The Law of Obligations
Roman Foundations of the Civilian Tradition

REINHARD ZIMMERMANN

Dr. iur (Hamburg)
Professor für Privatrecht, Römisches Recht und Historische Rechtsvergleichung, Universität Regensburg; formerly W.P. Schreiner Professor of Roman and Comparative Law, University of Cape Town

OXFORD
UNIVERSITY PRESS

But whatever the historically correct interpretation may be, in South African law Grotius' statement has contributed considerably to the prevailing confusion. More particularly, it has for a long time prevented courts and legal writers from recognizing that the requirement of iusta causa had in fact become redundant.[93] An agreement must be entered into with a serious intention to be bound, and it must not be tainted by illegality or immorality. If these conditions are present, an enforceable contract has come into existence.[94] Whether one lumps these two requirements together sub titulo "iusta causa" is a matter of terminology.[95] But under a regime of ex nudo pacto oritur actio, neither causa nor iusta causa are separate, additional requirements that have to be met before a contract can be said to have been validly concluded.[96]

III. CONSENSUS

1. Consent as the basis of contract in modern law

Having looked at two factors—form and causa—which are not essential to the modern concept of contract, we now have to turn our attention to the one which is: consensus. Consent forms the basis of the modern law of contract. But what exactly does that imply? It is obvious, first of all, that not every kind of consent can be relevant. A and B agree that Socrates is a stone,[97] or that Socrates is Socrates.[98] Clearly, their minds are ad idem, and thus there is consent. But it would be absurd to claim that this agreement can create a contract (or, for that matter, a pactum). Thus, consent between the parties has to

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pactum adiectum *in continenti*). No matter whether these subtleties have been complied with or not, the mere pactum can be regarded (according to Grotius) as a redelicke oorzaecke = counts as a contract = gives rise to an action. Cf., apart from Stassen, (1979) 42 *THRHR* 366 sq., especially Kotzé, op. cit., note 79, pp. 28 sqq.; Lee, *Introduction*, pp. 431 sqq., and De Villiers AJA in *Conradie v. Rossouw* 1919 AD 279 at 314 sqq., all offering somewhat different interpretations. One basic difficulty in understanding the contractual theory of Grotius is that he nowhere clearly states whether (in his view) (1) all pacts are actionable and (2) all promises must be based on a iusta causa. Both propositions can merely be inferred. But by still discussing, in a separate chapter, the express verbal contract (i.e. the stipulation of Roman law, although in modern dress), he shows that he has not (or rather: not totally) thrown off the shackles of Roman law (Lee, *Introduction*, pp. 432 sq.)

[93] Cf., particularly, Kotzé, op. cit., note 79, pp. 25 sqq.

[94] Cf., particularly, Kotzé, op. cit., note 79, pp. 25 sqq.

[95] Cf., particularly, De Villiers AJA, in his erudite judgment in *Conradie v. Rossouw* 1919 AD 279 at 298 sqq.

[96] Cf. today, for example, Stassen, (1979) 42 *THRHR* 358 sq.; Joubert, *Contract*, pp. 32 sqq. Neither De Wet en Yeats nor Kerr, *The Principles of the Law of Contract* (3rd ed., 1982), in their textbooks deal with (iusta) causa as a special requirement for the validity of contracts. Cf. further Jansen JA, in *Saambou-Nasionale Bouvereniging v. Friedman* 1979 (3) SA 978 (A) at 990B–993C. A (iusta) causa, however, continues to be required for bills of exchange; cf. s. 25.1 of the (South African) Bills of Exchange Act 34/1964, and F.R. Malan, *Bills of Exchange, Cheques and Promissory Notes in South African Law* (1983), pp. 71 sqq.

[97] Cf. the example discussed by Azo, supra, p. 538, note 192.

[98] Petrus Placentinus, *Summa Codicis* (Moguntina; 1536), Lib. II, Tit. III.

relate to performance. This was already very clearly seen by the medieval lawyers; it is necessary

> "ut consentiant in idem, scilicet dandum faciendumve ex diversis motibus animorum, postmodum convenientes in quid unum faciendum vel dandum".[99]

But even where this is so and where, for instance, A wants to hand over his sedan chair to B, and B indeed wishes to receive it from A, the mere agreement as such, that is, the fact that both parties intend one and the same thing, cannot give rise to a binding obligation. This is because it is necessary that these intentions be communicated, in one way or another, between the parties. No specific formalities have to be complied with, but there has to be a declaration. The intention has to be expressed; whether verbally, or in writing or, for instance, by simply nodding one's head, does not matter. As a contract involves (at least) two parties, we have in fact two such declarations of intention. They are normally referred to as offer and acceptance.

This way of analysing the conclusion of contract reveals two specific problem areas which modern legal systems have to grapple with. On the one hand, an offer can sometimes not be accepted immediately. When a contract is concluded inter absentes, for instance by exchange of letters or through a messenger, the two declarations of intention have to be given in succession, and formation of the contract takes some time. The question then arises whether and to what extent the offeror is bound by the offer. What legal effects does the law attach to the offer as an individual declaration of intention, i.e. to the one element of an as yet incomplete transaction?[100] In Germany, the offeror is, as a rule, not able to withdraw his offer.[101] Other legal systems decide differently. The English common law, for instance, does not regard an offer as binding;[102] until it has been accepted by the offeree, it may be withdrawn at any time.[103]

[99] Placentinus, loc. cit. Cf., much later, also Wolfgang Adam Lauterbach, *Collegium theoretico-practicum*, Lib. II, Tit. XIV, IV.

[100] For a comparative discussion of this problem, see Zweigert/Kötz/Weir, pp. 27 sqq.; for a very comprehensive comparative investigation of all problems relating to offer and acceptance, see Rudolf B. Schlesinger, *Formation of Contracts, A Study in the Common Core of Legal Systems* (2 vols., 1968).

[101] § 145 BGB; for further details cf. §§ 146 sqq., particularly § 147 II: "An offer made to a person who is not present may be accepted only up to the moment when the offerer may expect to receive an answer under ordinary circumstances." Cf. also § 862 ABGB and Artur Nussbaum, "Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine", (1936) 36 *Columbia LR* 920 sqq. ("Apparently it was only after the use of mail had become common in the 18th century that the traditional rule (sc. no binding effect to be attributed to an offer) was felt to be unsatisfactory" (p. 923)).

[102] The reason for this lies in the doctrine of consideration. No consideration is normally given for the offer, and hence the latter cannot bind the offeror. On South African law (where it is also accepted doctrine that an offer can be revoked, even though the doctrine of consideration has been rejected), cf. Ben Beinart, "Offers Stipulating a Period for Acceptance", 1964 *Acta Juridica* 200 sqq.; Joubert, *Contract*, pp. 36 sqq., 42.

[103] The practical effects of this rule are to a certain extent modified by the so-called mailbox theory (dating back to *Adams v. Lindsell* (1818) 1 B & Ald 681 sqq.): the contract is concluded (and thus the offer can no longer be revoked) when the offeree dispatches his acceptance (by, for instance, throwing it into the mailbox), not only when it reaches the offeror.

