that *Globe Refining* was merely an application of its earlier holding in *Smith v. Greenhow* that the damages sought were “beyond a reasonable expectation of recovery, for the purpose of creating jurisdiction.”<sup>147</sup> *Globe*’s holding was thus stated as “where the judge of the circuit court, upon sufficient evidence, found that the damages had been claimed and magnified fraudulently beyond the jurisdictional amount, the action should be dismissed.”<sup>148</sup> Thus diminished, its citations largely dried up. Indeed, the Court never again referred to *Globe Refining* for this procedural holding.

And so went the treatises on procedure. For instance, the Foster treatise quoted from earlier referred to *Globe Refining* in its next edition, but only as an application of the general principle that a court may find facts if jurisdiction is challenged, and may dismiss the case if the damages sought were “purposely and fraudulently magnified.”<sup>149</sup> The Foster treatise notably made no reference to *Globe Refining* in its section on how to determine the value of a dispute in an action for damages.<sup>150</sup> Even more tellingly, a treatise written by the Solicitor General’s longtime assistant for questions of procedure devoted seventy-five heavily annotated pages to determining the amount in controversy for federal jurisdiction. Not once did those pages mention *Globe Refining*.<sup>151</sup> And the treatise’s main comment on contract suits flatly contradicts Holmes’s approach in *Globe Refining*:

Mere conjecture or speculation as to the amount of gains or profits lost by an alleged breach of contract may not properly be made the basis of a finding, but if the court cannot affirm that it is impossible to adduce evidence, or sufficient data, to support a fair and reasonable estimate of such amount, it scarcely can be said that a case does not involve the requisite jurisdictional amount, where such estimate is more than [the statutory minimum].<sup>152</sup>

So *Globe Refining* was largely ignored by both the courts and the commentators, at least on the jurisdictional issue. Perhaps all concerned recognized it as an aberrant decision and let it fall into desuetude.<sup>153</sup> It does seem to have cut against the Court’s overall expansion of diversity jurisdiction and the general federal common law.<sup>154</sup>

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<sup>147</sup> *Smithers*, 204 U.S. at 643.

<sup>148</sup> *Id.*

<sup>149</sup> 1 ROGER FOSTER, A TREATISE ON FEDERAL PRACTICE CIVIL AND CRIMINAL § 16, at 91 (4th ed. 1909).

<sup>150</sup> *See id.* at § 16a.

<sup>151</sup> 1 WILLIAM J. HUGHES ET AL., FEDERAL PRACTICE JURISDICTION & PROCEDURE §§ 411–513 (1931); *see also* 1 WALTER MALINS ROSE, A CODE OF FEDERAL PROCEDURE § 129 (1907) (no mention of *Globe Refining* in section on jurisdictional amount).

<sup>152</sup> HUGHES ET AL., *supra* note 151, § 435.

<sup>153</sup> Note that *Globe Refining* was one of Holmes’s earliest opinions on the Supreme Court—his thirtieth majority opinion, and only the second seriously addressing procedure. It is possible that his relative unfamiliarity with federal procedure led him to issue a relatively wayward opinion, and that his more seasoned colleagues let it pass on the assumption that the procedural aspect would quickly be displaced by opinions more consistent with Supreme Court jurisprudence.

<sup>154</sup> *See, e.g.*, JAMES W. ELY, JR., THE FULLER COURT: JUSTICES, RULINGS, AND LEGACY 178–83 (2003). Holmes’s peculiar approach to jurisdiction in *Globe Refining* is, if nothing else, consistent with his abhorrence of the general federal common law. On the other hand,

The Court's quick shelving of *Globe Refining*'s procedural holding does raise a question or two. *Globe Refining* was unanimous; *Smithers* had only one dissent, and that without an opinion. So why did this apparent *volte-face* occasion no comment? At a minimum, one might have expected Holmes—the “Great Dissenter”—to write a few words in *Smithers* lamenting its *sub silentio* overruling. The same might have been expected of other members of the *Globe Refining* court. Two Justices retired and were replaced between *Globe Refining* and *Smithers*, hardly enough to explain this apparent reversal. Alternatively, one might expect a member of the *Smithers* majority to have dissented in *Globe Refining*, given their very different approaches to jurisdiction. Six justices joined in both opinions. Why their silence?

