

## STRIKING A BARGAIN

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*"I think that it takes some ingenuity, at times, to reconcile the practice of the common law, with the theory of offer and acceptance as elements of contract."*<sup>1</sup>

Today, offer and acceptance are treated as indispensable and fundamental concepts in the law of contract; that they are bare newcomers, is all too readily forgotten. Before the nineteenth century the words "offer" and "acceptance" were occasionally used in the courts,<sup>2</sup> but no technical rules attached to them. In the nineteenth century the courts had to deal frequently with contracts concluded by post and it was in this context that "offer" and "acceptance" became technical terms. Writers gave ever-growing prominence to these notions in their expositions of contract law.<sup>3</sup> Anson, in his textbook, which was to be the principal teaching tool in contract for half a century, stated dogmatically that offer and acceptance were essential to the formation of every contract.<sup>4</sup> Pollock was critical of such "obstinate pursuit of the analytical method";<sup>5</sup> he argued that the offer-acceptance formula was sometimes inapplicable, for instance in the case of two parties agreeing simultaneously to terms suggested by a third, indifferent person.<sup>6</sup> A few writers have rejected Pollock's argument.<sup>7</sup> Other exponents of offer and acceptance have recognised it as correct in theory,<sup>8</sup> but have treated it as of no consequence on the grounds that offer and accept-

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1. *Subdivisions Ltd. v. Payne* [1934] S.A.S.R. 214, 220 per Napier J.

2. *Cf. Turton v. Benson* (1718) 1 P.Wms. 496; *Harman v. Vanhatton* (1716) 2 Vern. 717.

3. In Blackstone's *Commentaries* (15th ed. 1809) offer and acceptance are not mentioned; Addison, *A Treatise on the Law of Contract* (2nd ed. 1849) devotes three pages to the subject; Anson, *Principles of the English Law of Contract* (2nd ed. 1882), though only one quarter the size of Addison's work, contains twenty-four pages on offer and acceptance. *Cf. Stoljar, "Offer, Promise and Agreement"* (1955) 50 *Northwestern University Law Review* 445, 454.

4. *Op. cit. supra* n. 3, 15-16. The same view was voiced by Leake, *The Elements of the Law of Contracts* (1876) 12. For an equally dogmatic judicial utterance, see *James & Sons v. Marion Fruit Jar Co.* (1896) 69 Mo. App. 207, 214-217 per Smith P.J. *Contra: Subdivisions Ltd. v. Payne* [1934] S.A.S.R. 214.

5. *Principles of Contract* (3rd ed. 1881) 4-6.

6. *Id.* at 5.

7. Anson, *op. cit. supra*, n. 3, at 15 n. 1; *Salmond and Williams on Contracts* (2nd ed. 1945) 70.

8. *Williston on Contracts* (3rd ed.) § 23; Cheshire and Fifoot, *Law of Contract* (5th ed. 1960) 30; Anson, *Principles of the English Law of Contract* (21st (Guest) ed. 1959) 26-27; *Restatement of the Law of Contracts*, § 22. For a forceful restatement of Pollock's view, see Ferson, *Basis of Contract* (1949) 85-99.

Also, by definition, the offer must precede the acceptance in point of time; where two manifestations of consent occur at one and the same moment, calling one offer and the other acceptance would be an arbitrary misnomer.<sup>16</sup> Beyond this point, offer and acceptance have never been successfully defined; indeed, attempts to provide more comprehensive definitions have met with unusually severe criticism.<sup>17</sup>

Where two parties agree simultaneously to terms suggested by a bystander, a contract is made which cannot be explained in terms of offer and acceptance.<sup>18</sup> This doesn't happen as infrequently as is often assumed. Contracts made on the floor of the stock-exchange, for instance, are commonly made on terms provided by a stranger to the contracts, namely the exchange.<sup>19</sup> If this were the only example of a contract concluded by simultaneous expression of consent, we might be justified in disregarding it. But there are others.

