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Excerpt

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## PART 1

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### Theoretical and historical introduction

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The concept of promise

There are a number of principal arguments advanced in this work, among them that promise has played a central role in obligations theory and practice (in part, though not merely, because it has been used to describe the nature of contract),<sup>1</sup> that the idea of promise as a manifestation of human will and commitment is central to an understanding of contract, that this idea explains much of the body of contractual rules and doctrines applied by the courts, and that promise narrowly defined (as a unilateral promise) is a better explanation for a number of circumstances in which voluntary obligations are intended than is the bilateral obligation of contract. However, none of these arguments can sensibly be advanced without first settling the fundamental definition of the idea of a promise and the characteristics of the practice or institution of promising. For that reason, this chapter will address some very basic matters, including: the constituent elements of a promise; how promises are formed; what the party making a promise (the promisor) must intend before a promise can exist; whether the beneficiary of a promise (the promisee) must also intend anything before the promise can be constituted; whether promises must be accepted before they bind the promisor; and whether promises may be made subject to conditions.

These questions will not be posed simply with legal understandings of promise in mind, but also with regard to other disciplines, including linguistics and morality. Such an inter-disciplinary approach recognises that promise, and the institution of promising, is not the preserve of lawyers alone, but is a feature of human society the effects of which cannot be neatly contained within the boundaries of a single academic field. There will, however, be some specifically legal discussion later in the

<sup>1</sup> The description of a contract in the US Restatement (Second) of Contracts is typical of such a usage of the promissory idea: contract is 'a promise ... for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty' (§1).

chapter, when the focus will be on three aspects of promise which are crucial for the law's conception of promise, these being whether a promise is by nature gratuitous, conditional and unilateral. Lack of precision about what these three concepts mean has been productive of much confusion in the debate as to the nature of promise and as to whether contract can be said to be about promising. It is hoped that clarity as to the meaning of these terms will enable such confusion to be resolved.

### 1. What is a promise?

#### (a) *A definition of promise*

To begin with, an attempt will be made to provide a definition of a promise; without such a definition, it must inevitably be unclear which types of transaction or behaviour can constitute promises and which cannot.<sup>2</sup> In seeking to construct such a definition, an attempt will be made not only to be as inclusive as possible, but also as jurisdictionally and disciplinary neutral as possible. In attempting this definitional task, a number of suggestions about the nature of promises will simply be stated, without (to begin with) any attempt to explore whether they are valid, so that a possible basis can be laid out for exploring the whole of the potential field of enquiry. The suggestions to be made are empirically based, deriving from observations of commonly conceived features of promise. Though this methodology may seem somewhat arbitrary, it is justified on the basis that, because promising is an institution constructed by human societies, it is therefore legitimate to examine how such societies conceive of the institution. Some might dispute the assertion of promise as a human institution, but challenges to such a view will require to wait until later in the chapter. It is hoped that the end result of this process will be a definition of promise which accurately describes the institution of promising

<sup>2</sup> It is surprising that in some of the leading modern works on promise this task of defining promise is not attempted. Thus, in Atiyah's *Promises, Morals and Law*, no clear definition of a promise is offered at any single point in the text, it merely being noted (p. 8) that the discussion will include both morally binding and non-binding promises. As a result, one is never clear exactly what Atiyah means by his reference to a promise at any stage of his argument. His treatment of vows (p. 54) is also undertaken without the provision of a definition. Consequently, he seems to conceive that a vow can lack a party to whom the vow is addressed, which is a quite different understanding of a vow to that taken in this work. Fried similarly fails to provide a comprehensive definition of a promise, saying simply that 'when I promise I commit myself to act, later' (Fried, *Contract as Promise*, p. 9), which expresses only some of the necessary elements of a promise. More recently, Kimel, in *From Promise to Contract*, also fails to offer a definition of promise.

and the promises to which it gives rise (the problem of different linguistic constructions with a similarity to the promise, as well as different cultural understandings of the phenomenon of promising, are also considered later in the chapter). The elements of the suggested definition produced by this process will then be tested for accuracy.

