Implying a Promise to Establish Mutuality

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IMPLYING A PROMISE TO ESTABLISH MUTUALITY

Most contracts are made by business men without the aid of legal advice. It occasionally happens that although they have gone through the form and motions of making a bilateral contract, one party has in fact neglected or omitted to make an express promise on his side in a matter apparently material towards carrying out the supposed intention of one or both of the parties. In such a case courts have sometimes implied a promise and sometimes have declined to do so. Where such promise has been implied the courts have said there is mutuality of obligation and the contract is enforceable; where no such promise was implied there was said to be no mutuality and no enforceable contract. The problem upon which this article attempts to shed light is: Under what circumstances have the courts implied the counter-promise and under what circumstances have they not?

A review of the cases may make possible a deduction of certain rules or principles governing the implication of such promises.

It is a time-worn maxim in the law of contracts that unless both parties are bound, neither will be bound. This has commonly been referred to as the doctrine of mutuality of obligation. It is another way of saying there must be valid consideration.

1 This maxim appears to have been first judicially recognized in 1698 in Harrison v. Cage, 5 Mod. 411, 412, where it was held in the King's Bench that in a bilateral agreement "either all is a nundum pactum, or else the one promise is as good as the other." The rule that both parties must be bound or neither is bound has often been stated by text-writers. See Addison, Law at Contract (11th ed. 1911) 14; Ashley, The Law of Contracts (1911) § 31; Clark, Contracts (3d ed. 1914) 145; Leake, Contracts (7th ed. 1921) 7; 1 Page, Law of Contracts (2d ed. 1922) 959; Williston on Contracts (Revised ed. 1936) § 103 E.


3 "It is often stated, as if it were a requisite in the formation of contracts, that there must be mutuality. This form of statement is likely to cause confusion and, however limited, is at best an unnecessary way of stating that there must be valid consideration." Williston on Contracts (Revised ed. 1936) § 141.
From the very nature of a unilateral contract—viz., an obligation outstanding on only one side at the time the contract is formed—the doctrine of mutuality does not apply to it.\textsuperscript{4} It is applicable only to bilateral agreements; that is, to agreements containing a promise on each side.\textsuperscript{5}

Even as recent as the beginning of the present century, courts were still looking for a clear promise on each side in bilateral contracts.\textsuperscript{6} A bargain which lacked such a promise by one of the parties was held to be wanting in mutuality, and therefore, to be unilateral and unenforceable. But, since, where the transaction is unilateral, one party may be at the mercy of the other, and, where the transaction is bilateral, both parties are protected as soon as the promises are interchanged, the tendency has developed, wherever possible, as a matter of interpretation of intention, to imply a promise where one is lacking, in order that there may be mutuality.\textsuperscript{7}

\textbf{EMPLOYMENT CONTRACTS.}

The problem has often arisen in purported contracts of employment where there are covenants by the servant to

\textsuperscript{4} \textit{Williston on Contracts} (Revised ed. 1936) § 141.

\textsuperscript{5} There are, however, several types of executory bilateral contracts which may be binding on one party and not on the other. See Ballantine, \textit{Mutuality and Consideration} (1914) 28 \textit{Harv. L. Rev.} 121, \textit{Selected Readings on the Law of Contracts} (1931) 343; Oliphant, \textit{Mutuality of Obligation in Bilateral Contracts at Law} (1925) 25 \textit{Col. L. Rev.} 705, \textit{Selected Readings on the Law of Contracts} (1931) 353.

\textsuperscript{6} \textit{Williston on Contracts} (Revised ed. 1936) § 31A.

\textsuperscript{7} "A promise may be lacking, and yet the whole writing may be 'instinct with an obligation' imperfectly expressed." Cardozo, J., in Wood v. Lady Duff-Gordon, 222 N. Y. 88, 118 N. E. 214 (1917).

"In a certain contract an express promise by one party may be lacking, yet when the agreement is viewed as a whole, it may be seen to be meaningless unless such a promise is implied. The grant to him of certain rights requires the assumption by him of certain duties. The courts will interpret such contracts as business men would ordinarily understand them, and they would understand the contract as intended to have business efficacy." Andrews, J., \textit{Decisions of the Court of Appeals in Recent Years, How they have affected Substantive Law} (1927) 12 \textit{Corn. L. Q.} 433, 447.

"The law will, sometimes, in the absence of express stipulation on the subject, infer a contract or promise from one party to the other, from the nature of the transaction, or the supposed intention of the parties, where the circumstances would seem to authorize the assumption that such an obligation was within the contemplation of the parties when making their contract." Roger, C.J., in Dermott v. The State, 99 N. Y. 101 (1885).
serve and do other things but no express promise by the master to employ the servant. For example, a workman entered into an agreement with a coal company to serve as a collier, in consideration of wages to be paid to him fortnightly, and the company, in consideration of such service, agreed that he should not be discharged without twenty-eight days notice in writing, unless in the case of misconduct. It was held that this contract necessarily implied an obligation on the part of the master to find work for the servant, and to pay him wages every fortnight; and consequently was not bad for want of mutuality.\(^8\)

In an often cited New York case\(^9\) a formal agreement was entered into between the parties providing for the defendant's employment by the plaintiff for a term of six years and in which the defendant covenanted to engage in no other occupation during that period and to use his best endeavors to promote the business and business interests of the plaintiff. The contract contained no express promise by the plaintiff to employ the defendant for the term but did expressly reserve to the plaintiff the right to terminate the contract at any time upon giving thirty days notice to the defendant. In a suit to enjoin the defendant from entering the service of a rival company during the six-year term, Scott, J., said:

"It is claimed that the contract of employment is unenforceable for lack of mutuality. It is true that plaintiff does not by precise words engage to employ defendant for the term specified, but the whole contract is instinct with such an obligation on its part, and there can be no doubt that upon a fair construction it imports a hiring by the plaintiff, as well as an obligation to serve by the defendant." (Italics supplied.)