On the other hand, it must be realized that both offer and acceptance are in turn composed of two essential elements, namely the intention of the party and his declaration. Hence the potential for a further conflict of interests: for will and declaration do not necessarily coincide. One (or even both) of the parties may have made a mistake in drawing up the declaration(s), or the opponent may have misunderstood it. It therefore has to be determined which of the two elements is to prevail. Does it matter, as far as both conclusion and interpretation of the contract are concerned, what the parties have intended or what they have in actual fact declared? Both views (normally dubbed will theory and declaration theory) are (and have been) advocated, though usually not without certain modifications.[104]

2. The Roman contribution

(a) Conceptual analysis in general

These are, in barest outline, some of the main features of modern contractual theory. It would be an entirely ahistorical enterprise to try to trace them back to Roman law. The modern general law of contract has essentially been developed by the natural lawyers, and our conceptual apparatus has thus been devised within the last three centuries.[105] But, of course, one did not start de novo; most of the individual parts that were needed for the new doctrinal building could conveniently be taken from the quarry of the Corpus Juris Civilis. All that was needed was a new scheme of putting things together: a coherent rational philosophy as a new basis and source of inspiration for systematic and conceptual clarity. The Roman lawyers did not think in terms of abstract propositions; they developed their law in casuistic fashion. Thus, as far as the voluntary transfer of assets was concerned, they did not look at phenomena such as "contract" or "legal act" as such; they paid attention to specific types of transactions carved out by experience rather than doctrinal thinking. In this manner, they devised transactions characterized by oral formalities, by rei interventio, by an entry into a ledger and by simple consent. The result was an abundant but imperfectly structured casuistry. And yet, their specific legal genius led the Roman lawyers to adjust their rules and precedents in such a

[104] Cf. infra, pp. 585 sqq., 621 sqq.

[105] Cf., in particular, Franz Wieacker, "Die vertragliche Obligation bei den Klassikern des Vernunftrechts", in: *Festschrift für Hans Welzel* (1974), pp. 8 sqq.; Theo Mayer-Maly, "Der Konsens als Grundlage des Vertrages", in: *Festschrift für Erwin Seidl* (1975), pp. 118 sqq.; idem, "Die Bedeutung des Konsenses in privatrechtsgeschichtlicher Sicht", in: G. Jakobs (ed.), *Rechtsgeltung und Konsens* (1976), pp. 96 sqq.; Flume, *AT*, pp. 1 sqq.; Martin Lipp, *Die Bedeutung des Naturrechts für die Ausbildung der Allgemeinen Lehren des deutschen Privatrechts* (1980), pp. 130 sqq.; Hans Hattenhauer, *Grundbegriffe des Bürgerlichen Rechts* (1982), pp. 58 sqq.; Nanz, *Vertragsbegriff*, pp. 135 sqq.

manner that the result was not unmanageable chaos. The germs of many of the modern general doctrines were slumbering in the sources.[106] Even most of the modern concepts were there, though they were rather diffuse and poorly defined; in addition, they had sometimes undergone considerable change in meaning before they were incorporated into the Corpus Juris Civilis.

(b) Contractus

Thus, first of all, there was the term "contractus". It is derived from the verb "contrahere" which, at least originally, meant "to contract" (in the sense of, for instance, "to contract a disease"). What one "contracted", in the legal context, was liability—any kind of liability, not only a "contractual" one.[107] The substantive contractus, too, was first of all used in the same wide and fairly untechnical sense. Characteristically, it was the law teacher, Gaius, with his systematic interests, who gave the term a narrower meaning and distinguished between obligationes ex delicto and ex contractu.[108] Since then contractus was used to identify those transactions that were enforceable according to the ius civile.[109] Later on, the innominate real "contracts" came to be included too.[110] No generally accepted definition of the term "contract" can be found in our sources.[111] There is only an "elegant" (in the opinion of Ulpianus) statement of Pedius to the effect that "nullum esse contractum, nullam obligationem, quae non habeat in se conventionem, sive re sive verbis fiat".[112]

(c) Pacta

The counterparts of the contractus were, on the one hand, the delicta and, on the other hand, the pacta. However, the term "pactum" was

[106] Cf. e.g. Gerhard Dulckeit, "Zur Lehre vom Rechtsgeschäft im klassischen römischen Recht", in: *Festschrift für Fritz Schulz*, vol. I (1951), pp. 148 sqq.; Kaser, *RPr* I, pp. 227 sqq.

[107] Cf. still e.g. Pap. D. 1, 3, 1 (delictum contrahere); Kaser, *RPr* I, p. 523; Biondi, *Contratto e stipulatio*, pp. 197 sqq.; Franz Wieacker (1967) 35 *TR* 130 sq.; Honsell/Mayer-Maly/Selb, p. 250. But cf. also Wunner, *Contractus*, pp. 10 sqq., 26 sqq.; Werner Macheiner, "Zu den Anfängen des Kontraktssystems", in: *Festsgabe für Arnold Herdlitczka* (1972), pp. 168 sqq.; Santoro, (1983) 37 *Annali Palermo* 31 sq.

[108] Gai. III, 88 sq.; Wieacker, (1967) 35 *TR* 132 sq.; Wunner, pp. 42 sqq. On the contract–delict dichotomy, see also supra, pp. 10 sqq.

[109] There is a vast literature on the Roman concept of contract; cf. e.g. Dulckeit, *Festschrift Schulz*, vol. I, pp. 152 sqq.; Kaser, *RPr* I, p. 523; Arnaldo Biscardi, "Some Critical Remarks on the Roman Concept of Obligations", (1977) 12 *The Irish Jurist* 371 sqq.; Santoro, (1983) 37 *Annali Palermo* 61 sqq. and passim (for the time of Labeo).

[110] Kaser, *RPr* II, pp. 362 sq.

[111] Labeo's attempt (Ulp. D. 50, 16, 19) to confine the term "contractus" to "ultro citroque obligationem, quod Graeci συνάλλαγμα vocant" is difficult to understand and possibly spurious. In any event, it has remained isolated and has never been followed up. Cf. e.g. Wunner, *Contactus*, pp. 33 sqq.; Benöhr, *Synallagma*, pp. 10 sqq.; Macheiner, *Festgabe Herdlitczka*, pp. 172 sqq.; but see the comprehensive analysis by Santoro, (1983) 37 *Annali Palermo* 7 sqq.