A good place to begin in creating a definition of promise is to ask who is conceived of as being able to make promises. Societies generally seem to wish to include human beings (both adults and children), as well as legally recognised entities such as companies, partnerships, governments, clubs and societies.<sup>3</sup> There is also a general wish to include supernatural beings, such as God, as promise makers, even if some may doubt the existence of God, for it is incontrovertible that religions have historically conceived, and do still conceive, of divine promises, and that such conceptions have been influential in the development of understandings of promise (as the discussion in later chapters will indicate). Given this range of persons who make promises, it can also be observed that, from whichever category of human, juristic, or supernatural they come, persons from one category are generally conceived of as being able to make promises to any of the other two categories of person (so a human being may make a promise to a company, two partnerships may exchange promises, God may make promises to human beings, and so forth). Second, it seems that promises are commonly conceived of as being more than merely internal thought promises. A promisor must do something other than mentally intending something: he must demonstrate his intention in some objectively observable fashion. Third, many promises seem to be made without any expectation on the part of the promisor that he will get any benefit from making the promise: they are what may be called gratuitous. So, for instance, a person may promise to mend another's garden fence for nothing. On the other hand, some promises seem to be given in the hope, or even with the legal entitlement, of some reciprocal benefit being received by the promisor. Thus, a company may promise to allot shares to an individual in exchange for money. Fourth, some promises are made without any condition attached, so that there is no uncertainty surrounding the fact that the promisor will be obliged to undertake the promised act. On the other hand, some promises are made with conditions attached. Thus, one person may promise another a lift in his car if the latter is unable to buy a ticket for a particular train. In such a case,

<sup>3</sup> Though these last two are not always conceived of as having personality in some legal systems, and thus not being able to make promises in their own name.

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the promisor is only obliged to fulfil the promise if the condition is met. Fifth, a promise is understood to entail the idea that the promisor is placing himself under some obligation, an enforceable duty or commitment to the promisee, whether of a moral or legal nature (a subject discussed more fully in Chapter 2). Last, it seems that it is generally conceived that the nature of the duty which the promisor is undertaking is the performance of some future act (which may include *not* doing something) which will be of benefit to the promisee.

These commonly held features of a promise allow a definition for a promise to be proposed. Such a definition is one which, it is suggested, is capable of satisfying the understanding of a promise held by different human disciplines, including those of sociology, psychology, theology and the law. Drawing on what has been said above, therefore, the following definition of a promise may be proposed:

A promise is a statement by which one person commits to some future beneficial performance, or the beneficial withholding of a performance, in favour of another person.

Some examples of statements which might constitute promises have already been suggested above. Given the proposed definition, a few more statements which would seem to qualify as promises may be suggested:

‘I promise to pay you what I owe you next week.’  
 ‘I promise to marry you when I get a job.’  
 ‘I promise to pay my taxes promptly in future.’  
 ‘I promise to give you a lift to the shops in my car on Saturday.’  
 ‘I promise to stand as guarantor for my son’s debt.’  
 ‘I promise not to trespass on your land again.’  
 ‘I promise that I will visit you in hospital tomorrow.’

In fact, given what was suggested earlier, that a promise must objectively demonstrate an intention to accept an obligation,<sup>4</sup> there would in addition seem to be no objection to a promise being constituted by a simple affirmative response to an enquiry as to whether a stated commitment was being undertaken. Thus, the question ‘Do you undertake to ensure that I will receive the package tomorrow?’ met with the reply ‘Yes’ would seem to give rise to a promise on the part of the person giving the positive

<sup>4</sup> See, for a recent exposition of the idea that the essence of contract lies in the acceptance of, or assumption of, an obligation, Coote, *Contract as Assumption*. Coote summarises his view (p. 42) thus: ‘In essence, a contract is a promise or undertaking in respect of which legal contractual obligation has been assumed by means which the law recognises as effective for that purpose.’

response.<sup>5</sup> Additionally, there is no reason why the idea of a promissory 'statement' might not be interpreted sufficiently widely to allow inclusion of non-verbal conduct manifesting promissory intent. So, a handshake, or the handing over of a key to a safe in which were contained funds sufficient to satisfy a debt, might equally be considered a 'statement' indicative of promissory intent.