In ancient times a contract of sale was not regarded as binding unless it had been sealed by a handshake. This rule appears to have been part of the customary law of all the Germanic tribes.<sup>20</sup> We find references to the practice of promising by shaking hands in the laws of the Anglo-Saxon Kings Eadmund I<sup>21</sup> and Aethelred II.<sup>22</sup> The etymological link between "striking a bargain" and "striking hands" (shaking hands) shows that many bargains must have been concluded in this way.<sup>23</sup> In the thirteenth and fourteenth centuries, when the Common Law required a specialty for an action based on covenant, the borough courts allowed their burgesses to contract validly by handshake.<sup>24</sup> In 1530, John Palsgrave translated the French "je touche la" as "I stryke handes, as men do that agre upon a bargaen or covenant".<sup>25</sup> In the eighteenth century, Daniel Defoe warned tradesmen against "striking hands with a stranger",<sup>26</sup> and Blackstone stated that the custom of concluding contracts by handshake was very widespread in England.<sup>27</sup> In some English country areas the handshake-

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16. That the courts have not always avoided this sort of arbitrariness is illustrated by *Ingram v. Little* [1960] 3 W.L.R. 504.
  17. When the authors of the *Restatement of Contract* defined "offer" as "a promise which is in its terms conditional upon an act, forbearance or return promise . . .", Pollock complained in a letter to Holmes: "other learned persons I see have gone crazy in the pursuit of new verbal formulas. When I read of such a result as confounding an offer with a conditional promise there seems to me to be something wrong with the method."—Letter dated January 26, 1928, *The Pollock-Holmes Letters* (Howe ed. 1942) ii, 213.
  18. Pollock, *op. cit. supra* n. 5, at 5.
  19. Person, *op. cit. supra* n. 8, at 89-90.
  20. Blackstone, *op. cit. supra* n. 3, ii, 448.
  21. Liebermann, *Die Gesetze der Angelsachsen* (1903) Bd. 1, 191.
  22. *Id.* at 225.
  23. O.E.D. "Strike", VIII, 69.
  24. *Borough Customs*, ii (Selden Society, vol. 21) LXXX, 182; Liebermann, *op. cit. supra* n. 21 (1906), Bd. 2, 490-491.
  25. Palsgrave, *Eclaircissement de la Langue Française in Collection de Documents Inédits sur L'Histoire de France* (1852) 739.
  26. *The Complete English Tradesman* (1841) 85.
  27. *Op. cit. supra* n. 3, at 448.

England at one time.<sup>35</sup> The exchange of documents containing the proposed terms is the most solemn form of contracting. Important bilateral international treaties, for instance, are concluded by the exchange of the documents of ratification.<sup>36</sup> "Ratification" is a somewhat misleading expression in this context. It is generally agreed that the exchange of documents of ratification is, in itself, the conclusion of the treaty.<sup>37</sup> A similar practice used to exist amongst conveyancing lawyers. Preliminary agreements for the conveyance of real estate were customarily converted into binding contracts by the exchange of the signed engrossments at a meeting of the solicitors in the office of one of them.<sup>38</sup>

Another instance of simultaneous expression of consent is provided by a now-forgotten method of conducting auctions, the auction by Inch of Candle.<sup>39</sup> Bidding at such auctions started after the auctioneer had lit a candle one inch long, and the bidder who had submitted the highest bid before the candle went out was the buyer. More often than not, bidding must have come to a close sometime before the fall of the wick, at which time both the highest bidder and the auctioneer indicated their consent by simply remaining passive. Lawyers are accustomed to viewing non-action in certain circumstances as an expression of consent. "*Qui tacet consentire videtur*" is an old maxim of English law.<sup>40</sup> As the ancient proverb "silence gives consent"<sup>41</sup> shows, lay people know as well as lawyers that silence may sometimes express our attitudes, thoughts and desires more clearly than speech or gesture could. To regard silence following an active expression of consent as in itself expressive of consent, is a particularly appropriate application of these maxims.