Sometimes the court is called upon to construe a hybrid contract in which the parties couple an agreement for payment by piece-work with the inconsistent provision that

\(^8\)Whittle v. Frankland, 2 B. & S. 49 (1862).
the service shall only be determinable upon a certain num-
ber of days written notice, and there is no express promise
by the master to provide the servant with work. What is
the implication as to providing work which the court ought
to read into the contract? There are two English cases on
this point. In neither was it held that the agreement was
void for want of mutuality, because in the first case it
imported an obligation by the master to provide the work-
man with work so long as the service continued, and in
the second case there was implied an undertaking by
the master to provide the servant with a reasonable amount
of work so long as the employment lasted, the measure of
what was reasonable being the average amount of the ser-
vant's earnings previously to the stoppage of the work. In
the latter case, Jelf, J., said:

"Apart from authority it would be strange if such a
right is not implied; for otherwise the bargain is of a
very one-sided character. The workman must be at
the beck and call of the master whenever required
to do so, and yet he cannot, though ready and willing
to work and to earn his pay, earn a single penny un-
less the master chooses; and this state of things may
go on for a period of nearly two months, as the
twenty-eight days notice to quit the service can only
be given on the first Monday in the month, and if
given on the first Tuesday in the month, would not
expire till twenty-eight days from the first Monday
in the next month."

In some instances it has been the servant who has made
no express promise. For example, in a well-known New
York case, the plaintiff testified without objection, that he
had a conversation with the defendant "on account of the
job at 138-140 East 40th Street and we were talking over
matters, and then he asked me, 'Mr. Grossman, how much
you are charging for superintending that job' and I told

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10 Regina v. Welch, 2 E. & B. 357 (Q. B. 1853).
11 Devonald v. Rosser & Sons, 2 K. B. 728 (1906).
Mr. Schenker that job is worth in a general way, that is
worth over a thousand dollars, but I will tell you what I
will do with you, I will make you five hundred dollars for
superintending the job. * * * Mr. Schenker said, will I keep
my word, five hundred dollars and I said, 'yes my word is
good for gold,' and he says, 'all right, you will have the
job.'" A motion to dismiss on the ground that there was
no mutuality of agreement was denied. This ruling was
affirmed by both the Appellate Division and the Court of
Appeals. Vann, J., writing for the Court of Appeals said:

"The general rule is that a promise, not under seal,
made by one party with none by the other is void,
for unless both are bound so that either can sue the
other for a breach, neither is bound. If, however,
there is a sufficient consideration mutual promises
are not essential, for the consideration supports the
promise although made by one party only. Even
when the obligation of a unilateral promise is sus-
pended for want of mutuality at its inception, still
upon performance by the promisee a consideration
arises 'which relates back to the making of the prom-
ise, and it becomes obligatory.'

"A contract includes not only what the parties said
but also what is necessarily to be implied from what
they said. Thus the words 'cash on delivery' with no
other promise to pay 'imply a promise and create an
obligation' to make payment upon delivery. So the
word 'sold' in a written agreement implies not only a
contract to sell, but also a contract to buy; and a con-
tact to buy with no express promise to sell implies
the latter obligation. 'What is implied in an express
contract is as much a part of it as what is expressed,'
for 'the law is a silent factor in every contract.'

"It was for the jury to infer what was meant by the
parties from what they said. Hence they could find
that the defendant asked the plaintiff how much he
would charge for superintending the job; that the
plaintiff replied he would accept five hundred dollars
for doing that work; that the defendant said all right,
and that the parties thus agreed, the one to superintend, the other to pay."

The question whether the court would imply a promise on the part of the servant to serve was answered in the negative by the Appellate Term of the Supreme Court of New York in a later case,¹³ in which one Sorrentino and one Sperandeo brought actions to recover damages for breach of alleged contracts, both of which were alike and read as follows:

"According to our verbal agreement, we confirm as follows: Beginning today, you are appointed a factory foreman and dryman of the above written company, and addicted to the oversight of the employees, who are employed in this factory. Your hours of work or employment will be from 7 A. M. to 12 M. and from 1 P. M. to 6 P. M. All overtime shall be paid extra. The lowest weekly salary that you will get shall be $15 for six days of the week. The present contract expires 1st of June 1917.

(Signed by a stamp) P. Daussa & Co.

D. 'Garello, Manager."

There was no letter written by either of the plaintiffs to the defendants, or to the manager binding themselves to serve the defendants for a period of two years or for any period of time. From judgments in the plaintiffs' favor in the Municipal Court, defendants appealed. The judgments were reversed and the complaint in each case dismissed. Shearn, J., writing for the Appellate Term said:

"It is obvious no bilateral agreement was made, for there is no pretense that any promise was made by the plaintiffs. The case of Grossman v. Schenker, 206 N. Y. 466, 100 N. E. 39, is cited by the respondents, but is an authority in support of the appellants. Therein the court said: 'The general rule is that a promise, not under seal, made by one party, with none

by the other is void, for, unless both are bound, so that either can sue the other for a breach, neither is bound. If, however, there is a sufficient consideration, mutual promises are not essential, for the consideration supports the promise, although made by one party only."