I have not found correspondence or the like that answers this question squarely. We may, however, speculate plausibly based on the history of the Court. Today, of course, it is the rare opinion of the Court that comes out unadorned with concurrences, dissents, or other such marginalia. But that was not true a century ago. It was not until the 1940s and the Chief Justiceship of Harlan Fiske Stone that the rate of separate opinions jumped up to something approaching modern levels.<sup>155</sup> Both *Globe Refining* and *Smithers* were decided by the Fuller Court, which took a very different view of dissent.

Why the rates of dissent were so low until the 1940s has been a fruitful topic for political scientists. Of the many reasons set forth, one seems most pertinent. There was a powerful custom that dissents were reserved for special cases. As Holmes himself put it in his very first Supreme Court dissent, “I think it useless and undesirable, as a rule, to express dissent.”<sup>156</sup> As a consequence, very often justices held their noses and joined opinions with which they disagreed.

This was not a rare phenomenon. Lee Epstein and her colleagues have studied the docket books of Chief Justice Waite, Fuller's predecessor, and found a tremendous number of vote changes from the conference to the final opinion—virtually all increasing support for the majority opinion, and most yielding unanimity. Only nine percent of the Waite Court's published opinions generated one or more dissenting votes; in conference, that figure is forty percent.<sup>157</sup> Strikingly, even when more than one justice initially cast minority votes, most of the time the published opinion was nevertheless unanimous.<sup>158</sup>

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as Professor White has noted, “he did not apply the logic of [his dissents in federal common law cases] to his own ‘federal’ common law opinions. He cheerfully went about [crafting federal common law opinions] without so much as a nod to relevant state decisions that did not support his position.” G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 388 (1993).

<sup>155</sup> See, e.g., Gregory A. Caldeira & Christopher J.W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874, 882, 892–93 (1998) (huge increase in separate opinions starting in the early Stone Court).

<sup>156</sup> Northern Sec. Corp. v. United States, 193 U.S. 197, 400 (Holmes, J., dissenting).

<sup>157</sup> Lee Epstein, Jeffrey A. Segal, & Harold J. Spaeth., *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 366 (2001). In contrast, only 1.2 percent of unanimous votes at conference yielded dissents when the opinions were published. *Id.*

<sup>158</sup> With one initial dissenter, the ultimate rate of unanimity was 89%; with two, it was 82%; with three, it was 67%; and, most remarkably of all, even with four dissenters the resulting opinions were unanimous fully 53% of the time. *Id.* at 366–67.

Robert Post found the same in a study of the Taft Court. In conference only half the votes were unanimous; the resulting opinions were unanimous eighty-six percent of the time.<sup>159</sup>

We lack similar data for the Fuller Court, but there is no obvious reason that those justices, most of whom also served on either the Waite Court or the Taft Court, would have behaved differently. Quite the contrary. The rate of dissent was more or less flat from the Waite Court through the Taft Court, though it inched up under Chief Justice Hughes and shot up under Chief Justice Stone.<sup>160</sup> In addition, Chief Justice Fuller was particularly good at coaxing assent, or at least acquiescence, from his colleagues. Holmes commented that “[a]s a presiding officer, Fuller was the greatest Chief Justice I have known.”<sup>161</sup> Fuller inherited a tradition of public agreement from his predecessors and was determined to continue it. This he did by dissenting very rarely himself<sup>162</sup> and by encouraging others to accede to the views of the majority, however they might have voted in conference.