The auction by Inch of Candle may be obsolete; contracting by mutual non-retraction is not. Whenever parties settle their terms and agree that the bargain shall become binding at a certain future date

35. Julia: "If you turn not you will return the sooner:  
Keep this remembrance for thy Julia's sake."

(Giving a ring.)

Proteus: Why, then, we'll make exchange; here, take you this.

Julia: And seal the bargain with a holy kiss."

Shakespeare, *Two Gentlemen of Verona*, ii, 2, 7.

36. Blix, "The Requirement of Ratification" (1953) 30 *British Yearbook of International Law* 352, 356, 364.

37. *Id.* at 355.

38. *Eccles v. Bryant* [1948] 1 Ch. 93, 97.

39. Squibbes, *Auctioneers, their Duties and Liabilities* (1879) 22-23. The "Act for . . . settling the Trade to the East Indies" 10 and 11, W.III, c. 44 p. LXIX prescribed that "all Goods and Merchandises, belonging to the [East India] company . . . or any other Traders to the *East Indies*, and which shall be imported into *England* or *Wales* . . . shall by them respectively be sold openly and publicly by Inch of Candle, upon their respective Accounts, and not otherwise."

40. Jenk, Cent. 32.

41. Fronde, *Life and Times of Thomas Beckett* (1883) 107.

procedure of exchange ensures that none of those difficulties will arise.<sup>43</sup>

Towards the end of his judgment, Lord Greene M.R. stated one of the most important rules on formation of contract as follows: "Parties become bound by contract when, and in the manner in which, they intend and contemplate becoming bound. That is a question of the facts of each case."<sup>44</sup>

One might try to reconcile the abovementioned instances of contracting by simultaneous manifestation of consent with the theory of offer and acceptance, by regarding the handshake and the other ceremonies as form requirements which merely lend enforceability to contracts previously concluded by offer and acceptance. In the case of form requirements imposed by law, such an argument might be sound. Where, however, parties choose to manifest their consent in a ceremonial way without any legal compulsion, it is untenable, since it implies the absurdity that they manifest their consent to be bound twice: first ineffectively by offer and acceptance,<sup>45</sup> and then effectively by ceremonial observance. Such an argument would be no more than a display of the greatest weakness from which the theory of offer and acceptance suffers: its failure to distinguish between agreeing on the terms of a proposed contract and agreeing to be bound by such terms. The latter may often be implied in the former, but it is clearly not the same thing.<sup>46</sup>

Offer and acceptance cannot account for any of the forms of contracting mentioned so far, unless the assumptions made above<sup>47</sup> are mistaken.

No apology is offered for discussing outmoded forms of striking bargains. Although largely obsolete, they are still significant, because there is every reason to think that the rule on formation of contract was originally drawn from such cases.

In 1550, in the case of *Reniger v. Fogossa*,<sup>48</sup> apprentice Atkins defined "executory agreement": "The third sort of agreement is, when both parties at one time are agreed that such a thing shall be done at a time to come, this agreement is executory, inasmuch as the thing shall be done hereafter; and yet there their minds agree at one time, but inasmuch as the performance shall be afterwards, and so the thing upon which the agreement was made remains to be done, this agree-

43. *Id.* at 99-100.

44. *Id.* at 104.

45. It should be borne in mind that we have made two assumptions at the beginning of this discussion: (1) That offer and acceptance are ways in which parties express their consent to be bound, and (2) that the offer, by definition, precedes the acceptance in point of time.

46. *Chillingworth v. Esche* [1924] 1 Ch. 97; *Eccles v. Bryant* [1948] Ch. 93.

47. *Supra* n. 45.