[112] Ulp. D. 2, 14, 1, 3.

ambiguous.[113] From early on, it referred to a transaction by means of which the person who had committed a delict "bought off" the injured parties' right of seizure. Apart from that, pactum could refer to what has come to be known as pactum de non petendo, an (informal) release agreement. Incidental agreements which could, if added to a contract with a iudicium bonae fidei, be indirectly enforceable, were also termed pacta (adiecta). Finally, and most importantly, pactum (or pactio) was the word used to denote all informal agreements which were not (independently) enforceable ("nuda pactio obligationem non parit"). But with the degeneration of the stipulation and the recognition of an increasing range of enforceable pacta, the distinction between contracts and pacta was, of course, greatly blurred and became more and more meaningless.[114]

(d) Conventio

Thirdly, then, there was the term "conventio". According to Ulpian this was a "verbum generale . . . ad omnia pertinens, de quibus negotii contrahendi transigendique causa consentiunt qui inter se agunt".[115] Conventio is derived from "convenire" = "to come together". In the same way as people are able to come together in one place, there can be a coming together of the minds, if two or more people agree on the same thing:

> "nam sicuti convenire dicuntur qui ex diversis locis in unum locum colliguntur et veniunt, ita et qui ex diversis animi motibus in unum consentiunt, id est in unam sententia decurrunt."[116]

But is conventio really the overarching generic term comprising both contractus and pacta? Or does it merely have a general significance in that it is an indispensable element contained in every pact or contract? The latter is what Pedius seems to imply (". . . nullum esse contractum, nullam obligationem, quae non habeat in se conventionem").[117] Conventio, in the context of this statement, appears more or less to be a synonym for consensus. In Ulp. D. 50, 12, 3 pr., too, both terms are used very much on the same level ("Pactum est duorum consensus atque conventio").

(e) Consensus

For consensus, in turn, the core concept of the modern law of contract, we do not find a definition or any attempt at a conceptual analysis in the Digest.[118] In Ulp. 2, 14, 1, 1 sq. we meet it as definiens, not as

[113] Cf. supra, pp. 508 sqq.

[114] Kaser, *RPr* II, pp. 362 sqq.

[115] D. 2, 14, 1, 3.

[116] Ulp. D. 2, 14, 1, 3.

[117] Ulp. D. 2, 14, 1, 3.

[118] Thus, the Romans did not concern themselves with questions relating to the actual formation of the contract as such. They looked at contract (and consensus) as a single,

definiendum: "Pactum autem a pactione dicitur . . . et est pactio duorum pluriumve in idem placitum et consensus." Did consensus refer to a subjective attitude of the parties to the contract (voluntas or animus) or rather to the (formal or informal) declarations made by them? Earlier this century attempts have not been wanting to eliminate every subjective notion from classical Roman law[119] and, in turn, to dispute the relevance of any objective criteria for post-classical contractual theory. But these are unacceptable doctrinal exaggerations.[120] True: there was a general tendency (prevalent in other developed legal systems too)[121] to "subjectivize" legal relations and to pay attention to the individual will rather than to strict and archetypal behaviour patterns, to move from form to formlessness, from a nearly exclusive emphasis on certainty of law to equity.[122] As far as the old liability transactions of pre-classical law were concerned, it did indeed matter only that the form had been complied with. The actual intention of the parties was irrelevant. Already in classical law, however, this situation had changed very considerably. No formal act was needed for the conclusion of consensual contracts; they were based merely on the consent of the parties, and they formed the nucleus around which the modern law of contract was to develop. Admittedly, consensus was not a well-analysed technical term but it did mean, first and foremost, what the English term "consent" is usually also taken to convey: a meeting of the minds, the concurrence of two or more wills, and hence something essentially subjective.[123] Of course, the only possible evidence of such intent is external facts, and thus, in order to be legally relevant, the agreement had to manifest itself somehow or other. Even the Byzantine lawyers could not entirely dispense with objective indications. But it is primarily the concurring wishes of the parties concerned that form the main element of contract. That this was so in classical Roman law appears most clearly from the approach adopted by the Roman lawyers towards the problem of error. The fact that a contract did not come into existence in cases where one of the parties

undivided unit and not at the individual declarationes voluntatis of the parties involved. Only after a general theory of contract had been developed by the natural lawyers and contract had come to be analysed in terms of offer and acceptance did, in particular, the question when a contract inter absentes can be taken to be concluded (e.g.: is it necessary that the offeror be notified of the acceptance of his offer?) come into the purview of scholarly debate. For a historical analysis, cf. Jörn Augner, *Vertragsschluss ohne Zugang der Annahmeerklärung: § 151 BGB in rechtshistorischer und rechtsvergleichender Sicht* (1985).

[119] Cf. e.g. Silvio Perozzi, *Istituzioni di Diritto Romano* (2nd ed., 1928), vol. II, pp. 30 sqq.; Wieacker, *Societas*, pp. 80 sqq.

[120] Very clear on this point is David Daube, "Societas as Consensual Contract", (1939) 7 *Cambridge LJ* 395 sqq.

[121] Heinz Hübner, "Subjektivismus in der Entwicklung des Privatrechts", in: *Festschrift für Max Kaser* (1976), pp. 715 sqq., 720 sq.

[122] Cf. supra, pp. 78 sqq., 82 sqq.

[123] Cf. e.g. Daube, (1939) 7 *Cambridge LJ* 395 sqq.; Grosso, *Sistema*, pp. 53 sqq.

had erred with regard to certain essential aspects of it[124] amply demonstrates the significance attached to the will of the parties in the formation of a contract. In fact, classical law had already gone one important step further, for it is widely recognized today that consent was not only the basis of "consensual" contracts, but was also an essential element of all other contracts.[125] Pedius left no doubt about that when he stated that

> "nullum esse contractum, nullam obligationem, quae non habeat in se conventionem, sive re sive verbis fiat: nam et stipulatio quae verbis fit, nisi habeat consensum, nulla est".[126]

And, indeed, we have already seen in our discussion of stipulation and of mutuum how the "subjective" agreement of the parties increasingly came to be accepted as the cornerstone of and actual effective reason for all contractual obligations.[127] This development was already in full progress in classical law, but it was brought to a close by Byzantine jurisprudence. Their doctrine of volition, based on stoic moral philosophy and on the influence of Christian thinking,[128] led to what Kaser has called an "internalization"[129] of contractual obligations; every contract was taken to be based on and to derive its obligatory nature from a conventio (consensus), that is, a meeting of the minds. Rei interventio and verborum sollemnitas, where they were insisted upon, were merely additional, formal requirements. It is hardly necessary to mention that pacta, too, were based on consent in the sense discussed.[130]

3. Conventio, pactum and contractus under the ius commune

Since the time of the intellectual rediscovery of the Digest, a fairly sterile and pointless debate has been raging as to which term should be used as nomen generale for the law of contract. Conventio and pactum were the two obvious candidates. The French humanists, in particular, indulged in intricate and subtle deliberations which they sometimes

[124] Cf. infra, pp. 587 sqq.

[125] Fritz Raber, "Hoc animo dare", (1965) 33 *TR* 51 sqq.; Kaser, *RPr* II, pp. 365 sq.; Grosso, *Sistema*, pp. 53 sqq.; Thomas, *TRL*, pp. 225 sq.; Buckland/Stein, pp. 412 sqq.; Santoro, (1983) 37 *Annali Palermo* 184 sqq. (on "conventio re"); for the law of stipulations cf., most recently, Malte Dobbertin, *Zur Auslegung der Stipulation im klassischen Römischen Recht* (1987), pp. 51 sqq.