Unanimity did not always prevail, but dissents usually were reserved for cases of great import. Whatever *Globe Refining* was, it was not a major case. For justices inclined to pick their battles, this would be a skirmish worth avoiding. Nor was *Smithers* all that important, its procedural point aside. Even justices somewhat restive at the custom of unanimity would be reluctant to waste their capital on minor cases.<sup>163</sup> In sum, the issues mangled in *Globe Refining* simply weren’t important enough to stir any justices to dissent. Whatever Holmes’s colleagues may have thought about his procedural stumbles, they were not, even in the short run, very important. Nor, when that part of *Globe Refining* was effectively overturned in *Smithers*, would Holmes have gotten very worked up; again, the issue was hardly of great moment, and Holmes was not inclined to dissent in run-of-the-mill cases.<sup>164</sup>

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<sup>159</sup> Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1333 (2001). Put otherwise, of the cases ultimately decided unanimously in a published opinion, only fifty-eight percent were also unanimous in conference. *Id.* at 1332.

<sup>160</sup> Stacia L. Haynie, *Leadership and Consensus on the U.S. Supreme Court*, 54 J. POL. 1158, 1165 (1992).

<sup>161</sup> WILLARD L. KING, MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES 1888-1910, at 290 (1950); see also Thomas G. Walker, Lee Epstein, & William J. Dixon, *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361, 380 (1988) (collecting tributes to the leadership skills of Chief Justice Fuller).

<sup>162</sup> Chief Justice Fuller wrote only thirty dissents in twenty-two years as Chief Justice. JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910 (1995).

<sup>163</sup> There were more minor cases than now. The Court had little control over its docket until 1925, though the creation of the Circuit Courts of Appeal in 1891 routed most cases through intermediate courts, often resolving them without yet another round of appellate review. This relief was, however, limited and temporary. The result was a flood of cases, most of them palpably uncertworthy by modern standards. The Roberts Court issues opinions in about seventy cases a year; the Fuller Court routinely did so in more than two hundred. ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES 139 (1978). I very much doubt *Globe Refining* would have gained a Supreme Court hearing after 1925—certainly not after *Erie* in 1938.

<sup>164</sup> There is another possibility. Landa Cotton Oil offered a spirited argument that *Globe Refining* was the villain in this drama—that *Globe Refining* breached the contract, made wild and unsupported claims for damages, and then made a fraudulent pleading in order to

And then there is the unfortunate contract holding. It might not have mattered much if *Globe Refining* were just another general federal common law decision, swept away like the others by the *Erie* tsunami. But *Globe Refining* remains surprisingly influential in both the courts and the commentaries, a phenomenon that warrants a little attention.

First consider the courts. Three jurisdictions, Arkansas, New Mexico, and New York, have expressly made *Globe Refining* part of their law of foreseeability.<sup>165</sup> Arkansas has done this for over a century.<sup>166</sup> Nor does it show any signs of relenting, though it does note from time to time Arkansas's relative loneliness.<sup>167</sup> New Mexico, on the other hand, has flirted with *Globe Refining* but has only just tied the knot. In a lengthy opinion rehearsing a long and tangled line of case authority, the New Mexico Court of Appeals recently held that "the only reasonable reading of the cases is that the tests in *Hadley* and *Globe Refining* comprise the common law contract damages rule in New Mexico."<sup>168</sup> Perhaps significantly, though, the New Mexico Supreme Court promptly granted certiorari; we may therefore learn that the Court of Appeals tied the knot but the Supreme Court rent it asunder.<sup>169</sup>

Now for New York. Some pre-*Globe Refining* New York authority tilted Holmes's way; some did not.<sup>170</sup> After *Globe Refining* the New York courts continued to waver, as in one Court of Appeals decision that cited approvingly to *Globe Refining* but then declined to decide whether a tacit agreement was

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get the resulting lawsuit into federal court. Whether this is true we will never know; the district court decided the case on essentially a bare record, and the affidavits and the like supplied as part of the record on appeal are self-serving. It may be that this transaction just smelled bad to the justices. The case raised messy fact issues and did nothing to advance federal law, so possibly the easiest thing was to get rid of it. After all, *Globe Refining* would still be able to pursue its claim in state court. This is pure speculation, but it does fit with my informal impression of how courts at times operate.