48. 1 Plowden 1.

contracts impressed upon the parties the significance of what they were about to do and thus ensured that consent, whenever it was manifest, was also genuine. Why, in such circumstances, reflect on the question whether the subjective consent or its objective manifestation is the more essential element in an agreement? Even the strongly subjective phrase "union, collection, copulation, and conjunction of minds"<sup>57</sup> might have been little more than an innocent *pars pro toto*, intended to denote the whole process of contracting, including the manifestation of consent. As far as agreements contained in signed documents were concerned, the restrictive treatment of the plea of *non est factum* shows that the early common law regarded the manifestation of consent as more important than the actual consent itself.<sup>58</sup> Brian C.J.'s famous judgment in an early case<sup>59</sup> gives us reason to think that less formal contracts were treated in the same way. Even when the influence of the French subjectivist Pothier<sup>60</sup> was at its highest peak in England, the view that unexpressed intentions are legally relevant found hardly any followers. As Winfield has correctly observed, "some writers appear to make much heavier weather of the conflict between subjectivity and objectivity than need be".<sup>61</sup> With respect, the writer of this article cannot find much evidence for Cheshire and Fifoot's contention that the judges were obsessed with the theory of *consensus* for, as the learned authors seem to imply,<sup>62</sup> a period of over forty years. Not even Pothier ever suggested that unexpressed intentions could make contracts. That the thought of man is not triable was as firmly settled in French jurisprudence as it was in English law.<sup>63</sup> The most extreme subjective aberration in the nineteenth century seems to have been that of Brett J., who at one time formed "a strong opinion that the moment one party made a proposition of terms to another, and it can be shown by sufficient evidence that the other had accepted those terms in his own mind, then the contract is made, before the acceptance is intimated to the proposer."<sup>64</sup> This *dictum* was firmly rejected in the House of Lords by Lords Blackburn<sup>65</sup> and Gordon,<sup>66</sup> whilst Lord Selbourne thought it more courteous to credit Brett J. and Lord Coleridge, who had expressed himself similarly

57. *Supra* n. 50.

58. Fifoot, *History and Sources of the Common Law* (1949) 232-233.

59. 17 Edw. IV, T. Pasch case, 2; cf. *Brogden v. Metropolitan Ry.* (1873) 2 App. Cas. 666, 692.

60. On Pothier's influence in England, see Cheshire and Fifoot, *op. cit. supra* n. 8, at 20.

61. "Some Aspects of Offer and Acceptance" (1939) 55 *Law Quarterly Review* 499, 502.

62. The first case they quote in support of their contention was decided in 1790 and the other one in 1828—Cheshire and Fifoot, *op. cit. supra* n. 8, at 46 n. 1.

63. Cf. Langdell, *A Selection of Cases on the Law of Contracts* (1871) 51, n. 1.

64. Quoted by Lord Blackburn in *Brogden v. Metropolitan Ry.*, *supra* n. 59, at 691.

65. *Brogden's case*, *supra* n. 59, at 691-692.

66. *Id.* at 697.

not contemplated by either party? Cross-offers are like a case where one party to a proposed contract stretches out his hand for a handshake whilst the other party raises his glass, both with the intention of binding the contract; it is submitted that no contract would result in such a case.

If the parties' intention determines the manner in which they bind themselves contractually, then there is no reason why they should not choose differing means of expression. Identical manifestations may demonstrate the "meeting of the minds" particularly well; differing ones are undoubtedly sufficient. In the Middle Ages, when it was intended to leave a sale executory on both sides, a "God's penny" or "earnest" was handed to the seller to bind the bargain.<sup>75</sup> This usually consisted of a small coin, sometimes accompanied by a quantity of beer or wine. Instances of this type of bargain are involved in *Hugh of Carlisle v. William of Halling* and *Fleming v. Tanner*, both decided in the Fair Court of St. Ives in 1291.<sup>76</sup> The passing of the "earnest" from the buyer's into the seller's hand, brought about by the giving and the taking gestures, quite clearly indicated simultaneous consent, marking the exact time at which the bargain became binding. The fact that the gestures were not identical was immaterial because it was understood by both parties that they would bind themselves in this manner.