In all of the above examples, the use of the phrase 'I promise that ...' would reasonably be interpreted by the hearer as an indication of an intention on the speaker's part to be bound by the commitment described in the statement. In other words, what the speaker would be doing in each of the above examples by uttering the phrase 'I promise that ...' could, in the alternative, have been done by uttering the more expansive phrase 'I am hereby promising that ...'. So, to utter the phrase 'I promise that ...' is, in this first sense of the phrase, to intend to undertake a promise in the act of the utterance. It must, however, be appreciated that there is a second sense which may be intended by use of the phrase 'I promise that ...', a sense which operates merely as a description of the act of promising, rather than as a phrase constitutive of a promise itself. In this second sense, a narrative rather than an active form, the phrase could be used by someone seeking to describe an act of promising and who was asking another to consider what the import of such a promise might be. So, 'I promise that ...' could be intended to mean 'Imagine that I were to promise that ...'.<sup>6</sup> Alternatively, also in this second sense of the phrase, it might be intended to describe a frequent habit of the promisor in making promises, as in 'On a regular basis, I promise that I will help my friends'. In this second sense therefore, the speaker is not making a promise, but merely describing the act of promising. What sense is meant by a speaker should be evident from the surrounding circumstances in which the phrase is uttered.<sup>7</sup>

It is important at this early stage of the analysis of promises to note that it is generally considered that it is not necessary to employ the verb 'promise' in order to make a promise, even though it is that verb which in

<sup>5</sup> As the discussion in Chapter 3 will indicate, such an answer and question format was the method by which the form of contract called *stipulatio* was undertaken in Roman law: see p. 111.

<sup>6</sup> For instance, as in this phrase, which might be used by a legal tutor to pose a question to a class: 'I promise that I will marry someone: what consequences would follow from such a promise?'.  
<sup>7</sup> Similar observations might be made of other words indicating commitment, e.g. 'I pledge that ...' or 'I swear that ...'.

English is most commonly used.<sup>8</sup> Any other verb which unequivocally indicates, from the context of its usage, an intention to commit to a future performance in favour of another will suffice. Thus, in English, alternative words or phrases such as ‘accept’, ‘assure’, ‘dedicate’, ‘undertake’, ‘guarantee’, ‘give you my word that ...’, ‘commit’, and ‘pledge’ will each suffice, in an appropriate context,<sup>9</sup> to indicate an intention to enter into a promise.<sup>10</sup> The words ‘vow’ and ‘swear’ may perform a similar function, though, as is discussed further below, vows and oaths have been the subject of somewhat distinct treatments by different societies and cultures and therefore require separate consideration. Some forms of words cause problems, however. The use of the form ‘I will do *x*’ is one such difficult case, as the intention communicated by the phrase ‘I will’ is ambiguous. Thus, if rather than stating ‘I promise to pay you what I owe you next week’, the speaker instead says ‘I will pay you what I owe you next week’, does such a statement indicate commitment of a promissory type or is it a mere prediction as to a future event or a statement of future intent? The phraseology when considered alone fails to convey a clear meaning, and any proper determination of the presence or absence of the commitment of the speaker to be bound to an obligation in such a case will inevitably require to have regard either to the circumstances in which the statement was made or conceivably to an operative presumption against or in favour of interpreting ambiguous words in a promissory way.

(b) *Promise: objectively existing phenomenon  
or human construction?*

The discussion thus far has assumed that promising is a legal institution (in the sense of a legal structure governing a specific type of human

<sup>8</sup> The English verb (as with similar verbs in other languages with classical origins) derives from the Latin verb *promittere*.

<sup>9</sup> The context, however, is everything. Use of none of the words listed, not even promise, is conclusive in every case that a promise will be intended or constituted by the speaker’s words, a point which has been made by many linguists, psychologists and jurists, in their respective writings. For instance, as Searle has commented on the phrases ‘I promise’ and ‘I hereby promise’, ‘we often use these expressions in the performance of speech acts which are not strictly speaking promises, but in which we wish to emphasize the degree of our commitment’ (Searle, *Speech Acts*, p. 58).