[126] Ulp. D. 2, 14, 1, 3.

[127] Cf. supra, pp. 156 sqq., 165, 510 sq.

[128] Pietro De Francisci, ΣΥΝΑΛΛΑΓΜΑ, vol. II (1916), pp. 498 sqq.; Melchiorre Roberti, "L' influenza Cristiana nello svolgimento storico dei patti nudi", in: *Cristianesimo e diritto romano* (1935), pp. 87 sqq.; but cf. Biondi, *DRC*, vol. III, pp. 214 sqq.; Ugo Brasiello, "Sull' influenza del Cristianesimo in materia di elemento subbicttivo nei contratti", in: *Scritti di diritto romano in onore di Contardo Ferrini* (1946), pp. 505 sqq.

[129] *"Verinnerlichung" der schuldrechtlichen Bindung*: *RPr* II, p. 366.

[130] Ulp. D. 2, 14, 1, 1 sq.; Ulp. D. 50, 12, 3 pr.; Grosso, *Sistema*, pp. 171 sqq.; Magdelain, *Consensualisme*, pp. 5 sqq.

even spiced with personal invectives.[131] Ultimately in France, conventio came to be accepted as the main category.[132] Thus, the code civil states in its art. 1101:

> *"Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelque chose."*

The Dutch and German usus modernus finally settled for the term "pactum". Vinnius appears to have been one of the last authors to discuss the matter in detail.[133] When he wrote his *Tractatus de Pactis*, the crucial breakthrough towards recognition of the principle of "ex nudo pacto oritur actio" had been achieved. From a purely systematic point of view this meant that a distinction had to be drawn between pactum in a wider sense and the more specific term "pactum nudum". Pactum in the wider sense comprised both pacta nuda and contractus.

But did it still make sense to distinguish these two species of "pacta"? Both, after all, were based on consensus, and both were now enforceable. It slowly dawned upon contemporary authors that the whole basis for the Roman typology of contracts had fallen away.[134] Its raison d'être, after all, had been the fact that not all agreements beget an action. The usus modernus, however, by and large, lacked the boldness to draw the dogmatic consequences of this insight. A new vision of contractual liability was required. It was provided by the natural lawyers.

4. Domat and Pothier

In France, Jean Domat was the great initiator. In his main work, *"Les loix civiles dans leur ordre naturel"*, he developed his ideas with such an elegance and clarity that they became, via Pothier and the code civil, the basis of modern French contract law. Contract for Domat—as for most of the other natural lawyers—was of cardinal importance within human society:

> *"L'usage des conventions est une suite naturelle de l'ordre de la societé civile, et des liaisons que Dieu forme entre les hommes. Car comme il a rendu nécessaire pour tous leurs besoins, l'usage réciproque de leur industrie et de leur travail, et les différens commerces des choses; c'est principalement par les conventions qu'ils s'en accommodent."*[135]

Pufendorf had put it similarly: contract is the vehicle for the exchange of goods which is necessary (and thus natural) in view of the innate

[131] Cf. e.g. Duarenus and Donellus, as discussed by Nanz, *Vertragsbegriff*, pp. 78 sqq. On the attitude of the glossators and commentators and of the authors of the usus modernus, cf. Nanz, *Vertragsbegriff*, pp. 44 sqq., 93 sq., 130 sqq.

[132] The general term for agreement in the medieval English common law was "covenant".

[133] *Tractatus de pactis*, Cap. I, 1 sqq. (A translation of this tractatus into Afrikaans by L.J. du Plessis has recently (1985) appeared.)

[134] Cf. e.g. Struve, *Syntagma*, Exercit. VI, Lib. II, Tit. XIV, 32; Stryk, *Usus modernus pandectarum*, Lib. II, Tit. XIV, §§ 4, 7; Voet, *Commentarius ad Pandectas*, Lib. II, Tit. XIV, IX;

[135] Liv. I, Introduction.

human imbecillitas.[136] The central significance attached to the law of contract led Domat to place it, very prominently, at the beginning of his new system of private law. *"Des Conventions en général"* is the first title of the first book of the Loix civiles, and at the outset the following definition is provided:

> *"Les conventions sont les engagements qui se forment par le consentement mutuel de deux ou plusieurs personnes qui se font entr'eux une loi d'exécuter ce qu'ils promettent."*[137]

The latter part of this phrase takes up a statement by Papinian (D. 50, 17, 23: "legem enim contractus dedit")[138] and is typical of Domat's attitude towards Roman law. He tried to avail himself of as much of the material contained in the Digest as possible, and regarded as his main task the elimination of those *"subtilitez"*, *"qui ne sont pas de notre usage"* and which had prevented the principles of Roman law from being entirely consonant with the precepts of the *"équité naturelle"*.[139] One of these subtleties which obviously had to be rejected was the Roman scheme of contracts; but, on the other hand, the Roman concept of consensus could be used as a constitutive element for a generalized law of contract. Hence: *"Les conventions s'accomplissent par le consentement mutuel donné et arrêté réciproquement."*[140] Domat did not analyse the concept of consensus any further. This was done only by Pothier, who distinguished offer and acceptance:

> *"Le contrat renferme le concours des volontés de deux personnes, dont l'une promet quelque chose à l'autre, et l'autre accepte la promesse qui lui est faite."*[141]

5. Grotius, Pufendorf and Wolff

In the other countries of central Europe consensus acquired an even greater importance, since here it had been able to emancipate itself entirely from causa as another requirement for the validity of contracts. On the other hand, however, the development took a peculiar detour. For the fundamental category in Grotius' system of natural law was neither contract (or conventio) nor consensus, but the (unilateral)

[136] *De jure naturae et gentium*, Lib. II, Cap. III, § 14; Lib. III, Cap. IV, § 1. For further details cf. Hans Welzel, *Die Naturrechtslehre Samuel Pufendorfs* (1958) (e.g. pp. 43 sqq.); Notker Hammerstein, "Samuel Pufendorf", in: M. Stolleis (ed.), *Staatsdenker im 17. und 18. Jahrhundert* (1977), pp. 174 sqq., 180 sqq.

[137] Liv. I, Introduction.

[138] Cf. also supra, p. 540.

[139] On Roman law as *"raison écrite"* and Domat's views in that regard cf. Jean Gaudemet, "Les tendances à l'unification du droit en France dans les derniers siècles de l'Ancien Régime (XVIe–XVIIIe)", in: *La formazione storica*, vol. I, pp. 179 sqq.; Klaus Luig, "Der Geltungsgrund des römischen Rechts im 18. Jahrhundert in Italien, Frankreich und Deutschland", in: *La formazione storica*, vol. II (1977), pp. 834 sqq. For much more hostile comment, see Christian Thomasius, *Institutiones Jurisprudentiae Divinae Italia* (1702), Lib. II, Cap. XI, 63 ("Hinc distinctiones . . . in nescio quas subspecies obscurissimas, quarum singulae infinitis litigiis inter Jurisconsultos dederunt occasionem ortae sunt"). On Thomasius' attitude towards the Roman law generally, see Wolfgang Ebner, *Kritik des römischen Rechts bei Christian Thomasius* (unpublished Dr. iur. thesis, Frankfurt, 1971).

