STRIKING A BARGAIN

By Horst K. Lucke*

"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."[1]

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,[2] 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.[3] 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.[4] Pollock was critical of such "obstinate pursuit of the analytical method";[5] 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.[6] A few writers have rejected Pollock's argument.[7] Other exponents of offer and acceptance have recognised it as correct in theory,[8] 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.

ance, if not infallible, are still convenient concepts,[9] and that Pollock's example of a contract made by simultaneous expression of consent is of such rare occurrence as to be practically negligible.[10] Pollock's significant insight into the bargain-striking process was thus given insufficient recognition, and today, the triumph of offer and acceptance is such that they are not only indiscriminately applied to all contracts, whether concluded through the post or not,[11] but are also taken to provide decisive clues to the solution of problems which are quite unrelated to formation of contract.[12] Although newcomers to the common law, they are widely treated as deeply rooted in its history. Hamson has tried to link them with two of the most inveterate concepts of contract law: "Consideration, offer and acceptance are an indivisible trinity, facets of one identical notion which is that of bargain."[13] Similarly, Sir Owen Dixon has spoken of "offer and acceptance" and "consideration" as "two aspects of the same thing".[14] With respect, to regard offer and acceptance as essential to the ancient "bargain" is a modernistic misunderstanding of that notion; it is historically without foundation, analytically mistaken, and productive of unsatisfactory decisions in the courts.

Offer and acceptance are neither essential to nor typical of the bargain-striking process. Historically, bargains were usually concluded by simultaneous manifestation of consent. Today, many contracts are still made in that way, and even those in fact made by the acceptance of offers are, in the eyes of the law, concluded by simultaneous expression of consent.

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In this discussion, no more concerning offer and acceptance will be taken for granted than seems entirely beyond challenge. That both offer and acceptance are ways in which parties express consent to be bound by the terms of a proposed contract,[15] no-one would dispute.

9. Cheshire and Fifoot, *op. cit. supra* n. 8, at 24-25; Anson, *op. cit. supra* n. 8, at 27.
10. "It is theoretically possible for a third person to state a suggested contract to the parties and for them to say simultaneously that they assent to the suggested bargain, but such a case is so rare, and the decision of it is so clear that it is practically negligible."—*Restatement*, Comment a. to § 22.
11. Instances of face-to-face bargains analysed by the courts in terms of offer and acceptance are *Fisher* v. *Bell* [1960] 3 All E.R. 731 and *Ingram* v. *Little* [1960] 3 W.L.R. 504.
12. The problem of unilateral mistake, for instance, is largely concerned with the determination of the contents of validly concluded contracts; offer and acceptance have been employed to provide the answers: Slade, "The Myth of Mistake in the English Law of Contract" (1954) 70 *Law Quarterly Review* 385-408.
13. "The Reform of Consideration" (1938) 54 *Law Quarterly Review* 233, 234.
14. "Concerning Judicial Method" (1956) 29 *Australian Law Journal* 468, 474; see also Holmes, *The Common Law* (1882) 303-304.
15. A mere statement of terms without manifestation of a willingness to be bound is neither an offer nor an acceptance: *Harvey* v. *Facey* [1893] A.C. 552; *Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists (Southern), Ltd.* [1952] 2 Q.B. 795.

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.[16] Beyond this point, offer and acceptance have never been successfully defined; indeed, attempts to provide more comprehensive definitions have met with unusually severe criticism.[17]

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.[18] 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.[19] 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.[20] We find references to the practice of promising by shaking hands in the laws of the Anglo-Saxon Kings Eadmund I[21] and Aethelred II.[22] The etymological link between "striking a bargain" and "striking hands" (shaking hands) shows that many bargains must have been concluded in this way.[23] 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.[24] In 1530, John Palsgrave translated the French "je touche la" as "I stryke handes, as men do that agre apon a bargen or covenant".[25] In the eighteenth century, Daniel Defoe warned tradesmen against "striking hands with a stranger",[26] and Blackstone stated that the custom of concluding contracts by handshake was very widespread in England.[27] In some English country areas the handshake-

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. Ferson, *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.

custom seems to be still alive. In a case involving a sale of cattle, decided in 1885, the parties are reported to have "struck their hands together in the usual Yorkshire fashion."[28] The phrase "strike hands" suggests that a clapping noise marked the moment when the bargain was clinched. This conclusion is supported by the fact that the German term for "handshake" is "Handschlag" ('handstrike'). Moreover, "clapping up a bargain" occurs at least twice in Shakespeare's plays[29] in place of "striking a bargain".