"In other words, there are certain cases where, on proof of an agreement between the parties, or such a meeting of the minds as is shown by an offer and its acceptance, a promise to perform a specified work may be implied, and the implied promise to do the work is just as effective as the express one made by the other party to pay. In the absence of any proof of such an agreement, performance constitutes a sufficient consideration for the express promise of one, although there is no promise, express or implied, on the part of the other. Neither element exists in this case."

Mr. Justice Shearn also said:

"Neither is there any evidence in the record that the plaintiffs agreed orally with the defendants, or with any one representing the defendants, that they would continue in the employment of the defendants, until June 1, 1917, or for any period of time."

He then proceeds to give the evidence bearing on an oral agreement, if any, made between the parties. The manager testified that he agreed to hire Sperandeo, and that the latter said: "All right, I will come, provided you will give us a written contract." Sperandeo testified on his direct examination that, when he was asked by the manager to accept the position, he answered: "I told him, 'Yes,' and he said, 'Do you want to come and work here' and I said, 'I want to come and work here, but in the first place I want to be guaranteed as to the work.'" It would seem under the liberal views entertained by the Court of Appeals in Grossman v. Schenker,14 that such evidence would be sufficient

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to warrant an implied promise on the part of Sperandeo to serve defendants upon being given a written guarantee of work such as the defendants gave him. The plaintiff, Sorrentino, on his direct examination, testified that he had worked in the defendants' place of business before and had been discharged, and that therefore, when he was asked to accept the position a second time he insisted on a contract. With reference to this evidence, Mr. Justice Shearn said:

"Furthermore, in the case of a contract of employment, either unperformed or partially performed, a promise on the part of the employee to continue in the service of the employer for any definite period cannot be implied, where there is merely a promise by the employer to continue the employment for such period. It would be unreasonable to imply that the employee had bound himself to a long term of service simply because the employer had promised to keep him that long. The fact that the employer could not succeed in having any such promise implied precludes the employee from maintaining an action upon the unilateral promise of the employer."

This case was distinguished by Hubbs, then presiding justice of the Appellate Division, Fourth Department, in a case decided a few years later, in which he said:

"It is urged by the respondent that the contract is unilateral and unenforceable, and our attention is called to the case of Sorrentino v. Bouchet (Sup) 161 N. Y. Supp. 262. In that case Mr. Justice Shearn stated that there was no evidence in the record that the servant agreed to remain in the service for any definite time. In the case at bar, the letter from the defendant upon which the plaintiff relied in withdrawing his resignation and remaining in the defendants' service contains words which, taken with the other evidence in the case, would justify a jury in

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finding that there was an agreement for a definite term. To quote again: "The confidential arrangement between us embodying your employment with the Fairbanks Company is that * * * for the year 1921 you are to receive a salary at the rate of $4,500 per year."

"The salary to be paid was for the year 1921. It was to be paid pursuant to the arrangement made between the parties. The jury might find that the word 'arrangement' was used in the sense of agreement or contract. 5 Corpus Juris 373; People v. American Ice Co. (Sup) 120 N. Y. Supp. 443. If there was an agreement between the parties that the plaintiff was to receive a salary of $4,500 for the year 1921, then there was an express promise by the defendant to pay the salary and an implied promise by the plaintiff to serve during that period."

SALES CONTRACTS.

It frequently happens that a memorandum of sale contains an express promise by only one of the parties. Sometimes the court has implied a promise to buy for the reason that the parties have apparently intended a contract to sell and in the very nature of things there cannot be a contract to sell without a contract to purchase. This view was taken by Mr. Justice Hunt in a case decided by the Supreme Court of the United States in which he said:

16 Butler v. Thomson et al., 92 U. S. 412, 23 L. ed. 684 (1875). See also, Kentucky Tobacco Products Co. v. Lucas, 5 F. (2d) 723 (1925) (a contract providing that one party "shall purchase" from the other its output of tobacco stems for ten years; held, by implication to bind the other to sell. Dawson, D.J.: "Nor is the contract a unilateral one. It is true that the contract provides, 'The new company shall purchase from the Continental Company its entire output of Burley Tobacco stems for a period of ten years from July 1, 1899,' etc., and there is no express provision that the Continental Company shall sell such entire output to the new company, but the contention of the government, that the failure of the contract in express words to impose this obligation upon the Continental Company makes the contract a unilateral one, is the utmost refinement of construction. In construing all contracts it is the duty of the court to arrive at the intention of the parties, if such intention can be gathered from the language of the contract itself, and the court has no hesitation in holding that the Continental Company, by the contract in
"The written memorandum recites that Butler & Co. sold the iron to the defendants at a price named; but it is said there is no recital that the defendants had bought the iron. There is a contract of sale, it is argued, but not a contract of purchase * * *.

"Under these authorities, it seems clear that there can be no sale unless there is a purchase, as there can be no purchase unless there be a sale. When, therefore, the parties mutually certify and declare in writing that Butler & Co. have sold a certain amount of iron to Thomson & Co., at a price named, there is included therein a certificate and declaration that Thomson & Co. have bought the iron at that price * * *.

"The memorandum in question, expressing that the iron had been sold, imported necessarily that it had been bought. The contract was signed by the agent of both parties, the buyer and the seller, and in our opinion, was a perfect contract, obligatory upon both the parties thereto."