[140] *Les loix civiles*, Liv. I, Tit. I, 8.

[141] *Traité des obligations*, n. 4.

promise.[142] This was a heritage of scholastic moral theology, where the binding nature of both the promissory oath and the simple promise had been emphasized; breach of faith displeases God and is a sinful deviation from the precepts of honesty and truthfulness.[143] Grotius blended this tradition with man's natural freedom to act or not to act in a specific manner. A binding promise thus has the effect of an "alienatio particulae cuiusdam nostrae libertatis";[144] and such an alienation can ultimately find its legitimation only in the fact that it has been willed by the alienor. On the other hand, however, Grotius also mentioned the requirements of a "signum volendi"[145]—the will to be bound has to find some external manifestation[146]—and of an "acceptatio" on the part of the promisee.[147,148] It was Pufendorf who installed the pactum (as opposed to the promissio) as the central category of the systematic endeavours of the natural lawyers,[149] and it was Christian Wolff who rounded off the development by introducing the modern term *"Vertrag"*.[150] Wolff also emphasized consensus as basis and reason for the contractual obligation and defined it as "volitio, ut fiat, vel non fiat, quod alter fieri vel non fieri vult".[151] Pufendorf, in so far as he was thinking along the lines mapped out by Grotius, had still required two "consents", one on the part of each of the parties to the contract: "Ut

[142] Cf. in particular Malte Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen* (1959); Nanz, *Vertragsbegriff*, pp. 139 sqq. Cf. also § 861 ABGB; for a general evaluation of the influences of the Roman ius commune and of natural law in the contract law of the ABGB, cf. Gunter Wesener, "Naturrechtliche und römisch-gemeinrechtliche Elemente im Vertragsrecht des ABGB", 1984 *ZNR* 113 sqq.

[143] For details of the tradition on which Grotius built (particularly Molina and Lessius), cf. Diesselhorst, *Hugo Grotius*, pp. 4 sqq., 10 sqq., 39 sqq.

[144] *De jure belli ac pacis*, Lib. II, Cap. XI, 4. Cf. also *Inleiding*, III, I, 1 and 12; see further Okko Behrends, "Treu und Glauben, Zu den christlichen Grundlagen der Willenstheorie im heutigen Vertragsrecht", in: L.L. Vallauri, G. Dilcher (eds.), *Christentum, Säkularisation und modernes Recht*, vol. II (1981), pp. 964 sqq.

[145] *De jure belli ac pacis*, Lib. II, Cap. XI, 3 and 4.

[146] Reason: ". . . nudis animis actibus efficientiam juris tribuere non fuerat congruum naturae humanae, quae nisi ex signis actus cognoscere non potest": *De jure belli ac pacis*, Lib. II, Cap. IV, 3.

[147] *De jure belli ac pacis*, Lib. II, Cap. XI, 14; cf. also *Inleiding*, III, I, 10: "Toczegging noemen wy een willighe daed eens mensches waer door hy aan een ander iet belooft, met meninghe dat den ander het zelve aennemen ende daer door op den belover eenig recht zal mogen verkrijgen." For details, see Diesselhorst, *Hugo Grotius*, pp. 106 sqq., 111 sqq.

[148] The question has recently been asked whether Grotius' view of contract as the sum of two unilaterally binding promises does not reflect the psychological realities much better than the "mystification" of a consensus: Eugen Bucher, "Für mehr Aktionendenken", (1986) 186 *Archiv für die civilistische Praxis* 21.

[149] *De jure naturae et gentium*, e.g. Lib. III, Cap. IV; cf. further Malte Diesselhorst, *Zum Vermögensrechtssystem Samuel Pufendorfs* (1976); Lipp, op. cit., note 105, pp. 141 sqq.; Nanz, *Vertragsbegriff*, pp. 149 sqq.

[150] *Grundsätze des Natur- und Völckerrechts* (Halle, 1754), § 438; Nanz, *Vertragsbegriff*, pp. 165 sqq. The term *"Vertrag"*, incidentally, is derived from *"sich vertragen"*, which means as much as to agree, to make peace, to be reconciled (with each other) and thus has connotations vaguely similar to the Latin "pactum".

[151] *Institutiones* § 27; cf. also Mayer-Maly, "Die Bedeutung des Konsenses", op. cit., note 105, pp. 98 sq.

promissio sit valida, requiri non solum consensum ejus, qui promittit, sed et ejus, cui promittitur."[152] Obviously, therefore, in terms of Pufendorf's analysis, the conclusion of a contract is dependent upon an act of volition on the part of both parties concerned. Apart from that, however, it is also necessary that these "actu[s] voluntatis . . . signis . . . manifestantur".[153] As a result, we have two declarationes voluntatis as essential elements for the formation of the contract. This analysis of contract in terms of two (coinciding) declarations of intention *("Willenserklärungen")*[154] was ultimately merged with Wolff's consensual theory of contract and became one of the legacies of natural law to the modern law of contract.[155,156]

6. Formation of contract in English law

(a) England and Continental legal science

This influence was not confined to the European continent. The history of the law of contract provides ample support for a thesis crisply stated by Edmund Burke in the words: "The Laws of all the nations of Europe are derived from the same sources."[157] It is in this spirit that William Strahan set about translating Domat's *Loix civiles* into English: it contains "all the Fundamental Maxims of Law and Equity, which must be the same in all countries".[158] It is in this spirit, too, that in 19th-century Britain treatises became the typical form of legal

[152] *De jure naturae et gentium*, Lib. III, Cap. VI, § 15.

[153] *De jure naturae et gentium*, Lib. III, Cap. VI, § 16.

[154] The doctrine of *"Willenserklärung"* (declaratio voluntatis) owes much to Wolfgang Adam Lauterbach; cf. his *Disputatio de voluntate*, as discussed by Mayer-Maly, "Die Bedeutung des Konsenses", op. cit., note 105, pp. 97 sq. and *Festschrift Seidl*, pp. 126 sq. Generally on the history of this concept, see Siegmund Schlossmann, "Willenserklärung und Rechtsgeschäft. Kritisches und Dogmengeschichtliches", in: *Festgabe der Kieler Juristen-Fakultät für Hänel* (1907), pp. 48 sqq.; Hermann Dilcher, "Die Willenserklärung nach dem preussischen ALR 'frei, ernstlich und zuverlässig' ", in: *Gedächtnisschrift für Hermann Conrad* (1979), pp. 85 sqq.