<sup>165</sup> In addition, at least one state's highest court early adopted the tacit agreement test and has not since revisited the issue. *Hall v. Advance-Rumely Thresher Co.*, 212 P.290, 293 (Mont. 1923). Whether that court would stick with *Globe Refining* given a case that forced the issue is an open question.

<sup>166</sup> *Hooks Smelting Co. v. Planters' Compress Co.*, 79 S.W. 1052, 1056 (Ark. 1904) ("[T]he facts and circumstances in proof must be such as to make it reasonable for the judge or jury trying the case to believe that the party at the time of the contract tacitly consented to be bound to more than ordinary damages in case of default on his part"; quoting extensively from *Globe Refining*.).

<sup>167</sup> See, e.g., *Morrow v. First Nat'l Bank of Hot Springs*, 550 S.W.2d 429, 431 (Ark. 1977) ("The tacit agreement test is a minority rule, but we think it to be sound. We did not lightly adopt it. To the contrary, we relied upon three textbooks and a number of decisions, including one written by Justice Holmes." (emphasis added)). More recent decisions are less defensive. See, e.g., *Reynolds Health Care Servs., Inc. v. HMNH, Inc.*, 217 S.W.3d 797, 804–805 (Ark. 2005) (applying tacit agreement test without noting any disagreement elsewhere). See generally Phillip M. Brick, Jr., Case Note, *Agree to Disagree: The Inequity of Arkansas's Tacit-Agreement Test as Seen in Deck House, Inc. v. Link*, 62 ARK. L. REV. 361 (2009) (tracing the history of Arkansas's adoption of the tacit agreement test and questioning its continued use).

<sup>168</sup> *Sunnyland Farms v. Cent. N.M. Elec. Coop.*, 255 P.3d 324, 336 (N.M. App. 2011).

<sup>169</sup> *Sunnyland Farms v. Cent. N.M. Elec. Coop.*, No. 32968 (N.M. May 17, 2011).

<sup>170</sup> Compare *Messmore v. N.Y. Shot & Lead Co.*, 40 N.Y. 422, 427 (1869) (notice sufficient) with *Griffin v. Colver*, 16 N.Y. 489, 497 (1858) (mere notice insufficient).

necessary.<sup>171</sup> New York's irresolution ended, however, with *Kenford Co. v. County of Erie*,<sup>172</sup> in which the Court of Appeals belatedly and bizarrely adopted the tacit agreement test.<sup>173</sup> Nor has New York recanted, at least not formally. In a recent decision the Court of Appeals reaffirmed *Kenford*, and with it the tacit agreement test of *Globe Refining*.<sup>174</sup> Despite this affirmation, however, the court found that consequential damages were recoverable, so it may be that New York's tacit agreement test is, as they say in Texas, all hat and no cattle.

Otherwise, some courts did cautiously make approving references to *Globe Refining*, though usually in cases in which the actual test didn't much matter. But not long after, those courts made quick U-turns, seldom actually overruling their earlier decisions, but clearly enough rendering them obsolete. And, of course, the Uniform Commercial Code, the Restatements, the treatises, and the commentators overwhelmingly rejected the tacit agreement test.<sup>175</sup> Rejected it, but at least in one spot took account of part of the problem it was put forth to solve.

One of the bases of the tacit agreement test was the idea that no sensible promisor would agree to take on a huge and uncertain risk by accident, but might if it was sufficiently vivid as to bring it to the consciousness of the contracting parties.<sup>176</sup> Baron Alderson suggested in *Hadley* that, "had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms."<sup>177</sup> The tacit agreement test did not necessarily follow from Baron Alderson's dictum; the parties are free not to provide specifically for a risk, even an obvious risk, if they are content with the default rule of contract. Furthermore, these huge risks are almost always highly improbable. As a result, it would not make sense for the parties to spend much time dickering over a risk allocation. Nevertheless, there is something to this intuition. The likelihood of mispricing this sort of risk is high and the biases associated with this pricing are robust.<sup>178</sup> There may be some value in providing a sort of escape hatch where the parties to a contract have badly mispriced a risk, or perhaps where under the circumstances they are likely to have done so.