In some cases the separation of hands may have been the decisive moment at which the bargain was concluded. Schoolboys have preserved the traditional "breaking" of a bet: a third party cuts through the united hands with a striking gesture, thus separating them.

Another not uncommon way of expressing consent simultaneously was the "Dutch" or "wet bargain",[30] i.e. the sealing of a contract by drinking together. As the name indicates, the practice originated on the Continent where it is still a social custom to drink together after the conclusion of important agreements. On such occasions glasses are raised simultaneously. Originally, this must have been the chosen method of binding the bargain. A reported example is *Ellesmere* v. *Serle* (about 1450).[31] The complainant had purchased certain leases by oral agreement and petitioned the Chancellor for specific performance. The Chancellor allowed him to prove the agreement and one John Cresswell, the complainant's first witness, testified *inter alia*: " . . . they wente to the Swan beside Saint Antonyes and there they dronke to gederes upon the saide bargayn atte the coste of the saide Robert Ellesmere."[32] One George Horton testified: "Then, seide I, the seide William be ye accordeth in the maner as Robert here hath rehersed and he seid, ye, Then goo we drynke; and so We did unto the Swan, a brewhaus fast by Seynt Antoines and then departed."[33]

Another mode of expressing consent simultaneously is the face-to-face exchange of rings. Marriage contracts may be a law all to themselves,[34] but contracts of engagement are treated like ordinary contracts in English law. On the Continent they are still concluded by an exchange of rings, and the same custom seems to have prevailed in

28. *Greaves* v. *Longster* (1885), The Times, March 10, 1885, 4, i (Q.B.D., Divisional Court).
29. "No longer than we well could wash our hands,
To clap this royal bargain up of peace,"
—King John, iii, 1, 93.
"Give me your answer; i' faith, do; and so clap
hands and a bargain: how say you, lady?"
—King Henry V, v, 2, 134.
30. *O.E.D.*, "Bargain", 7.
31. Vinogradoff, *Oxford Studies in Social and Legal History* (1914) iv, 204-207.
32. *Id.* at 206.
33. *Id.* at 206-207.
34. Cf. 19 *Halsbury's Laws of England* (3rd ed. 1957) 779-811.

England at one time.[35] 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.[36] "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.[37] 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.[38]

Another instance of simultaneous expression of consent is provided by a now-forgotten method of conducting auctions, the auction by Inch of Candle.[39] 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.[40] As the ancient proverb "silence gives consent"[41] 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

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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 publickly 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.

unless either party notifies the other of his withdrawal, the same kind of contracting is involved.[41a]

A modern lawyer, not accustomed to contracting through ceremonial observances, might be inclined to regard the few remnants of all these ancient forms of contracting as empty formalities, devoid of any contractual significance. In some cases they may in fact have degenerated into mere social customs. But where the parties themselves still regard such ceremonies as essential to their bargain, they cannot be disregarded. In *Eccles* v. *Bryant*[42] the parties had agreed to bind an agreement for the sale of a house by an exchange of their respective signed parts of the contract. The exchange was to take place, as is now customary, by post. The purchaser posted his part, but the vendor changed his mind. The purchaser's argument that the contract was clinched without either posting or receipt of the vendor's part was rejected by the Court of Appeal. Lord Greene M.R. stated:

> It is said that a contract took place when, in response to an alleged invitation on behalf of the vendors, the purchaser signed his part of the contract and communicated the fact to the vendors. It was argued that there is no necessity in this class of case for an exchange of documents at all, and that the references which have taken place in very many judgments in this court and other courts to an exchange are either inaccurate or wrong; a contract in this class of case, it is said, does not require exchange. The answer to that seems to me to be a simple one. When parties are proposing to enter into a contract, the manner in which the contract is to be created so as to bind them must be gathered from the intentions of the parties express or implied. In such a contract as this, there is a well-known, common and customary method of dealing; namely, by exchange, and anyone who contemplates that method of dealing cannot contemplate the coming into existence of a binding contract before the exchange takes place.
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> It was argued that exchange is a mere matter of machinery, having in itself no particular importance and no particular significance. So far as significance is concerned, it appears to me that not only is it not right to say of exchange that it has no significance, but it is the crucial and vital fact which brings the contract into existence. As for importance, it is of the greatest importance, and that is why in past ages this procedure came to be recognised by everybody to be the proper procedure and was adopted. When you are dealing with contracts for the sale of land, it is of the greatest importance to the vendor that he should have a document signed by the purchaser, and to the purchaser that he should have a document signed by the vendor. It is of the greatest importance that there should be no dispute whether a contract had or had not been made and that there should be no dispute as to the terms of it. This particular

41a. See *Pym* v. *Campbell* (1856) 6 El. & Bl. 379.
42. [1948] 1 Ch. 93.