Not only are two differing active manifestations of consent sufficient, but also there is no rule against combining an active indication of consent on the one side with a passive one on the other. Today, the auctioneer no longer waits for a candle to go out; his discretion determines when no further bidding is to be expected and the fall of the hammer, rather than the fall of the wick, marks the crucial *punctum temporis*. By knocking down the hammer, the auctioneer indicates his consent actively rather than passively, as was formerly the case.<sup>77</sup> But the highest bidder has in no way changed his manifestation of consent: as in the Inch of Candle auction, he signifies consent by non-retraction at the crucial moment. This analysis was all but expressly adopted by Lord Kenyon C.J. in *Payne v. Cave*.<sup>78</sup> In that case, the highest bidder had retracted his bid before the fall of the hammer and the seller insisted that the retraction was invalid. Lord Kenyon C.J. found that there was no contract: whilst the auctioneer was signifying his consent by knocking down the hammer, the highest bidder could at that

75. Henry, *Contracts in the Local Courts of Medieval England* (1926) 227-246.

76. *Select Cases on the Law Merchant*, i (Selden Society, vol. 23) 47, 51. In the first case the plaintiff bought a pair of tongs for twelve shillings, "giving him (the defendant) for the same a God's penny and a drink". In the other case the plaintiff bought a cask of beer for two marks of silver "and to bind the purchase he (William) paid him a farthing as a God's penny and a bottle of beer worth a penny as beverage".

77. *Supra* at n. 40.

78. (1789) 3 Term. Rep. 148.

prepared document in quick succession, it is hardly possible to talk about offer and acceptance "without a certain strain of thought and language".<sup>88</sup> But in the case of an auction, it seems natural to regard the highest bidder as offering a complete contract almost like a physical object to the auctioneer and the auctioneer as taking or accepting that contract by the fall of the hammer. The conditions of sale and the description of the lot, i.e. all the terms of the contract except the price, are provided by the auctioneer, but the "insertion" of the price by the highest bidder seems to complete the contract and make it ready to be handed to the auctioneer for acceptance.

Legally, nothing could be more misleading than to equate the offering of a contract and the offering of a physical object. There is nothing the "offeror" can hand over, since the contract is only created by simultaneous expression of consent. Anything that precedes the crucial *punctum temporis* is merely preparatory matter which, without the subsequent expression of consent, lacks all contractual significance.

The correctness of this view is placed beyond doubt by *Adams v. Lindsell*.<sup>89</sup> That case dealt with contracting through the post, another instance of successive manifestations of consent. Without at this stage introducing the thorny problem as to the moment at which the acceptance of a postal offer takes effect,<sup>90</sup> we can certainly conclude from the reasoning of the court that the offer takes effect no sooner than the acceptance.

It seems likely that the court's analysis of formation of contract through the post was influenced by Pothier's writings. Pothier's conception of contract differed considerably from that accepted in English law, but there was one similarity: Pothier considered that there was no genuine *consensus*, unless both parties could be shown to have been of one mind at one and the same moment. He faced the difficulty that in contracts concluded by post, the parties seemed to be of the same mind at different times. In his treatment of contracts *per epistolam aut per nuntium*, he proposed the following solution: "In order to constitute consent in this case, it is necessary that the intention of the party who writes to another to propose the bargain, should continue until the time at which the letter reaches the other party, and at which the latter declares that he accepts the bargain. This intention is presumed to continue as long as nothing appears to the contrary."<sup>91</sup> As it stood, Pothier's suggestion was useless, since English law did not regard the subjective *consensus*, but simultaneous manifestation of consent, as the essence of contract. But in a modified

88. Pollock, *op. cit. supra* n. 5, at 5.

89. (1818) 1 B. & Ald. 681.