One way to get at this problem is through agreement, as *Globe Refining* attempted. But in the words of Professor Farnsworth, "Such a patent fiction is, however, a poor device to use to gain flexibility."<sup>179</sup> Another is to take aim

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<sup>171</sup> *Czarnikow-Rionda Co. v. Fed. Sugar Ref. Co.*, 173 N.E. 913, 915–16 (N.Y. 1930).

<sup>172</sup> *Kenford Co. v. Cnty. of Erie*, 537 N.E.2d 176 (N.Y. 1989).

<sup>173</sup> *Id.* at 179 (quoting from *Globe Refining*). Neil Cohen has suggested to me that the result here was designed to shield Erie County from potentially massive damages liability. If so, we have here another instance of hard cases making bad law, as somebody or other said.

<sup>174</sup> *Bi-Economy Mkt. v. Harleysville Ins. Co.*, 886 N.E.2d 127, 130 (N.Y. 2008).

<sup>175</sup> See *supra* notes 126–34 and accompanying text.

<sup>176</sup> See, e.g., *McEwan v. McKinnon*, 11 N.W. 828, 829 (Mich. 1882) (tacit agreement case: "If a vessel were delayed in port for want of a bowsprit, should a loss of freight, to the amount perhaps of thousands of pounds, be obtained in damages?" (internal quotation marks omitted)).

<sup>177</sup> *Hadley v. Baxendale*, (1854) 156 Eng. Rep. (Ex) 145; 9 Ex. 341.

<sup>178</sup> For one attempt to develop this line of analysis, see Garvin, *supra* note 138.

<sup>179</sup> E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1209 (1970) (referring to McCORMICK, *supra* note 35)

directly at the risk—to say that even an otherwise foreseeable risk does not pass if the promisor did not receive some sort of premium for taking it on, or if it would systematically have underestimated the magnitude and probability of that risk. A number of decisions after *Globe Refining* moved in this direction, typically where it was particularly hard to think the promisor, notwithstanding notice, assumed the risk. This idea is more or less embodied in the Restatement (Second)'s disproportionality limit on the recovery of consequential damages.<sup>180</sup> So perhaps *Globe Refining* had some beneficial effect after all—though, I hasten to note, a benefit far outweighed by the mischief it caused.

#### IV. *GLOBE REFINING* AND THE DARK SIDE OF REPUTATION

The judge for whom I clerked once told me a story about his Contracts professor, the great Friedrich Kessler. Kessler had fled from the Nazis some twenty years earlier and had become one of America's leading contracts scholars. One day the class came to a Holmes opinion. Professor Kessler challenged the class to reconcile Holmes's opinion with what they had already learned. Try as they might, the most ingenious and brilliant students in the class couldn't do it. Kessler then smiled and announced to the class in his German-tinged accent, "Ze grrreat Holmes vos WRRRONG!"

And which Holmes opinion provoked this comment? On the reasonable assumption that Professor Kessler would have assigned the casebook that he wrote, I looked through the then-current edition for any Holmes opinions set out at length. There were two. One was an unremarkable case on consideration.<sup>181</sup> The other was *Globe Refining*.<sup>182</sup>

So vos ze grrreat Holmes wrrrong? Ganz recht. Not only did he do some lasting damage to the law of foreseeability, but he got there only by fouling up the law of jurisdiction.<sup>183</sup> His damage to the law of jurisdiction was transitory at most, thanks to the apparent inclination of Holmes's new colleagues to distinguish *Globe Refining* away and the willingness of treatise writers to overlook this lapse.<sup>184</sup> But the law of foreseeability bears its Holmesian scars to this day.

<sup>180</sup> RESTATEMENT (SECOND) OF CONTRACTS §351(3) (1981); see also Garvin, *supra* note 138 (analyzing the doctrine in numbing detail).