Sometimes the court is aided in its construction by some phrase or clause in the memorandum which adds strength to the implication of a promise. For example in a case where the memorandum contained the words: "We agree to deliver * * * cash on delivery" it was held that the memorandum was not a nudum pactum; the court saying:

"Although there is no distinct and express promise in terms by the plaintiff to pay the price specified, the terms 'cash on delivery' imply a promise and create an obligation to make such payment when the rifles are delivered."

In the same spirit of interpretation courts have seized on the phrase, "in consideration of W. P. Fuller & Co. buying" as a ground for implying an agreement by the latter

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question, intended to and did obligate itself to furnish its entire output of Burley Stems, during the period covered by the contract, to the new company, as fully as if it had so undertaken in express language."}).

17 Justice v. Lang, 42 N. Y. 493 (1870).
to buy as a consideration for the express promise of the other party to sell.\textsuperscript{18}

Likewise where there is an express promise to sell but no express promise to buy, the word “confirmed” written by the buyer at the bottom of the written instrument opposite his signature, has been held to imply a promise on his part to buy;\textsuperscript{19} the court saying:

“The contract is not an option given by Carl Coon, nor is it a unilateral agreement, such as the offer of a reward. By it Carl Coon said he sells wheat, future delivery, at a certain price to Dement Bros. Company. It is impossible to sell unless at the same time there is a purchaser. The one obligation must have its corresponding and co-relative obligation. Therefore, when Carl Coon signed the contract he obligated himself to sell wheat, future delivery, at the price stated to Dement Bros. Co., and, when the latter wrote on it the word ‘confirmed’ and then signed it, respondent entered into the correlative obligation of purchasing wheat, future delivery, at the price stated, from Carl Coon. The same may be said with reference to the obligation of respondent to receive the wheat.” (Italics supplied.)

Although the word “confirmed” was thus held to imply a promise, courts have declined to give that effect to the word “accepted” written by one who made no express promise. In a case decided in the same state\textsuperscript{20} as the case just quoted from, the word “accepted” written by the offeree of an offer which recited that “in consideration” of the offeree “soliciting and delivering ice,” in a certain area, the offeror “agrees to sell pure merchantable ice” for $1.50 a ton for the offeree’s “requirements during 1916,” was held not to constitute an express or implied promise on the offeree’s

\textsuperscript{18} Fuller & Co. v. Schrenk, 58 App. Div. 222, 68 N. Y. Supp. 781 (1st Dept. 1901), aff’d, 171 N. Y. 671, 64 N. E. 1126 (1901).

\textsuperscript{19} Dement Bros. Co. v. Coon, 104 Wash. 603, 177 Pac. 354 (1919).

\textsuperscript{20} Mowbray Pearson Co. v. E. H. Stanton Co., 109 Wash. 601, 190 Pac. 330 (1920). See also Carpenter v. Foundation Co., 124 Misc. 765, 208 N. Y. Supp. 327 (1924), where “accepted” written on an option by the optionee was construed to mean merely that the option terms were correct.
part. Practically the same attitude was taken by the Appellate Division in New York in a case where the defendant had invented a certain machine but was encountering difficulty in procuring a patent for it, and did not have the financial means to market the invention. The plaintiff wrote him offering to obtain a patent for and to assist him financially in marketing the invention for 40% of the profits realized. Underneath this written offer, the defendant wrote: “I accept the above” and signed his name. The plaintiff procured the patent but before he had had a chance to market the invention, the defendant wrote to the plaintiff stating that the plaintiff’s services were no longer required. The court refused to take the position that a bilateral contract had been formed by the defendant’s writing “I accept the above,” because that did not give the plaintiff any exclusive right nor did it oblige the defendant in any way.21

Where a written instrument contained an express promise by one party to sell steers by the carload, but no express promise by the other party to buy, the words “Said J. Raines to have the privilege of selecting the two loads that he takes on or before February 16th” was held to imply a promise on the part of the latter to buy.22 West, J., said:

“Usually one who signs a written instrument which calls itself a contract may well be assumed to have intended to accept it. Here the paper laboriously consumes one-fifth of its space in saying, ‘Contracts by and between G. G. Railsback, party of the first part, and Raines, party of the second part.’ Raines could not be a party of the second part to a contract which had only a party of the first part. When two parties agree that one is to sell cattle to the other, the latter to have the selection of those he takes on or before a certain date, this agreement is a contract, binding on both, and this is what perspicuously appears from the paper which these parties both signed. The fact that it was frequently referred to by the de-

fendant as a contract, even on the witness stand, is not a necessary, but a significant, expression of what was in his mind when he signed his name to the paper.”

As an illustration of “down east Yankee shrewdness” the contract in a Maine case is hard to beat. One Binford and Jones & Co. agreed in writing that Binford should plant and cultivate four acres with sweet corn and, when it was ripe, would from time to time, upon reasonable notice from Jones & Co., gather and deliver the corn at a certain corn-canning factory and Jones & Co. agreed to pay Binford “for all his corn so received” at a price named. In an action for breach of contract it was contended that although there was an express promise by Jones & Co. to pay for all corn received by them, the written instrument did not bind them to receive any, and hence the express promise to pay amounts to nothing and the agreement lacked mutuality. On this point Danforth, J., said:

“But it is claimed that here there is virtually no promise on the part of the plaintiff; that the contract is so cunningly worded that while there is in it a distinct unqualified promise to pay for the corn ‘so received’ there is under it no obligation to receive any. This depends upon the meaning of the words ‘so received’ and that is to be ascertained by consulting the previous clause, which imposed the obligation resting upon the defendant.