[155] Savigny dealt with the concept of contract and all questions relating to its formation within the general part of his system of private law (on the idea of a "general part" cf. supra, p. 31); he thus detached it from the law of obligations. Cf., for example, *System*, vol. III, pp. 7, 310, and Hammen, *Savigny*, pp. 95 sqq. This is also the approach adopted in the BGB which includes in book one its rules both on declarations of intention (*Willenserklärungen*; §§ 116 sqq. BGB), and on contracts (*Verträge*; §§ 145 sqq. BGB). Book two (containing the law of obligations) commences only with § 241. On the reasons cf. "Motive", in: *Mugdan*, vol. I, p. 422. The generic term, covering both *"Willenserklärung"* and *"Vertrag"* is that of *"Rechtsgeschäft"* (legal act); cf. the title of Book I, section III (§§ 104–185 BGB). On the history of this concept cf. Flume, *AT*, pp. 23 sqq., 28 sqq.; Hattenhauer, op. cit., note 105, pp. 58 sqq.

[156] In recent times, the concept of contractual liability based on consent has been questioned; cf., as far as England is concerned, Atiyah, *Rise and Fall*, passim, e.g. pp. 716 sqq.; for Germany cf. e.g. the discussion by Eugen Dietrich Graue, "Vertragsschluss durch Konsens?", in: G. Jakobs (ed.), *Rechtsgeltung und Konsens* (1975), pp. 105 sqq.

[157] Cf. Harold J. Berman, *Law and Revolution* (1983), p. 18.

[158] The translator's preface, p. X.

writing.[159] This is well illustrated by the first English monograph that can properly be called a legal treatise, Sir William Jones's essay on the *Law of Bailments* (1781). In the introduction to this work, Jones sets out his plan of work as follows:

> "I propose to begin with treating the subject analytically, and, having traced every part of it up to the first principles of natural reason, shall proceed historically, to show with what perfect harmony these principles are recognized and established by other nations, especially the Romans, as well as by our English Courts, when their decisions are properly understood and clearly distinguished. . . ."[160]

Significantly, it was a branch of the law of contract that was first subjected to this treatment; and in a sense, therefore, Jones's book heralded the era of innovation into which the English contract law was about to enter.[161] The stress on principles, as Atiyah has pointed out, was an important element in contemporary intellectual ideals.[162] Thus, in the law of contract the emphasis shifted from the traditional method of jumbling around individual precedents to a systematic exposition of general principles. Hence the need for books which dealt with the law of contract as a whole. These textbooks were written by scholars who were usually well versed in Roman law. They created the modern general law of contract,[163] and in doing this, they were

> "engaged upon an enterprise which was new to the common law . . . but old to the civilian tradition; they were trying to do what the civilians, the canonists and the natural lawyers had been doing for centuries".[164]

It is hardly surprising, therefore, that they borrowed heavily from that civilian tradition: from Roman law, from Domat, Grotius and Pufendorf, from Pothier and from Savigny. Domat's, Grotius' and Pufendorf's main works were all available in English translation by the end of the 18th century. Pothier's *Traité des obligations* was made accessible to English lawyers by W.D. Evans in 1806 and it soon became one of the most influential sources of modern English contract law. The high esteem in which Pothier's clear and eminently readable exposition of the law was held not only by academic writers but also by the English courts can perhaps best be gauged from the extravagant remark by Best J, in *Cox v. Troy*: "[T]he authority of Pothier . . . is as high as can be had, next to the decision of a Court of Justice in this country."[165] A translation of the first part of Savigny's *System des heutigen römischen Rechts* was published only in 1867[166] and came perhaps too late to exercise an equally profound influence on the development of English contract law. Sir Frederick Pollock (the first edition of whose treatise on the law of contract appeared eight years after Holloway's translation), in particular, however, relied heavily on Savigny.[167]

[159] Cf. especially A.W.B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature", (1981) 48 *University of Chicago LR* 632 sqq.
[160] At p. 4.
[161] Cf. the analysis of A.W.B. Simpson, "Innovation in Nineteenth Century Contract Law", (1975) 91 *LQR* 247 sqq.
[162] *Rise and Fall*, p. 345. Cf. also at pp. 388 sqq., where the rise of formalism and, in conjunction with it, principle-orientation is discussed.
[163] Atiyah, *Rise and Fall*, pp. 398 sqq., 681 sqq.
[164] Simpson, (1975) 91 *LQR* 254.

(b) *The analysis of contract*

If we look at the formation of contract, most modern textbooks analyse it in terms of offer and acceptance, an intention to create legal relations and the doctrine of consideration. All three requirements appear to be deeply engrained in the English common law. And yet, it is only the doctrine of consideration that has been an integral part of it for a considerable period of time; it evolved, as we have seen, in the 16th century,[168] and was closely related to the emergence of the action of assumpsit.

The analysis of contract as a legal transaction formed by offer and acceptance, was superimposed upon the doctrine of consideration in the course of the 19th century by treatise-writers such as Powell and Chitty, Pollock and Anson.[169] Essentially, they adopted the civilian doctrine as it had been developed by Grotius and Pufendorf, and as they had found it in Pothier. Judicial recognition came as early as 1818, in the famous case of *Adams v. Lindsell*.[170]

The third of the above-mentioned criteria serves to distinguish legal arrangements from extralegal, merely social ones. If—as was supposed—all contractual obligations are the product of the joint wills of the contracting parties, it does not follow—conversely—that every agreement must necessarily be legally enforceable. Whether or not an agreement should have any legal consequences must depend, in turn, on the intention of the parties.

> "If people make arrangements to go out for a walk or to read a book together, that is no agreement in a legal sense. Why not? Because their intention is not directed to

[165] (1822) 5 B & Ald 474 at 480. For further details concerning the reception of Pothier in England and (via England) South Africa, cf. Reinhard Zimmermann, "Der Einfluss Pothiers auf das römisch-holländische Recht in Südafrika", (1985) 102 *ZSS* (GA) 168 sqq., 176 sqq.
[166] *System of the Modern Roman Law*, translated by W. Holloway.
[167] "Considering the amount of coincidence (if not more than coincidence) between English and Roman law in the main principles of Contract, I have felt justified in making a pretty free use of the Roman law for purposes of illustration and analogy. . . . On points of Roman law (and to a considerable extent, indeed, on the principles it has in common with our own) I have consulted and generally followed Savigny's great work." (*Principles of Contract at Law and in Equity* (1st ed.), foreword).
[168] Cf. supra, pp. 554 sqq.
[169] Simpson, (1975) 91 *LQR* 258 sqq.; Atiyah, *Rise and Fall*, pp. 446 sqq.
[170] (1818) 1 B & Ald 681. Cf. also Stefan A. Riesenfeld, "The Impact of Roman Law on the Common Law Systems", (1985) 1 *Lesotho LJ* 269 sqq.

legal consequences, but merely to extralegal ones; no rights or duties are to be created."[171]

Hence the doctrine that a legally binding agreement must be accompanied by a joint intention of the parties to create legal relations.[172] Pollock took it over from Savigny,[173] but its civilian pedigree dates back, far beyond Pothier and Pufendorf, to the writings of the glossators.[174] In *Carlill v. Carbolic Smoke Ball Company*,[175] the new dogma received the stamp of judicial approval.