> procedure of exchange ensures that none of those difficulties will arise.[43]

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."[44]

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,[45] 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.[46]

Offer and acceptance cannot account for any of the forms of contracting mentioned so far, unless the assumptions made above[47] are mistaken.

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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*,[48] 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.

ment shall be called executory, as is said before."[49] Serjeant Pollard, in the same case, explained the meaning of "agreement":

> . . . as to the definition of the word (agreement) it seems to me that *agreamentum* is a word compounded of two words, viz. of *aggregatio* and *mentium*, so that *agreamentum est aggregatio mentium* in re *aliqua facta, vel facienda.* And so by the contraction of the two words, and by the short pronunciation of them they are made one word, viz. agreamentum, which is no other than an union, collection, copulation, and conjunction of two or more minds in anything done or to be done.[50]

Serjeant Pollard was no expert in etymology; "agree-" has no more to do with "aggregatio"[51] than "-ment" with "mens".[52] Nevertheless, the explanation was elegant, if incorrect, and his as well as Atkin's statement were given prominence by being included in *Plowden's Reports,* and by being quoted as good law in the law books.[53] In the eighteenth century we even find a simplified version, intended for the educated layman, in Ephraim Chambers' Cyclopaedia.[54] The controversial phrase "meeting of the minds" is sometimes associated with the continental notion of *consensus.*[55] It seems more likely that its origin lies in Serjeant Pollard's attempt to anglicise "agreement". When Thesiger L.J., in 1879, restated the rule on formation of contract, he was summing up three centuries of English law: "Now, whatever in abstract discussion may be said as to the legal notion of it being necessary in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of formation of contracts."[56] According to these authorities, the essential elements in the formation of executory contracts are (1) *Agreement* (*"union" or "meeting of the minds"*), (2) *at one and the same moment,* (3) *on something to be done at a time to come.*

The last two elements seem self-explanatory, but the first requires clarification. To sixteenth century lawyers, the term "agreement" might have seemed free from ambiguity. The old forms of concluding

49. *Id.* at 8-9.
50. *Id.* at 17.
51. "Agree" derives from the Latin word "gratum"—O.E.D., "Agree".
52. "-ment" derives from the Latin suffix "-mentum"—O.E.D., "-ment". As Dr. Jackson has pointed out, Pollard's explanation was queried in *Termes de la Ley* (1579 ed.) under "Testament" and was refuted by Spelman, *Glossarium Archaiologicum* (1626)—"The Scope of the Term 'Contract'," (1937) 53 *Law Quarterly Review* 525, 526n. 5.
53. *Cf. Bacon's Abridgment* (17th ed. 1832) i, 130; *Comyns's Digest* (5th ed. 1822) i, 529; The Law-Latin Dictionary (2nd ed. 1718) "Agreement"; Jacob, *New Law Dictionary* (9th ed. 1772) "Agreement". Dr. Jackson has referred to *Reniger* v. *Fogossa* as the case which "contains the classic exposition of agreement"—*supra* n. 52, at 526.
54. (2nd ed. 1738) "Agreement".
55. *Black's Law Dictionary* (4th ed. 1951) *"Consensus ad idem"*, Cheshire and Fifoot, *op. cit. supra* n. 8, at 41.
56. *Household Fire Insurance Co.* v. *Grant* (1879) 4 Ex. D. 216, 220.