“In that clause the defendant agrees to plant and cultivate four acres of sweet corn and when the corn is in proper condition for packing, he will, upon proper notice, deliver to the plaintiffs, as wanted, the corn so raised ‘at their factory in Hiram.’ In the next clause the plaintiffs agree to pay a price specified for all the corn ‘so received.’ The necessary inference is that the delivery provided for is the reception referred to. The one is the same as the other, and when the delivery is completed, so is the recep-

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Jones & Co. v. Binford, 74 Me. 439 (1883).
tion. As the delivery is incumbent upon the defendant, he has only to perform his duty in that respect, and the obligation on the part of the plaintiffs to pay follows necessarily. The clause is the same in effect and imposes the same obligation upon the plaintiffs as though it was a promise to pay for all the corn so delivered."

Perhaps the case most frequently cited as authority for denying an implied promise in cases of sales or agency is Schlegel Mfg. Co. v. Cooper's Glue Factory. 24 In that case defendant wrote a letter to the plaintiff, agreeing to deliver such glue as the plaintiff required for one year at 9¢ per pound. At the bottom of the letter the plaintiff's president wrote "accepted" and signed his name. There was no express promise by the plaintiff to buy any glue. The plaintiff, at the time, was engaged in no manufacturing business in which glue was used or required, nor was it then under contract to deliver glue to any third parties at a fixed price or otherwise. It was simply a jobber, selling, among other things, glue to such customers as might be obtained by sending out salesmen to solicit orders therefor. Under these circumstances, there may have been an implied promise on the plaintiff's part that if he needed or required any glue he would order it of the defendant and of no one else, but there was no implied promise to order any glue at all events and no matter what happened. McLaughlin, J., for the Court of Appeals, said:

"The plaintiff, it will be observed, did not agree to do or refrain from doing anything. It was not obligated to sell a pound of defendant's glue or to make any effort in that direction. It did not agree not to sell other glue in competition with defendant's. The only obligation assumed by it was to pay 9¢ a pound for such glue as it might order. Whether it should order any at all rested entirely with it. If it did not order any glue, then nothing was to be paid.

"Had the plaintiff neglected or refused to order any glue during the year 1916, defendant could not have maintained an action to recover damages against it, because there would have been no breach of the contract. * * *

"In the instant case, as we have already seen, there was no obligation on the part of the plaintiff to sell any of the defendant's glue, to make any effort towards bringing about such sale, or not to sell other glues in competition with it. There is not in the letter a single obligation from which it can fairly be inferred that the plaintiff was to do or refrain from doing anything whatever."

On the authority of the Schlegel case, it was decided by a later New York case that even though an exclusive agency had been conferred within a certain territory by the plaintiff upon the defendant and the defendant has assumed the exclusive agency by acting under it for several years, there was no implied promise by the defendant to buy any of the plaintiff's goods in the absence of an express promise to do so. It seems difficult to square such a decision with the following statements of Judge Cardozo in a Court of Appeals decision, rendered twelve years previously:

"The implication of a promise here finds support in many circumstances. Defendant gave an exclusive privilege. She was to have no right for at least a year to place her own indorsements, or make her own designs, except through the agency of the plaintiff.

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\(^{25}\) See Smith v. Diem, 223 App. Div. 572, 229 N. Y. Supp. 56 (1928) where the plaintiff wrote to defendants advising them that as long as their purchases of the "Havana Brown" cigar manufactured by the plaintiff amounted to not less than 10,000 average weekly shipments, he would not sell that cigar in a certain territory in which defendants' business of jobbing cigars was located. Defendants made no reply to the letter, but purchased for several years cigars of that brand from the plaintiff in excess of the quantity mentioned in the letter. Later, plaintiff wrote defendants terminating the arrangement. In an action to recover the price of cigars delivered, defendants counterclaimed for breach of contract. The referee's decision dismissing the counterclaim on the authority of the Schlegel case was affirmed on the ground that the defendants had not agreed to buy any cigars of plaintiff and hence there was no mutuality of obligation.
The acceptance of the exclusive agency was an assumption of its duties.” (Italics supplied.)

AGENCY CONTRACTS.

The problem has most frequently arisen in connection with contracts of agency, where either the principal or the agent has made no express promise in the written instrument which purports to be a bilateral agreement. The most celebrated case on this point is Wood v. Lucy, Lady Duff-Gordon. The defendant had built up a reputation as a creator of fashions. She entered into a written agreement with the plaintiff by which he was to have the exclusive right, subject always to her approval, of placing her indorsements on the designs of others. He was also to have the exclusive right to place her designs on sale, or to license others to market them. In return, she was to have one-half of “all profits and revenues” derived from any contracts he might make. This exclusive right was to last at least one year and thereafter from year to year unless terminated by notice of ninety days. Although there was an express promise by the plaintiff to pay to her one-half of the profits derived from any contracts he made, there was no express promise by him to try to make any contracts on her behalf. Cardozo, J., writing for the Court of Appeals said:

"The agreement of employment is signed by both parties. It has a wealth of recitals. It is true that he does not promise in so many words that he will use reasonable efforts to place defendant’s indorsements and market her designs. We think, however, that such a promise is fairly to be implied. A promise may be lacking, and yet the whole writing may be ‘instinct with an obligation’ (Scott, J., in McCall Co. v. Wright, 133 App. Div. 62). If that is so, there is a contract.