7. Contract and pollicitatio

(a) From promise to contract

Even more important, however, than the reception of these and other individual doctrines was the fact that in the course of the 19th-century contract emerged as the essential systematic cornerstone of the law of obligations. Contractual obligations, it was now argued, were those arising from voluntary acts of the will.[176] Everything that did not fall within the purview of contract was either tort or quasi-contract. Yet, traditionally, the common law had been primarily concerned with promissory liability[177] (as had indeed been continental canon law). It had grown up around the action of assumpsit,[178] a remedy for breach of promise.[179] Promise and breach of promise are essentially one-sided notions, and they were now replaced by an essentially two-sided conception.[180] As a consequence of this, unilateral acts, particularly the promise of a reward, were now bound to give rise to severe doctrinal headaches. Here we come, once again, across the ever-memorable smoke ball case.[181]

[171] Frederick Pollock, *Principles of Contract at Law and in Equity* (1876), p. 2.
[172] Simpson, (1975) 91 *LQR* 263 sqq.
[173] *System*, vol. III, § 140.
[174] Cf. supra, pp. 559 sq.
[175] [1893] 1 QB 256 (CA); on this aspect of the smoke ball case, see Simpson, (1985) 14 *Journal of Legal Studies* 375 sqq. Cf. further especially *Heilbut, Symons & Co. v. Buckleton* [1913] AC 30 (HL).
[176] Cf. e.g. Kindersley VC in *Haynes v. Haynes* (1861) 1 Dr & Sm 426 at 433: "When both parties will the same thing, and each communicates his will to the other, with a mutual agreement to carry it into effect, then an engagement or contract between the two is constituted"; Atiyah, *Rise and Fall*, pp. 405 sqq. (esp. p. 407).
[177] Cf. e.g. Simpson, (1975) 91 *LQR* 257 sqq.
[178] On the connection between canon law (laesio fidei) and the growth of assumpsit, see R.H. Helmholz, "Assumpsit and Fidei Laesio", (1975) 91 *LQR* 406 sqq. On the emergence and rise of the action of assumpsit generally, see A.W.B. Simpson, *History*, passim.
[179] Simpson, *History*, pp. 248 sqq.
[180] Simpson, (1975) 91 *LQR* 257.
[181] For a recreation "of the historical background and significance of this landmark in the history of contract law and its relationship to the seedy world of the late nineteenth-century vendors of patent medical appliances", cf. A.W.B. Simpson, "Quackery and Contract Law: The Case of the Carbolic Smoke Ball", (1985) 14 *Journal of Legal Studies* 345 sqq. The brief account that follows in the text is based on Simpson's analysis.

(b) The smoke ball case

A certain Frederick Augustus Roe had invented the carbolic smoke ball as a ". . . Device for Facilitating the Distribution, Inhalation and Application of Medicated and Other Powder". In the wake of the great influenza epidemic that swept through England in the winter of 1889–90, he began to market it as being able to "positively cure Influenza, Catarrh, Asthma, Bronchitis, Hay Fever, Neuralgia, Throat Deafness, Hoarseness, Loss of Voice, Whooping Cough, Croup, Coughs, Colds, and all other ailments caused by Taking Cold". A massive promotion campaign was launched, in the course of which an advertisement was placed in the *Pall Mall Gazette* of 13 November 1891, promising a reward of 100 Pounds Sterling to be paid by the Carbolic Smoke Ball Co.

> "to any person who contracts . . . Influenza, Colds, or any diseases caused by taking cold, after having used the ball 3 times daily for two weeks according to the printed directions supplied with each Ball".

Mrs. Carlill saw the advertisement, purchased a smoke ball and diligently snuffed and sneezed three times daily for two weeks. Despite all her exertions, she contracted influenza shortly afterwards. When she claimed the 100 Pounds Sterling promised, Roe refused to pay. Legal proceedings were instituted,[182] in the course of which a verdict was given in favour of Mrs. Carlill[183] and upheld on appeal.[184] The background story to this case, which has recently been unfolded, is full of interesting and amusing details. The crucial point, however, in our context, is that the court did not regard the promise of the reward as such as binding. It tried to fit the decision into the new doctrinal framework and declared that the reward could be claimed only on the basis of a "unilateral" contract. Like all contracts, it required the exchange of offer and acceptance. Consequently, the advertisement was taken to constitute an offer (ad incertas personas), which Mrs. Carlill had, in turn, accepted by performing the act specified therein. It can hardly be denied that this extension of the concept of acceptance (which need not be communicated to the offeror) is a somewhat strained construction.[185]

(c) "Auslobung" and pollicitatio

Yet, by attempting to reconcile these types of cases with (what had by then become) orthodox contractual theory, the English common law has been more rigid and dogmatic than some of the modern civilian

[182] The defence was led by H.H. Asquith, Q.C., who became Home Secretary shortly afterwards, and later Prime Minister (1908–1916).
[183] [1892] 2 QB 484; the trial was before Hawkins J ("assisted by his fox terrier Jack, which always sat on the bench with him": Simpson, (1985) 14 *Journal of Legal Studies* 362).
[184] [1893] 1 QB 256.
[185] Simpson, (1985) 14 *Journal of Legal Studies* 378.

jurisdictions themselves. In the German Civil Code, special provision is made for the promise of a reward.[186] It is known as *"Auslobung"*,[187] a unilateral act, which does not require acceptance. Whoever performs the condition of the reward is entitled to claim, whether he knew of the promise and acted with a view to the reward or not. Contrary to the prevailing opinion under the ius commune,[188] the BGB does therefore not regard *"Auslobung"* as a contract;[189] we are dealing here with one of those rare exceptions to the general principle of § 305, according to which for the creation of an obligation by legal transaction a contract between the parties is necessary.[190]

It is interesting to observe that the South African courts have not seen their way open to adopt a similar approach.[191] They have come to the same conclusion as the English courts and therefore had to dismiss—reluctantly[192]—the claim of a certain Mr. Bloom who had performed the act (for which a reward had been publicly announced) without, however, having had any knowledge of this offer of reward. Since under these circumstances he could not have intended to accept anything, no contract had come into existence; and as a result of this, no legal tie had been established between the parties.[193] This solution may be inconvenient and unsatisfactory but it cannot be described as wrong from a historical point of view; for a general institution of a promise of reward constituting a unilaterally binding legal act can be found in neither the Roman nor the classical Roman-Dutch sources.[194] Pollicitatio is probably the closest we get. But although this was indeed an informal, unilateral promise that was enforceable in the cognitio extra ordinem,[195] it was a far cry from a promise of reward à la §§ 657 sqq. BGB.[196] Firstly, the pollicitatio was made for the benefit of the promisor's municipality, that is, of a specific (public) body, whereas it is a characteristic feature of the promise of reward that a specific addressee does not in fact exist; it is a promise ad incertas personas. And secondly, the institution of pollicitatio was designed exclusively to serve the public interest; only as far as the promise of gifts or