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"[57] 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.[58] Brian C.J.'s famous judgment in an early case[59] gives us reason to think that less formal contracts were treated in the same way. Even when the influence of the French subjectivist Pothier[60] 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".[61] 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,[62] 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.[63] 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."[64] This *dictum* was firmly rejected in the House of Lords by Lords Blackburn[65] and Gordon,[66] 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.* (1876) 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.

in the Court of Appeal, with not having meant what they had said: "If either Lord Coleridge or Mr. Justice Brett intended to express an opinion that a mere mental consent given under those circumstances, and followed up neither by communication nor by action, would make a binding contract, I should certainly hesitate very much before I assented to that proposition. I do not know that it is necessary so to understand their expressions."[67]

The only other significant subjective aberration contended for in England was based on Pothier's suggestion that not only communication of retraction, but any manifestation of a change of mind on the part of the offeror, whether communicated or not, terminated an open offer.[68] McIntyre Q.C., in a well-known case,[69] argued that this was the law. But Pothier's authority was counterbalanced by writers of equal eminence, and Lindley J., in a judgment which has never been questioned, had little difficulty in holding that Pothier's view was not in accordance with the general principles of English law.[70] It is worth noting that this particular emanation from Pothier's subjective conception of contract has never been endorsed by any English judge.

Subjective consent has never been regarded as essential to the notion of agreement when justice demanded that it be dispensed with. On the other hand, manifestation of consent by both contracting parties has always been regarded as essential. Understood correctly, the old rule on formation of contract therefore required (1) *Manifestation by both parties,* (2) *at one and the same moment,* (3) *of consent on something to be done at a time to come.*

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In all the examples so far considered, the parties have employed identical means of expression to indicate their consent. There is no magic in this identity; where it is accidental, as in the case of identical offers crossing in the post,[71] no contract results. It is true that in the case of cross-offers there is, as Cheshire and Fifoot point out,[72] a coincidence of acts and a unanimity of mind, but it is also true that parties become bound in the manner in which they intend and contemplate becoming bound.[73] It was this additional requirement which Honyman J. overlooked when he stated: "Why should [cross-offers] not constitute a good contract? The parties are *ad idem* at one and the same moment."[74] How could parties become bound in a manner

67. *Id.* at 688.
68. See the extract from Pothier's *Traité du Contrat de Vente,* No. 32, reproduced in 3 Manning & Ryland's Reports 100, comment (c).
69. *Byrne* v. *Van Tienhoven* (1880) 42 L.T. 371, 372.
70. *Id.* at 371-373.
71. *Tinn* v. *Hoffmann* (1873) 29 L.T. 271.
72. *Op. cit. supra* n. 8, at 45.
73. *Supra* at n. 44.
74. *Tinn* v. *Hoffmann supra* n. 71 at 275; Archibald, Grove, Brett and Blackburn JJ. expressed the opinion that cross-offers do not constitute a valid contract —*id.* at 275, 277, 278 and 279.

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.[75] 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.[76] 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.[77] 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.*[78] 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.

moment no longer be said to be signifying *his* consent by non-retraction, since he had, in fact, retracted.

Regarding non-retraction of the highest bid and acceptance by fall of the hammer as the operative components of a contract made by auction meant that the bidder could retract at any time before the fall of the hammer and even simultaneously with it. In a case like *Payne* v. *Cave*,[79] that spelt hardship for the seller since it enabled the highest bidder to deprive him of a profitable sale with impunity. Walton, for the plaintiff, put the argument very cogently: "The hammer is suspended, not for the benefit of the bidder, or to give him an opportunity of repenting, but for the benefit of the seller: in the meantime the person who bid last is a conditional purchaser, if nobody bids more. Otherwise it is in the power of any person to injure the vendor, because all the former biddings are discharged by the last, and, as it happened in this very instance, the goods may thereby ultimately be sold for less than the person who was last outbid would have given for them."[80] Similar hardship could result in a case like *Routledge* v. *Grant*,[81] where the offeror had pledged that he would not retract for a certain period, during which the offeree was to make up his mind. Where consideration was given for the open offer, it became itself a bargain, but where that was lacking, no solemn promise of the offeror could move the courts to dispense with the principle, characteristic of the handshake contract, that both parties became bound at the same time. Already, at the beginning of the eighteenth century, Lord Cowper L.C. had invoked the *nudum pactum* rule for the proposition that a man was not bound by an offer before it had been accepted.[82] Lord Kenyon C.J. in *Payne* v. *Cave*[83] and Best C.J. in *Routledge* v. *Grant*[84] rejected the attempts to make offers binding before acceptance on the same ground. This meant that the parties could not dispense with the necessity for simultaneous expression of consent, except by creating an option for sufficient consideration.