27 222 N. Y. 88, 118 N. E. 214 (1917).
"The implication of a promise here finds support in many circumstances. Defendant gave an exclusive privilege. She was to have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff. The acceptance of the exclusive agency was an assumption of its duties. We are not to suppose that one party was to be placed at the mercy of the other. Many other terms of the agreement point the same way. We are told at the outset by way of recital that 'the said Otis F. Wood possesses a business organization adapted to the placing of such indorsements as the said Lucy, Lady Duff-Gordon has approved. The implication is that plaintiff's organization will be used for the purpose for which it is adapted.

"But the terms of defendant's compensation are even more significant. Her sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from plaintiff's efforts. Unless he gave his efforts, she could never get anything. Without an implied promise, the transaction cannot have such business 'efficacy as both parties must have intended that at all events it should have' (Bowen, L. J. in the Mooreock, 14 P. D. 64, 68).

"But the contract does not stop there. The plaintiff goes on to promise that he will account monthly for all moneys received by him, and that he will take out all such patents and copyrights and trademarks as may, in his judgment, be necessary to protect the rights and articles affected by the agreement. If he was under no duty to try to market designs or to place certificates of indorsement, his promise to account for profits or take out copyrights would be valueless. That promise helps to enforce the conclusion that the plaintiff had some duties. His promise to pay the defendant one-half of the profits and revenues resulting from the exclusive agency and to render accounts
monthly, was a promise to use reasonable efforts to bring profits and revenues into existence.”

Although courts may thus construe the written evidence of an agreement to imply a promise where an express one is lacking, it has been held that where a complaint fails to allege a promise by one who has made no express promise, the court should not imply such a promise for the purpose of sustaining the complaint.

One of the finest judicial expositions bearing on the subject of implied promises is found in a case where the written instrument provided that the agent agreed to sell the products of the principal for a term of five years and the

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28 See also Commercial Wood & Cement Co. v. Northampton Portland Cement Co., 115 App. Div. 388, 100 N. Y. Supp. 960 (1st Dept. 1906) obiter dictum that although the agent made no express promise to make any sales, or to endeavor to make any, a covenant to use his best endeavors to sell may be read into the contract since he expressly promised to keep a set of books showing sales and to make remittance of receipts. However, since the contract was held to be void for lack of authority on the part of the executive committee to enter into it, the determination of the question of the implication of a promise was unnecessary.

29 See also Ellis v. Miller, 164 N. Y. 434, 58 N. E. 516 (1900), where in consideration of an allowance of $1,000 per annum by the plaintiff the defendants agreed to push and do all in their power to increase the sale of a certain brand of cigarettes (Recruit cigarettes) manufactured by plaintiff. The agreement was to remain in force for five years. The plaintiff had made no express promise to sell nor had the defendants made any express promise to buy the cigarettes in question. Therefore the contention was made that the only effect of the agreement was to prescribe the terms on which the goods should be sold in case the plaintiff should be willing to sell and the defendants be willing to buy. It was held that the agreement did not lack mutuality. The plaintiff entered into a positive obligation to allow the defendants $1,000 a year to be deducted in equal monthly installments from the current bills. This necessarily imported an agreement on the plaintiff’s part to sell the defendants at least one thousand dollars worth of cigarettes a year; for, otherwise, it would be impossible to credit the defendants with that amount on their purchases.

30 Goldfield v. Foster, 227 App. Div. 543, 238 N. Y. Supp. 387 (1st Dept. 1930) where Proskauer, J., said: “In form, the allegations of the complaint describe a nudum pactum and not a contract. A plaintiff should plead the essentials of a valid agreement. We are not here concerned with the interpretation of a piece of written evidence, such as was before the court in the case of Wood v. Lucy, Lady Duff-Gordon, 222 N. Y. 88, 118 N. E. 214. There the complaint alleged a valid contract, and the court held that, while the writing introduced in evidence at the trial did not contain express words of agreement to purchase, an inference thereof could be drawn from the language. It does not follow that a similar inference should be drawn wherever a plaintiff alleges in a pleading merely an agreement on the part of the defendant to sell. If there was a valid contract made, there is no reason why the plaintiff should not concisely allege it.”

principal agreed to pay him a commission on the sale of goods to be made according to an annexed schedule. The trial judge had dismissed the cause of action for damages for breach of contract of employment on the ground that the contract though imposing on the plaintiff the duty to serve for five years, did not impose on the defendant a duty to employ him for a like period and, therefore, that the contract was, at the defendant's option, terminable at will; Mr. Justice Cardozo said:

"We cannot accept that construction of its meaning. An intention to make so one-sided an agreement is not to be readily inferred. (Sanford v. Brown Bros. Co., 208 N. Y. 90.)"