90. Cf. Samek, "A Reassessment of the Present Rule relating to Postal Acceptance" (1961) 35 *Australian Law Journal* 38-45.

91. *Traité du Contrat de Vente*, No. 32; 3 Manning & Ryland's Reports 100-101, comment (c).

The advent of the cases on contracting by post made English lawyers aware of the problems inherent in successive manifestations of contractual consent. By inventing the "continuing offer", they assimilated the new forms of contracting to the old face-to-face bargain, of which simultaneous expression of consent was typical. In the contemplation of the law, contracting continued to take place by simultaneous manifestation of consent, but it was realised that the parties' consent might express itself in different ways. Active manifestations were typical of the old forms of bargaining, a combination of active and passive manifestations or manifestation by mutual non-retraction were the more frequently found modern forms of contracting. The main contention of this article<sup>101</sup> is thus made out, but one further problem remains: How does the law determine the *punctum temporis* at which the contract arises?

In most of the examples considered so far, the parties have marked that moment with complete precision. The effective ceremony, such as the clapping of hands or the fall of the hammer, took no more than an instant.<sup>102</sup> A ceremony which could be carried out at one moment might be extended beyond this, because the parties see no practical reason for complete precision; maybe a change of mind is not likely, maybe both parties are willing to accept a change of mind even after the conclusion of the contract. In the case of a face-to-face exchange, one party might hand over his ring or document before the other party does. If the parties do not care to meet, the exchange might be effected through the post. International treaties are increasingly concluded by postal exchange of notes of approval.<sup>103</sup> Similarly, signed engrossments in the case of real estate transactions are nowadays usually exchanged through the post.<sup>104</sup> In all these cases, the law may be called upon to determine exactly at which point of time the contract has arisen. It seems natural to regard the moment at which the ceremony is completed as the crucial one. For instance, in the case of two parties signing a contract in quick succession, rather than simultaneously, the completion of the second signature is the crucial moment:

... When one party, having entered into a contract that has not been signed by the other, afterwards repents and refuses to proceed in it, I should have felt great difficulty in saying that he had not a *locus poenitentiae* and was not at liberty to recede until the other had signed, or in some manner made it binding upon himself. How can the contract be complete before it is mutual?<sup>105</sup>

101. *Supra* at nn. 14 and 15.

102. *Supra* at nn. 29 and 77.

103. The "note of approval" is a modern equivalent of the document of ratification—*cf.* Blix, *supra* n. 36, at 364.

104. *Eccles v. Bryant*, *supra* n. 38.

105. *Martin v. Mitchell* (1820) 2 Jac. & W. 413, 428 *per* Plumer M. R.



The theory of offer and acceptance insists that the *punctum temporis* coincides with the acceptance of the offer. This article has tried to show that no formula containing the terms "offer" and "acceptance" can be of universal application. On the other hand, it cannot be denied that the *punctum temporis* can be tied to an "acceptance" in some situations. For instance, where a businessman holds himself out as willing to contract at any time during opening hours on terms which he exclusively provides, a customer's "I'll take this" may well be regarded as an acceptance and clinch the contract.<sup>113</sup> The customer, in such a case, has ample time for his decision and if he does not expressly reserve a *locus poenitentiae*, the law will usually not create one for him. Whether the acceptance in such a case takes place *inter praesentes* or by letter, is immaterial, except for the presumption created by *Adams v. Lindsell*,<sup>114</sup> that, in the absence of a different intention, despatch rather than receipt of the acceptance is the decisive moment. It is this presumption only which has given "offer" and "acceptance" the significance of technical terms. Where it applies, the offer requires communication whilst the acceptance does not.<sup>115</sup> That is the only technical difference between the two notions.