Payne v. *Cave*[85] is sometimes regarded as one of the first cases in which the offer-acceptance formula was used judicially.[86] In fact, the terms were used occasionally by the courts at a much earlier stage,[87] but at no stage in the eighteenth century were they regarded as technical terms. In a purely factual sense, it may be said that contracts concluded by successive indications of consent are formed by the acceptance of offers. Where parties bind themselves by signing a

79. *Ibid.*
80. *Id.* at 149.
81. (1828) 4 Bing. 653.
82. *Viner's Abridgment* (1743) xvi, "Offer"; *Turton* v. *Benson*, *supra* n. 2; *Harman* v. *Vanhatton*, *supra* n. 2.
83. *Supra* n. 78.
84. *Supra* n. 81.
85. *Supra* n. 78.
86. Cheshire and Fifoot, *op. cit. supra* n. 8, at 30.
87. *Supra* at n. 2.

prepared document in quick succession, it is hardly possible to talk about offer and acceptance "without a certain strain of thought and language".[88] 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*.[89] 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,[90] 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."[91] 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).

form, it could help satisfy the old requirement that both parties must manifest their consent at one and the same time. Pothier's concept of the continuing intention underwent a process of adaptation in the court and emerged as the "continuing offer". The famous passage in *Adams* v. *Lindsell*[92] is, apart from this adaptation, an all but literal reproduction of Pothier's view: the author of a postal offer "must be considered in law as making, during every instant of the time their letter was travelling[93] the same identical offer to the [offerees] and then the contract is complete with the acceptance of the latter."[94] This analysis was later expressly endorsed in the House of Lords.[95] It was not confined to contracting through the post. As counsel for the plaintiff in *Head* v. *Diggon*[96] correctly argued, it applied equally to open offers, made *inter praesentes* and accepted later. That same case also shows that of the innumerable notional offers made until the moment of acceptance, it is the one made simultaneously with the acceptance, that clinches the contract. The ratio of *Head* v. *Diggon* is correctly stated in the *Law Journal Reports*: " . . . if the acceptance of such an offer, and the withdrawing of it, be simultaneous, the withdrawing shall be preferred, and neither party will be bound."[97] This holding shows convincingly that the operative expressions of consent must be strictly simultaneous in English law. The continuing-offer concept was not an innovation in English law, but merely an application to new facts of the old maxim that silence gives consent. Once the offeror has expressed consent by making an offer, non-retraction is in itself an expression of consent: *qui tacet consentire videtur.*[98] It might be added that this view of the matter necessarily implies that an offer is terminated by supervening death or insanity.[99] This rule was well explained by a Scottish court:

> A contract cannot be made directly with a dead man or a lunatic. The contract is not made until the offer is accepted; and if the person with whom you merely intend to contract dies or becomes insane before you have contracted with him, you can no longer contract directly with him. You cannot, by adhibiting your acceptance to an offer, and addressing it to a dead man or a lunatic, make it binding on him, whether his death or insanity be or be not known to you.[100]

. . . . . .

92. *Supra* n. 89.
93. Pothier's words " . . . and until the time at which the (offeree) declares that he accepts the bargain . . . " must be interpolated at this point in order to make sense of the passage—*supra* at n. 91.
94. *Adams* v. *Lindsell, supra* n. 89, at 683.
95. *Dunlop* v. *Higgins* (1848) 1 H.L.C. 381, 400 *per* Lord Cottenham L.C.
96. (1828) 7 L.J.K.B. 36.
97. *Id.* at 36.
98. *Supra* n. 40.
99. *Dickinson* v. *Dodds* (1876) 2 Ch. D. 463, 475 *per* Mellish L.J.
100. *Thomson* v. *James* (1855) 18 Dunlop 1, 10 (Court of Session).

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[101] 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.[102] 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.[103] Similarly, signed engrossments in the case of real estate transactions are nowadays usually exchanged through the post.[104] 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?[105]

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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.

In international law, a treaty is concluded at the moment at which the second note of approval reaches its destination.[106] That the end of the ceremony is the crucial moment, is not a firm rule, but merely a common sense presumption in an area where everything depends on the facts of the individual case. As the Court of Appeal has convincingly shown in *Eccles* v. *Bryant*,[107] the ultimate test is the express or implied, or failing that, the presumptive intention of the parties. With reference to the postal exchange of engrossments, Asquith L.J. stated:

> It seems to me a plain (though, of course, a rebuttable) presumption that neither party would normally wish to be bound to the other in the absence of such a vital security as is offered by physical possession of a copy of the contract signed by the other.[108]