After observing that the plaintiff, upon looking at the writing drawn up by the defendant's lawyers and tendered to him, would find that he was binding himself to sell for five years for and on account of the defendant, certain paints, oils and varnishes, a list of which was attached, Mr. Justice Cardozo continued:

"He could not sell them unless the defendant furnished them. The defendant did not merely accept the plaintiff's promise to serve it for five years by the sale of its goods; it agreed to pay him commissions 'on sales of said goods' and spoke of them as sales 'to be made.' The plaintiff must have understood this as meaning that the defendant would do its part in permitting them 'to be made.' It could not do that part unless it filled the orders which he reported. Note also that the writing in its opening words is described as an agreement, and not merely of promise. The plaintiff 'agrees' to serve for five years. The defendant 'agrees' to pay him at certain rates. The very word 'agreement' connotes a mutual obligation. (Benedict v. Pincus, 191 N. Y. 377, 383, 384.) There may be a 'promise' to serve without a promise to employ, but there can be no agreement for service without mutuality of rights and duties. (Richards v.
Edick, 17 Barb. 260, 263; Baldwin v. Humphry, 44 N. Y. 609, 615.) 'If it be agreed between A and B that B shall pay A a sum of money for his lands, etc., on a particular day, B's words amount to a covenant by A to convey the lands, for agreed is the word of both.' (Pordage v. Cole, 1 Saund. 319 1, quoted in Baldwin v. Humphry, supra.) So, in Richards v. Edick (supra) where the covenant read: 'The aforesaid party of the first part agrees to sell his farm in Florence, etc., to the party of the second part for and in consideration of seventeen hundred dollars.' The court held that the word 'agreement' necessarily imported two parties, one to sell and one to buy. 'It was not merely a promise made by one party to the other, but it was an agreement made by both and binding on both by every principle of law and morality applicable to the construction of contracts.' These words are equally applicable to the contract before us. Just as the plaintiff impliedly undertakes to serve at the rates which the defendant 'agrees' to pay, so the defendant impliedly undertakes to accept for the designated term the service which the plaintiff 'agrees' to render. (Italics supplied.)

"The law, in construing the common speech of men, is not so nice in its judgments as the defendant's argument assumes. It does not look for precise balance of phrase, promise matched against promise in perfect equilibrium. It does not seek such qualities even in written contracts, unless perhaps the most formal and deliberate, and least of all does it seek them where the words are chosen by the master under legal advice and accepted by the servant without the aid of like instruction. There are times when reciprocal engagements do not fit each other like the parts of an indented deed, and yet the whole contract, as was said in McCall Co. v. Wright (133 App. Div. 62, 68) may be 'instinct with * * * an obligation' imperfectly expressed. If the defendant meant the plaintiff to understand that it had a right to discharge him at pleasure, it could easily have said so in words too
clear for misconstruction. We think it did not say so, but by implication said the contrary.”

Frequently in agency contracts the principal has failed to expressly promise to do certain acts necessary by him to be done in order that the agent may carry out his commission. For example, no express promise may be made by the principal to furnish the agent with samples and price lists of the goods. Such a promise has been implied. Likewise where in an agency agreement there is no express promise by the principal to furnish the goods which were to be sold, such a promise has been implied.

**MISCELLANEOUS CONTRACTS.**

A written contract to lease commenced with the words “we agree” and was signed by both landlord and tenant, but contained no express promise by the tenant to pay any rent in advance. It did, however, state that “it is understood that at signing of lease—6 months rent in advance is to be paid by (tenant).” The court held that a promise to pay six months’ rent is implied, saying: “The phrase, ‘it is understood’ * * * * means the same as ‘it is agreed’ and thus becomes the expression of both parties, not of one only. It does not mean simply that the Messrs. Pincus (the landlords) understood, but both they and Mr. Smith (the tenant) understood.”

Sometimes the question whether a written agreement is a lease or a mere license may depend upon the implication of a promise. For example, the defendant, who conducted a drug store, entered into a written agreement with the plaintiffs “permitting” plaintiffs to occupy certain space in

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31 Jacquin v. Boutard, 89 Hun 437, 35 N. Y. Supp. 496 (1895), aff’d, without opinion, 157 N. Y. 686, 51 N. E. 1091 (1895). In that case Parker, J., said: “The failure of this promise to appear in the contract was not an intentional omission, but a mere inadvertence; and, while the courts hesitate to imply promises in formal contracts, they should do so where otherwise the manifest intention of the parties would be defeated.”


defendant's drug store with soda fountain for five years, with the privilege of buying goods from the defendant at ten per cent above wholesale, the defendant to receive a stated percentage of plaintiffs' gross income. This written agreement was signed by both parties. There was no express promise by the plaintiffs to enter and remain in occupation of the located space for any period of time. After the plaintiffs had installed a soda fountain and occupied the space in defendant's store for some time, the defendant removed one of the plaintiffs' counters and threatened to remove the fountain. The plaintiffs brought suit for an injunction restraining the defendant and moved for an injunction *pendente lite.* The defendant contended there was no enforceable contract for lack of mutuality. An order granting the motion was affirmed on the ground that the written instrument was a lease and not a mere license. Wagner, J., said:

"It is manifest that it was intended by the agreement to confer upon the plaintiffs something more than a bare license.* * * *

"An agreement does not of necessity lack mutuality because it does not contain express reciprocal promises. The agreement, the surrounding circumstances, and the acts of the parties thereunder, giving practical construction thereto, may reasonably permit the implication of reciprocal promises and obligations.

"It is our opinion that the agreement under consideration, though imperfectly expressed, contains mutual obligations. It is a valid lease. The plaintiffs impliedly bound themselves to install and operate the soda fountain within a reasonable time from the date of the execution of the lease.* * * *

"Here it was clearly within the contemplation of the parties that the defendant was to grant, and the plaintiffs were obligated impliedly to enter and occupy a

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definite space of the drug store of the grantor for a
definite period at a fixed rental, with a conditional
right of renewal.”