<sup>181</sup> *Wis. & Mich. Ry. Co. v. Powers*, 191 U.S. 379 (1903), in FRIEDRICH KESSLER & MALCOLM PITMAN SHARP, *CONTRACTS: CASES AND MATERIALS* 205–06 (1953) (statutory tax exemption not a contract breached by the statute's repeal, because lowering taxes and building railroads were not inducements for each other).

<sup>182</sup> *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903), in KESSLER & SHARP, *supra* note 181, at 569–73.

<sup>183</sup> *Globe Refining* thus makes an interesting contrast with *Carnival Cruise Lines*, discussed elsewhere in this Symposium. In *Carnival Cruise Lines*, Justice Blackmun messed up the law of contracts in order to reach a procedural issue, which he messed up as well. In *Globe Refining*, Justice Holmes messed up the law of procedure in order to reach a contract issue, which he messed up as well. I am indebted to Chuck Knapp for this observation.

<sup>184</sup> This does raise an interesting side issue. To what extent do secondary sources determine whether a judicial opinion becomes important? If all the standard treatises had immediately proclaimed *Globe Refining* a major change in the law of procedure, would procedure have changed, or would the Court have had to deal more explicitly with *Globe Refining* in *Smithers*? Before on-line databases, treatise writers and key-number assigners could make a judi-

There are many possible morals to the story of *Globe Refining*. One I think worth mentioning in this conclusion is that the eminent have louder voices than the rest of us, and sometimes we mistake great volume for great content. Justice Holmes was “grrreat,” as Professor Kessler noted. His dicta count for more than the carefully wrought holdings of most of his colleagues. And that can make even his less impressive opinions receive deference well after they otherwise would have fallen into abeyance.<sup>185</sup> Not surprisingly, judicial opinions citing to *Globe Refining* commonly refer to *Holmes’s opinion in Globe Refining*, not just *Globe Refining* unadorned. And *Globe Refining* has considerable staying power, as witness its continuing trickle of citations.

*Globe Refining* may also exemplify a problem with judges who have axes to grind. With our immersion in the economic analysis of law, Holmes’s idea of contract as option is not very strange. When it was issued, however, it was at least unusual, and some would have said bizarre. For Holmes to have a theory of contract was, of course, not a bad thing at all. Nor was it necessarily a bad thing for him to apply that theory in the opinions that he wrote. But in *Globe Refining* Holmes, apparently determined to put his theory into practice, laid waste to the established law of civil procedure and, for that matter, the law of contracts. Perhaps this shows a certain lack of perspective on Holmes’s part, or

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cial decision all but disappear, at least one not inherently attention-getting. It is less clear that these retain that screening function, thanks to the myriad trawlers of judicial opinions found on the internet.

<sup>185</sup> This is not even Holmes’s only dubious contracts opinion to survive thanks to this undue deference. In *Daniels v. Newton*, 114 Mass. 530 (1874), Holmes held for the court that the doctrine of anticipatory repudiation had no place in the common law of Massachusetts. That court has steadfastly adhered to the holding in *Daniels*, even after the courts in *every other state* have long since adopted anticipatory repudiation—indeed, every major civilian legal system, as well as international contract regimes, has done so as well. See generally Keith A. Rowley, *A Brief History of Anticipatory Repudiation in American Contract Law*, 69 U. CIN. L. REV. 565, 592 n.162 (2001) (tracing Massachusetts law on anticipatory repudiation). Indeed, Massachusetts itself has acknowledged anticipatory repudiation in one area: when it enacted the Uniform Commercial Code, it enacted § 2-610 on anticipatory repudiation. But still the Massachusetts courts hang on to Holmes’s less than felicitous ruling. *Pedersen v. Klare*, 910 N.E.2d 382 (Mass. App. 2009) (“As a general matter, Massachusetts has not recognized the doctrine of anticipatory repudiation outside of the commercial context . . .”). Would they have done so if the opinion had been written by one of Holmes’s distinguished colleagues—say, Charles Allen or Marcus Morton? Cf. LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 62–63 (1940) (“One who surveys [Holmes’s] contributions to the . . . common law and compares them with those, say, of Cardozo, cannot escape a sense of disappointment. Even his most ardent admirers will have to admit, I believe, that his influence as a judge—at least in the field of private law—fell far short of being commensurate with his general intellectual stature.”).