[186] § 657 BGB.
[187] This term is of very recent origin (second half of the 19th century) and has not managed to establish itself in popular parlance; cf. Hans Hermann Seiler, in: *Münchener Kommentar*, vol. III, 2 (2nd ed., 1986), § 657, n. 1.
[188] "Contractual theory": cf. e.g. Vangerow, § 603, n. 2; Windscheid/Kipp, § 308.
[189] "Motive", in: *Mugdan*, vol. II, p. 290.
[190] Jost Wiechmann, *Der Ausschluss des Rechtsweges bei den öffentlichen Belohnungsversprechen* (1987), pp. 56 sqq.
[191] *Bloom v. The American Swiss Watch Company* 1915 AD 100.
[192] *Bloom's* case at 107 (per De Villiers AJA).
[193] *Bloom's* case at 103 (per Innes CJ).
[194] Karlheinz Dreiocker, *Zur Dogmengeschichte der Auslobung* (unpublished Dr. iur. thesis, Kiel, 1969), pp. 10 sqq., 65 sqq.
[195] Cf. supra, p. 496.
[196] In favour of a close historical connection, cf. Rudolf Düll, "Auslobung und Fund im antiken Recht", (1941) 61 *ZSS* 19 sqq. But see Dreiocker, op. cit., note 194, pp. 16 sqq.

performances of work "propter communem utilitatem" were concerned, was one prepared to deviate from general principles (that is, from the requirement of consensus). Promises of reward, on the other hand, are not thus confined; it is usually the promisor's private interest that dominates. All this is not to say that no private rewards were promised in Roman times. On the contrary: we find a variety of examples in Roman literature as well as, for instance, in inscriptions on walls and necklaces of slaves.[197] Characteristically, however, they were not treated as pollicitationes, but seem, by and large, to have remained extra-legal phenomena.[198]

(d) Pollicitatio and contractual liability

How does pollicitatio fit into the modern system of contractual liability, as designed, essentially, by the natural lawyers? Grotius, as we have seen, required acceptance in order that a promise may transfer a right.[199] Consequently, neither promissio nor pollicitatio was able to confer (iure naturali) a right upon another person to compel performance. Grotius' subtle distinction between promissio and pollicitatio[200] tended to be dropped by later writers,[201] but whether one identified the two or not, the result remained the same: "jus proprium alteri non dat".[202] This view, shared, as far as Roman-Dutch law is concerned, by Voet[203] and others, prevailed in most civilian systems down to the 19th century;[204] via Pufendorf and Pothier, it filtered through into the English common law. Pothier, as usual, stated the conceptual distinctions most clearly. A contract includes the concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise. A pollicitatio, on the other hand, is a promise not yet accepted by the person to whom it is made. *"[A]ux termes du pur droit naturel"*, it does not produce, without

[197] Cf. Dreiocker, op. cit., note 194, pp. 40 sqq. Cf., for example, Petronius, *Satiricon*, XCVII, 2: "Puer in balneo paulo ante aberravit, annorum circa XVI, crispus, mollis, formosus, nomine Giton. Si quis eum reddere aut commonstrare voluerit, accipiet nummos mille."
[198] Kaser, *RPr* I, p. 604.
[199] Cf. supra, p. 568, note 147.
[200] A promissio, according to Grotius, was designed, if accepted, to confer a ius upon another person; the person who uttered a pollicitatio, on the other hand, did not contemplate such a transfer of a right; cf. *De jure belli ac pacis*, Lib. II, Cap. XI, 3 sq. and Lib. II, Cap. XI, XIV. Pufendorf (*De iure naturae et gentium*, Lib. III, Cap. V, 6) describes pollicitatio as an "imperfecta promissio". Cf. also Geoffrey MacCormack, "A Note on Stair's Use of the Term Pollicitatio", 1976 *Juridical Review* 124.
[201] Cf., for example, Voet, *Commentarius ad Pandectas*, Lib. L, Tit. XII, I ("Pollicitatio est solius offerentis promissio").
[202] *De jure belli ac pacis*, Lib. II, Cap. XI, 3.
[203] *Commentarius ad Pandectas*, Lib. L, Tit. XII (listing, however, a considerable number of exceptions to the principle).
[204] T.B. Smith, "Pollicitatio—Promise and Offer", in: idem, *Studies Critical and Comparative* (1962), pp. 168 sqq.; cf. also Coing, p. 408.

such acceptance, what can properly be called an obligation.[205] This exposition (based; as it was on Ulp. D. 50, 12, 3)[206] became the basis of the English doctrine of offer and acceptance.[207] A pollicitation is "a promise made but not accepted";[208] but only an accepted promise can give rise to a (contractual) obligation.

The concept of pollicitatio as a unilateral but binding promise was revived in Germany only in the course of the 19th century. Somewhat surprisingly, the so-called *"Pollizitationstheorie"*[209] was, as we have seen, accepted by the drafters of the BGB.[210] In Scotland, the same view had already gained ground much earlier, since Viscount Stair in his *Institutions of the Law of Scotland* had refused to follow Grotius in this respect; in his view, an absolute promise which does not contemplate acceptance is enforceable as such.[211] Sir Percival Gane's suggestion that pollicitatio may yet figure prominently in South African law has thus far not been taken up. "It is curious", Gane wrote in 1957,[212]

> "that in a country in which promises to public concerns and civic bodies are not uncommon, and promises to religious bodies very common, more use has not been made of this title [sc. D. 50, 12 De pollicitationibus]."

It goes to show that the civilian doctrine of offer and acceptance in its inflexible English form still reigns supreme in this part of the world.

IV. PACTA SUNT SERVANDA

1. Pacta sunt servanda and classical contract doctrine

A final word on pacta sunt servanda. We have seen how the praetor's promise, as related by Ulpian in D. 2, 14, 7, 7, was turned into this general maxim by the canon lawyers.[213] Its import was, first of all, to assert the principle of consensualism: all pacts are binding, regardless of whether they are clothed or naked. However, once this principle had generally gained acceptance, the significance of "pacta sunt servanda" shifted slightly. The maxim was now taken to imply that contractual

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[205] *Traité des obligations*, n. 4.

[206] "Pactum est duorum consensus atque conventio, pollicitatio vero offerentis solius promissum."

[207] Simpson, (1975) 91 *LQR* 259.

[208] John Austin, *Lectures on Jurisprudence*, vol. II (1885), p. 906.

[209] Cf. e.g. Dernburg, *Pandekten*, vol. II, § 9; Arndts, *Pandekten*, § 241; Baron, *Pandekten*, § 211.

[210] § 657 BGB.

[211] *Institutions of the Law of Scotland* (4th ed.), vol. I (1826), Book I, Tit. X, IV; T. B. Smith, op. cit., note 204, pp. 168 sqq., 173 sqq.; cf. also D.I.C. Ashton Cross, "Bare Promise in Scots Law", (1957) 2 *Juridical Review* 138 sqq. There is considerable confusion as to the use of the terms "promissio" and "pollicitatio" by Stair; cf. Alan Rodger, "Molina, Stair and the Jus Quaesitum Tertio", 1969 *Juridical Review* 130 sqq.; MacCormack, 1976 *Juridical Review* 121 sqq.

[212] Percival Gane, *The Selective Voet*, vol. VII (1957), Book L, Title 12, translator's note.

[213] Cf. supra, p. 543.