In *City of New York v. Paoli*, the contract contained
an express agreement of the city that the contractor, Paoli,
“shall have the privilege of picking over all refuse at the
dumps, including paper, rags, wood and metal objects and shall have the right to appropriate to his own use the
materials.” There was no express agreement on the part of the city to deliver its refuse at the “dumps” for the contractor to pick over. The contractor, therefore, contended that the contract was void for lack of mutuality. The Court of Appeals held that a promise on the part of the city to deliver its refuse at the “dumps” is to be implied since such a correlative covenant was intended. Gray, J., said: “The agreement of the city that its street refuse should be delivered at the dumps enumerated was indispensable to the effectuation of the contract, and for that reason, it will be implied.”

In *Stillwell v. Ocean Steamship Co.*, the defendant, by telephone, asked plaintiffs what their rates for transportation of 6,000 barrels of rosin to Chicago and 2,500 barrels of rosin to Buffalo would be. Plaintiff stated the rates, and defendant replied that they were satisfactory and asked plaintiffs to confirm the statement by letter, which plaintiffs did, requesting defendant to advise them “accepted.” This the defendant did. The defendant claimed that no contract was proved by these facts, and that the transaction evidenced thereby amounted to nothing more than an agreed statement as to the rates. Barrett, J., said:

“*If that was the understanding of the parties, they would hardly have resorted to formal writings upon the subject, * * * It is true that in the case at bar the parties do not literally use the words ‘we agree to transport 6,000 barrels of rosin from New York to

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202 N. Y. 18, 94 N. E. 1077 (1911).
Chicago at 12¢ per 100 pounds, and 2,500 barrels of rosin from New York to Buffalo at 61¢ per 100 pounds. But the agreement upon the one side to furnish the rosin for transportation and upon the other to transport it, is plainly implied from the language used. They were business men. They were not drafting a legal document when they wrote these letters. They were making their contract in their own way, and expressing themselves in their common parlance. It was either that or an immense amount of precise formality about nothing. The letters were senseless unless they intended to contract; and there could be no binding contract about a rate disconnected with a contract to transport at such a rate. * * * When one side confirmed the rates quoted, that was the carrier's short, mercantile way of saying that they would transport at those rates. When the other side accepted the confirmed rate, that was the shipper's or brother carrier's short, mercantile way of saying that they would furnish the goods and pay the rate."

SUMMARY.

While courts hesitate to imply promises in formal contracts, they should not be astute to construe a contract so as to render it nugatory. An intention to make a one-sided agreement is not to be readily inferred. On the other hand, "the court or jury who are called upon to imply an obligation on the other side which does not appear in the terms of the contract, must take great care that they do not make the contract speak where it was intentionally silent." 37

The cases reviewed in this article seem to indicate the following rules in regard to implying a promise in the absence of an express one.

(1) Where any act of the parties, or either of them, is essential to carry out the intention of the parties, appearing from the provisions of the contract, a promise to perform such act may be implied. 38

37 Cockburn, J., in Churchward v. The Queen, L. R. 1 Q. B. 173 (1865).  
38 Jugla v. Trouttet, 120 N. Y. 27, 23 N. E. 1066 (1890); City of New York v. Paoli, 202 N. Y. 18, 94 N. E. 1077 (1911).
(2) Where the covenant on one side involves some corresponding obligation on the other, as a covenant to sell necessarily involves a covenant to buy, a promise may be implied.\(^{39}\)

(3) A promise may be implied where the court or jury may rightfully assume that it would have been made if attention had been drawn to it.\(^{40}\)

(4) It is proper to imply a promise to do an act which the parties as business men apparently intended should be done.\(^{42}\)

(5) The words "it is understood" that a certain act be done, in a written instrument signed by both parties, imply a promise to do that act.\(^{42}\)

(6) The word "confirmed" signed by one party to a written instrument drawn up by the other party, implies a promise to do the act or acts mentioned in the written instrument to be done by the first party.\(^{43}\) But the word "accepted" is not always given that construction.\(^{44}\)

(7) The word "arrangement" in a written instrument drawn up and signed by one party, may be evidence of an agreement involving mutual promises.\(^{46}\)

(8) The phrase "in consideration of" the one party doing a certain act, the other party expressly promises, may justify the implication of a promise to do that act.\(^{46}\)

\(^{41}\) King v. Leighton, 100 N. Y. 386, 3 N. E. 594 (1885).
\(^{42}\) Bennett v. Fincus, 191 N. Y. 377, 84 N. E. 284 (1908).
(9) The phrase "cash on delivery" implies a promise to pay on delivery.\textsuperscript{47}

(10) Where the written instrument signed by both parties recites that one party "agrees to serve" or "agrees to sell" the word "agrees" connotes a mutual obligation, so that a promise to pay is implied in both cases.\textsuperscript{48}

(11) A promise to do a certain act will be implied when the agreement, viewed as a whole, would be meaningless in the absence of a promise to do that act.\textsuperscript{49}

(12) Where one party over his signature has consented to receive certain exclusive rights, the assumption by him of correlative duties may be implied.\textsuperscript{50}

In the last analysis the test to be applied in determining whether to imply a promise where one is silent is to ascertain the intention of the parties, from the language used, the surrounding facts and circumstances and the common sense of the situation.

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\textsuperscript{47} Justice v. Lang, 42 N. Y. 493 (1870).


\textsuperscript{50} Wood v. Lucy, Lady Duff-Gordon, 222 N. Y. 88, 118 N. E. 214 (1917).