<sup>10</sup> A useful promissory analysis of many of these phrases, from a linguistic perspective, is found in Hickey, ‘A Promise is a Promise’. Hickey does not mention ‘commit’ in his list of promissory synonyms, because commitment is the concept he uses to define the foundational meaning and content of a promise. He defines commitment as ‘binding oneself to a certain course of action’ (p. 70), such binding usually being of a moral, but also possibly legal, nature.



interaction) of human origins, the nature and boundaries of which are therefore determinable by human societies.<sup>11</sup> An alternative view would be that promising should properly be seen as having an externally determined and constant nature (much like gravity), which it is the task of human beings to discover rather than determine for themselves as a matter of social agreement. A similar debate might be had in respect of other institutions with similarities to promise, such as the vow or the oath which are considered later in this chapter. Whichever view of the nature of the institution of promising were adopted, one would expect its existence to be recognised in a foundational legal rule or norm, that norm being something like 'If A makes a promise in favour of B in the correct form, then that promise must be kept'.

If promising is a given objective reality, rather than a human social construct, describing the nature of promising would be an enquiry focused on discovering its objective nature, rather than an exercise of constructing a definition that seemed to match the human institution of promise. Can a belief in promising as an objective reality be maintained? Theologians might argue that God makes promises and, as human beings, formed in the divine image, we derive our capacity and disposition for promising from God, and that therefore the very concept of the promise has boundaries which are defined by reference to divine acts of promising. Natural lawyers might argue that promising is a fundamental, innate aspect of the human condition, an aspect of the way the world is and thus not something simply created by man through particular instances of social interaction. Linguistic philosophers might argue that even though the promise is a type of human 'speech act', it is one which is employed to describe specific instances of the species of promise, a species which has an existence quite apart from any specific instance of it or of the parties to a particular promise.<sup>12</sup> It is not the intention of this work to explore in depth the complexity of such arguments, but they will be touched on so far as they throw light on the law's conception of promises and the functions the promise plays in contract law. In particular, Chapter 2 (which explores the nature of promise as a moral and legal obligation) will consider the sources of the obligatory nature of promises, and will thus necessarily consider contrary

<sup>11</sup> There is an extensive body of literature on the subject of legal institutions. See for instance MacCormick, *Institutions of Law*; Del Mar and Bankowski, *Law as Institutional Normative Order*; Ruiter, 'A Basic Classification of Legal Institutions' and 'Structuring Legal Institutions'.

<sup>12</sup> Not all linguistic philosophers would agree with such an argument, but it is advanced in the writings of Adolf Reinach (see, principally 'Die apriorischen Grundlagen', trans. by Crosby as 'The Apriori Foundations of the Civil Law').

arguments to the position that promising is a human institution the content of which is determinable by those to whom it applies.

For the moment, however, it will continue to be asserted, without providing a detailed justification for such assertion, that the concept of promising may be determined, as with other human social institutions, by human beings themselves, though it is not denied either that human beings may be predisposed (perhaps genetically, perhaps by virtue of our nature as divinely created beings) to promising, or that the boundaries they give to the institution of promising may not be affected by a theistic belief in an objective and supernatural nature to promising, issues considered further in the next chapter.

The nature of promise will now be explored further by reference to component elements of the working definition suggested above. In this examination, it will become evident that the promissory analysis of non-legal disciplines can often be of assistance to juridical understandings of promise.

(c) *Testing component elements of the definition of promise*

- (i) A promise is more than merely an internal mental process:  
promises as speech acts demonstrating commitment

It was observed when suggesting a definition of a promise that mere internalised mental processes or unarticulated statements – the ‘promise’ made only in the mind of the promisor of the type ‘I shall see to it that my daughter is financially supported while at University’ – should not count as promises properly so called. It is generally accepted across disciplines having an interest in the idea of a promise that some manifested commitment of the person undertaking a promise – whether that commitment be expressed by way of spoken words, writing, or behaviour (for instance, a nod of the head in response to a question asking whether a promise is intended<sup>13</sup>) – to another is required before there may be a promise. So the speaker, uttering the promissory words, must know and intend that in so doing he is undertaking a commitment, that commitment being

<sup>13</sup> Atiyah suggests that, where it is conduct, such as a nod of a head, which is held to demonstrate the promissory intent, what is happening is that a promise is being implied from the conduct (see *Promises, Morals and Law*, pp. 173–4). But why must an implication be made? Where conduct unequivocally indicates assent to an obligation, no implication need be made any more than where words indicate assent: each is simply a mode of communicating assent to the obligation.