

# CONTENTS

<i>Preface</i>	<i>page</i> xiii
<i>Abbreviations of Court names</i>	xvi
<i>Table of cases</i>	xviii
<i>Table of legislation</i>	xxxi
<b>PART 1 Theoretical and historical introduction</b>	<b>1</b>
<b>1 The concept of promise</b>	<b>3</b>
1. What is a promise?	4
(a) A definition of promise	4
(b) Promise: objectively existing phenomenon or human construction?	8
(c) Testing component elements of the definition of promise	10
(i) A promise is more than merely an internal mental process: promises as speech acts demonstrating commitment	10
(ii) A promise is a commitment to a performance of the promisor	21
(iii) A promise must manifest more than an illusory commitment or one which the promisor is patently unable to fulfil	22
(iv) A promise must relate to the future	22
(v) A promise must state a commitment in favour of another party	23
(vi) Things which are not components of the definition	25
2. Three crucial qualities of relevance to promises: gratuitousness, conditionality, unilaterality	25
(a) Gratuitousness	26
(b) Conditionality	30
(c) Unilaterality	35
3. Acts having some similarity to, but which are distinct from, promises	38
(a) Vows	39
(b) Oaths	41
(c) Threats	45
(d) Donation (gift)	46

viii	CONTENTS	
	(e) Warranties (guarantees)	48
	(f) Agreement	50
	4. Promise as a culturally universal and significant idea	52
	5. Preliminary conclusions	56
2	Promises as obligations: morality and law	58
	1. Introduction: promise as a type of obligation	58
	2. Taxonomies of obligations in morality and law	59
	3. Promises as moral obligations: the practice of promising	62
	(a) Promises as moral, immoral or amoral?	64
	(b) Source of the morality of the practice of promising	67
	(i) Promising as a virtuous act; the natural law tradition	68
	Scripture	77
	The canon law	79
	Objections to the morality of promising as	
	having a natural law/virtue basis	83
	(ii) Promising as an act of the will: respect for	
	personal autonomy	86
	(iii) The 'contract theory' of promising	93
	(iv) Consequentialism (utilitarianism)	95
	(v) Reliance theory	98
	A more limited role for reliance	104
	(vi) Conclusion on the competing theories of the	
	moral value of promises	106
	4. Powers and sanctions relevant to breach of morally	
	binding promises	106
3	The historical development of promissory ideas	
	in the law	109
	1. Roman law	110
	(a) Formal contracts: the <i>stipulatio</i>	110
	(b) Informal contracts	114
	(c) Conclusion on Roman law	115
	2. Medieval contract law	116
	(a) Continental legal thought	116
	(b) English law	119
	(i) Debt	120
	(ii) Covenant	121
	(iii) Unilaterality and bilaterality in early English	
	contract law	123
	(iv) Assumpsit	123
	(v) The doctrine of consideration	125
	3. The Northern natural law school	127
	(a) Hugo Grotius	128
	(b) Samuel von Pufendorf	130
	(c) James Dalrymple (Viscount Stair)	134

CONTENTS	ix
4. Eighteenth and nineteenth centuries	142
(a) English law	142
(b) Scots law	147
(c) Civilian systems	151
(i) German law	151
(ii) Robert Pothier	152
5. Contract theory and practice in the twentieth century	157
6. A revitalised will theory	166
 <b>PART 2 The modern law</b>	 175
<b>4 Formation of contract</b>	<b>177</b>
1. Wasted pre-contractual expenditure following termination of contract negotiations	179
(a) A Common law solution to the problem of pre-contractual expenditure: promissory and proprietary estoppel	180
(i) Promissory estoppel: promissory or reliance-based principle?	182
(ii) Promissory estoppel and failed contractual negotiations	185
(iii) Proprietary estoppel and failed contractual negotiations	188
(iv) Conclusion on estoppel and pre-contractual expenditure	189
(b) A civilian solution to wasted pre-contractual expenditure: <i>culpa in contrahendo</i> and bad faith termination of contractual negotiations	190
(c) A mixed legal system solution to wasted pre-contractual expenditure: liability from an implied assurance that a valid contract exists	197
(d) Other solutions to the problem of pre-contractual liability	201
(e) Conclusion on pre-contractual liability	203
2. Pre-contractual duties of disclosure	204
3. Offer and acceptance	210
(a) Offer and acceptance as conditional promise	210
(b) The traditional offer and acceptance model as a unilateral dictation of terms	212
(c) Distinguishing offer from conditional promise	213
(d) Problem cases for a promissory analysis of offer and acceptance	215
(e) Conceiving of offers as binding	217
4. Enforcement of auction/tender conditions	219
5. The firm or irrevocable offer	223
(a) Characterising the firm offer	223
(b) Promises of reward	228