If, in the cases just considered, the crucial *punctum temporis* had to be determined as a question of fact, it must *a fortiori* also be a question of fact in the case of the typical modern contract, which is concluded without any ceremonial manifestation of consent. The postal exchange of engrossments or notes of approval is so standardized that one might tolerate a hard and fast rule, and yet the law determines the beginning of the contract as a question of fact. In modern informal contracts consent may be implied in so many different circumstances that no single rule could hope to do justice to all the cases. Consent may lie in the settling of terms; after all, negotiations are usually intended to result in contract. It may be found in mutual non-retraction at a particular moment after terms have been agreed on.[109] In some cases it may appear no sooner than in initial acts of performance.[110]

Dr. Stoljar has suggested that at least in the case of contracts concluded *inter praesentes*, the parties still emerge from their negotiations with a "verbal" or a "virtual" handshake.[111] Sometimes the parties may in fact seal their bargain with a mutual "all right". To insist, however, that this is always the case, substitutes fiction for fact. Usually, the consent of the parties is implied at some stage of their dealings. At what stage that is the case can only be determined as a question of fact, and it must be ascertained in accordance with the express, implied or presumptive intention of the parties.[112]

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106. Blix, *supra* n. 36, at 364.
107. *Supra* n. 38.
108. Cohen L.J. preferred the moment at which the latter of the two documents is put into the post; Lord Greene M.R. thought both views arguable and expressed no preference—*id.* at 107 and 97-98.
109. *Supra* at n. 41a.
110. *Brogden* v. *Metropolitan Ry*, supra n. 59.
111. *The Law of Agency* (1961) 32-33; see also Stoljar, "Offer, Promise and Agreement", *supra* n. 3.
112. *Cf. Eccles* v. *Bryant, supra* n. 38 at 99 and 104 *per* Lord Greene 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.[113] 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*,[114] 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.[115] 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.

the pencil. Less valuable lots are sold without any such ceremony and retraction as well as higher bids are allowed in such cases until the auctioneer begins to write down the price or even until the next lot is put up for sale. The correct rule in the case of contracts arrived at by negotiation appears to be that the contract becomes binding a reasonable time after the last term has been settled.

It is immaterial whether the parties negotiate face-to-face or by correspondence. In the latter case, they may be even more in need of a reasonable *locus poenitentiae* after settling their last term, since the possibilities of misunderstanding are greater. Where it is in accordance with the actual or presumptive intention of the parties to have a *locus poenitentiae*, a postal contract is not complete until a reasonable time after the letter consenting to the last proposed term has been received. Lord Eldon L.C. has stated this rule with reference to postal contracts as follows:

> I have always understood the law of the Court to be, with reference to this sort of contract, that, if a person communicates his acceptance of an offer within a reasonable time after the offer being made, and if within a reasonable time of the acceptance being communicated, no variation has been made by either party in the terms of the offer so made and accepted, the acceptance must be taken as simultaneous with the offer, and both together as constituting such an agreement as the court will execute.[116]

Lord Eldon, although much criticised for his imperfections of style,[117] was justly regarded by his contemporaries as an almost infallible judge.[118] Few of his decisions were appealed from and hardly any were ever reversed on appeal.[119] Moreover, in an era when the thought of English lawyers on matters of contract was strongly influenced by Pothier, Lord Eldon could be relied on to expound the law of contract undiluted by French subjectivism. French principles he disliked even more than French wines, which he abhorred.[120] Lord Eldon's significant *dictum* has been all but completely forgotten. This need not surprise us since the universal application given to the offer and acceptance formula resulted in the mistaken belief that the presumption in *Adams* v. *Lindsell*[121] applied to all postal contracts. The enthusiasm for offer and acceptance has declined and there are now

116. *Kennedy* v. *Lee* (1817) 3 Mer. 441, 454-455.
117. *Cf.* 3 Manning & Ryland's Reports 100-101, comment (c); Campbell, *Lives of the Lord Chancellors* (5th ed. 1868) X, 235-236.
118. Campbell, *op cit. supra* n. 117, at 236.
119. *Dictionary of National Biography*; *The Concise Dictionary* (1953) i. "John Scott".
120. Campbell, *op cit. supra* n. 117, at 304.
121. *Supra* n. 80.

some critical voices.[122] 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."[123]

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This article is mainly concerned with the formation of bilateral contracts. Reward-contracts[124] 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[125] 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."[126] 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.[127]

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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.1, 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.