*Daniels v. Newton* and *Globe Refining* both follow from Holmes’s general view of contract as a promise either to perform or to pay damages. *Globe Refining* does so because a less restrictive foreseeability test imposes an obligation in the absence of agreement, express or tacit, and thus suggests that there is a duty to perform. *Daniels v. Newton* does so because, according to Holmes’s approach, deciding not to perform before the time set for performance is merely electing one of the options available to the promisor. Treating that election as a repudiation means that there is something repudiated, presumably something that amounts to a duty—a point made by Sir Frederick Pollock in his decades-long debate with Holmes on the nature of contract. See Patrick Atiyah, *The Legacy of Holmes Through English Eyes, in HOLMES AND THE COMMON LAW: A CENTURY LATER*, at 27, 56–57 (Harvard Law School Occasional Pamphlet No. 10, 1983).

perhaps it displays an inclination to slight the specific when speaking in terms of the general. But many bad opinions come about because a judge applies a juridical method without regard to the actual facts and law at issue. Certainly that is true in my field, though limited space and the wish not to antagonize sitting judges oblige me to omit examples.<sup>186</sup>

So, then: Is *Globe Refining* the worst Supreme Court decision of all time? To ask the question is to answer it. Is it the worst Supreme Court *contracts* decision of all time? Probably not, though it does belong in the Contracts Hall of Shame. It's merely a bad decision, one among many—but one making mischief over a century after it was published, thanks mainly to its deservedly renowned author. The *argumentum ad verecundiam* is tempting, but fallacious all the same. *Globe Refining* thus represents a type of bad decision that occurs too often and survives too long. We might do well to read opinions about which we have doubts as though they were written by Justice Whozis, not Judge Stupendous. We might also do well to be skeptical of the judge with a jurisprudential mission; as with other sorts of missionaries, zeal may overcome discretion. In the meantime, *Globe Refining* totters on.

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<sup>186</sup> Well, just one, because it is so widely recognized as wrong by remotely serious students of the issue. Judge Easterbrook's opinion in *ProCd v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), has become one of the leading cases on the enforceability of terms unavailable to the parties at the time of contracting—in this case, “shrinkwrap” contracts. He held that those terms are enforceable, subject to the usual contract defenses. This would be a perfectly justifiable policy choice, as Judge Easterbrook makes quite clear. But to get there Judge Easterbrook had to deal with the inconvenient language of U.C.C. § 2-207(1), which allows the parties to form a contract in which the acceptance and the offer do not match up. The additional or different terms become part of the resulting contract only under rather narrow circumstances, absent express assent. Judge Easterbrook dealt with this problem, and incidentally with some contrary opinions, by stating that section 2-207 did not apply where there was only one form. Wrong. Wrong, wrong, wrong, wrong, wrong. R, O, N, G, wrong. Judge Easterbrook could have made his point outside the judicial arena—he remains an active scholar—or as disapproving dictum in a decision reluctantly applying state law in this diversity action. Instead, he made his point by flagrantly misconstruing the U.C.C., thus fouling up the law, not just in shrinkwrap cases, but in other section 2-207 cases. Indeed, in the face of overwhelming academic criticism Judge Easterbrook seems if anything to have dug in his heels. In *IFC Credit Corp. v. United Bus. & Indus. Credit Union*, 512 F.3d 989 (7th Cir. 2008), he applied this identical analysis to a dispute involving a lease of personal property. Just one little problem. Leases of personal property aren't governed by Article Two of the Code; they're governed by Article 2A. And Article 2A has nothing like section 2-207. So Judge Easterbrook—usually an excellent commercial judge—decided this case using a faulty analysis of an inapplicable statute. One would expect better from a judge even with only a fraction of Judge Easterbrook's tremendous ability. But here, alas, we had a judge with a theory, and that theory was going to be applied regardless of its validity or even pertinence.