6. Options	230
7. Letters of intent and preliminary contracts	235
(a) An intent to contract	236
(b) A preliminary contract, envisaging a further contract	236
(c) An expectation of a formal contract	237
(d) An expression of intention to do something other than contract	238
(e) A genuine unilateral promissory intention	239
8. Error in formation of contract	239
(a) Choosing the policies which inform the rules on error	240
(b) Constructing workable classifications which implement the policies chosen	242
(i) Roman law	242
(ii) The Common law	244
(iii) The mixed legal systems	248
(iv) German law	251
(v) An ideal approach to promissory error?	254
9. Extortion in the formation of contract	257
(a) English law	260
(b) The mixed legal systems	261
(c) German law	265
(d) Conclusion on extortion	265
10. Implied terms	266
11. Consideration	274
(a) The Common law	274
(b) The mixed legal systems	276
(c) German law	278
(d) Model law	279
12. Requirements of form: unwarranted restrictions on promising?	280
5 Third party rights	284
1. The challenge to third party rights in contract	284
2. The historical legal background	292
3. Third party rights in modern contract law	297
(a) The Common law	297
(b) The mixed legal systems	301
(c) German law	308
(d) Model law	311
(e) Conclusion on third party rights under contract	312
4. Assignment	313
(a) English law	316
(b) The mixed legal systems	316
(c) German law	318
(d) Model law	319

CONTENTS	xi
5. The problem of transferred loss	320
(a) English law	320
(b) The mixed legal systems	329
(c) German law	330
6. Conclusion on third parties	332
<b>6 Contractual remedies</b>	<b>334</b>
1. The 'interests' protected by remedies	334
2. Mutuality of promises and withholding of performance	337
(a) The Common law	340
(b) Mixed legal systems	341
(c) German law	345
(d) Model law	347
3. Specific performance	348
(a) English law	349
(b) Mixed legal systems	352
(c) German law	355
(d) Model law	358
4. Perfect or substantial performance of contractual promises	358
(a) Contracts for services	359
(b) Sales of goods	363
5. Injunction (interdict)	365
6. Damages	368
(a) Contractual damages and interests other than the performance interest	372
(b) Damages for mere breach of contract, or for fault?	376
(c) English law	379
(d) Mixed legal systems	382
(e) German law	387
(f) Model law	392
7. Liquidated damages: penalty clauses	394
(a) English law	395
(b) Mixed legal systems	397
(c) German law	401
(d) Model law	403
8. Termination of contract for non-performance	403
(a) Historical origins of the right to terminate	405
(b) English law	405
(c) Mixed legal systems	406
(d) German law	410
(e) Model law	412
9. Restitution following termination for non-performance	414
(a) English law	414
(b) Mixed legal systems	416

xii	CONTENTS	
	(c) German law	419
	(d) Model law	421
	10. Good faith and contractual remedies	421
7	The renunciation of contractual rights	428
	1. Terminology	428
	2. Bilateral or unilateral renunciations	429
	3. Characterising undertakings not to enforce contractual rights	431
	4. Express contractual or promissory renunciation of rights	432
	(a) The Common law	432
	(b) Mixed legal systems	434
	(c) German law	437
	5. Forbearance, promissory estoppel and personal bar	439
	(a) The Common law	440
	(i) Forbearance at common law	440
	(ii) Forbearance in equity: promissory estoppel in English law	441
	(iii) Promissory estoppel in American Common law	443
	(iv) Conclusion on promissory estoppel in the Common law	445
	(b) Mixed legal systems	445
	(i) South Africa	445
	(ii) Louisiana	446
	(iii) Scotland	447
	(c) German law	448
	6. Model law and renunciations of rights	449
	<b>PART 3 The future</b>	451
8	The future of promise in contract law	453
	1. The restricted role of promise in the modern law	453
	2. Future possible development of the law	455
	(a) General remarks	455
	(b) The Common law	460
	(c) The mixed legal systems	462
	(d) German law	463
	(e) The development of supranational model law	464
	3. Conclusion on the future of promise	466
	<i>Bibliography</i>	468
	<i>Index</i>	482