Where parties settle the terms of a proposed contract point after point by negotiation and compromise, it would require an extremely strong case to justify the finding that the parties intended to be bound immediately upon settling the last term. Usually they require a reasonable period of time to consider whether further terms need settling and to contemplate the bargain as a whole. If one party, only seconds after the last term has been settled, insists on a variation, it seems clear that the other party cannot immediately sue for anticipatory breach. Although the parties have abandoned the handshake, nothing justifies the conclusion that they also intended to dispense with the *locus poenitentiae* which was inherent in the handshake custom. At modern auctions we can, in fact, observe that whenever the ceremony of marking the *punctum temporis* is abandoned, the parties are given a more rather than a less generous *locus poenitentiae*. It is customary at furniture auctions in Adelaide to sell only valuable items in the formal way by marking the decisive moment with a sharp knock of

113. According to *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.* [1953] 1 Q.B. 401 it is not the "I'll take this" but the shop assistant's "That is all right" which clinches the contract. Whatever the correct finding, it would have been better if the Court of Appeal had not expressed it in terms of offer and acceptance—*cf. Fisher v. Bell* [1960] 3 All E.R. 131; (1961) 1 *Adelaide Law Review* 221-224.

114. *Supra* n. 89.

115. The rule, in *Adams v. Lindsell* is not a happy one—*cf. Samek, supra* n. 90. Although it has been rationalised on the grounds of convenience—*Re Imperial Land Co. of Marseilles, Harris' Case* (1872) 7 Ch. App. 587 *per Mellish L.J.*—it was originally devised because of the supposed "ad infinitum" dilemma, which was wholly imaginary. If the offer could continue until dispatch of the acceptance, it could also continue until its receipt by the offeror—*cf. Adams v. Lindsell, supra*, n. 89.

some critical voices.<sup>122</sup> The day may not be far off when Lord Eldon's sound understanding of formation of contract will be remembered. As Pollock has said: "Great men's ideas that were deemed to be solemnly buried have a way of coming back to life, not walking as ghosts but fighting again as men of valour."<sup>123</sup>

This article is mainly concerned with the formation of bilateral contracts. Reward-contracts<sup>124</sup> and perhaps all unilateral contracts, are not bargains in the true sense, and different considerations may apply to them. Contracts concluded by more than two parties<sup>125</sup> may also require separate treatment; they too were excluded from this discussion. Some of the contentions made in this article concerning the history of contract should be taken as hypotheses rather than as solidly proven statements. For instance, the historical evidence supporting the statement that most contracts were formerly concluded by simultaneous expression of consent, although substantial, is not overwhelming. If these hypotheses can be fortified by future historical research, then the belief that "offer" and "acceptance" are significant terms of art may eventually be destroyed. Pollock has reminded us that "the application of methodical historical criticism to commonly accepted statements has exploded one baseless legend after another."<sup>126</sup> If it succeeds in exploding the legend of offer and acceptance, then the true elements in the formation of contract will be reinstated in their rightful place. In the case of bilateral contracts, these elements are: (1) simultaneous manifestation of consent, (2) at the *punctum temporis* at which the contract is intended to arise, (3) with reference to terms previously agreed upon.<sup>127</sup>

122. *Subdivisions Ltd. v. Payne*, *supra* n. 1, *per* Napier, J. Llewellyn, "Our Case Law of Contract, Offer and Acceptance" (1938-39) 48 Yale L.R.I., 779; Stoljar, *op cit. supra* n. 111, at 32-333.

123. "A Plea for Historical Interpretation" (1923) 39 *Law Quarterly Review* 163.

124. *Cf. Williams v. Carwardine* (1833) 4 B. & Ad. 621.

125. *Cf. Clark v. Dunraven* [1897] A.C. 59.

126. *Supra* n. 123, at 168.

127. This was the rule Christopher Saint Germain appears to have had in mind when he stated: ". . . such bargains and sales be called contracts, and be made by assent of the parties upon agreement between them. . . .": *Doctor and Student* (17th ed. 1787) 176.