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ON THE THEORY OF IMPLIED CONTRACTS.[1]

The object of the present article is to ascertain what, in the technical language of English law, is meant by the expression "implied promise," or "promise in law," and to show that in the great majority of cases these expressions do not denote a genuine, but a fictitious promise. The writer has also endeavored to set forth the reasons which gave rise to the fiction in question, and also to the fiction of implied requests, which is inseparable from it. In order to render what follows more clear and intelligible, it is proposed in the first place, to draw the attention of the reader to the true nature of a genuine agreement.

1. AGREEMENTS.

An *agreement* is the mutual and deliberate consent of several persons, that something shall be done or forborne. If the agreement arises from a deliberate offer by one party, and a simple acceptance thereof by another party, the agreement is termed a *promise*, and its effect is to impose an obligation on the offerer (called the promisor), and a right correlative thereto on the acceptor (called the promisee). If the agreement consists of mutual promises, *i. e.*

[1] From the London Law Magazine, for February, 1856, p. 27.

of offers made by each party and accepted by the other, the agreement is termed a *pact* or *convention*, or simply an *agreement*, and its effect is to impose obligations on each promisor, with correlative rights on each promisee.

By a *contract* is meant, an agreement which is recognized as binding in a judicial, as opposed to a moral or religious point of view. A contract, therefore, like an agreement, may consist of one promise or of several mutual promises; but in every case the effect of a contract is the creation of one or more obligations, enforceable actively or passively in a court of civil jurisdiction.

The binding power of an agreement is entirely dependent on the consent of the parties to it; not only, be it observed, on the consent of one of the parties, but on the mutual consent of both, viz.: of the person making the proffer and of the person accepting it. An unaccepted proffer (*pollicitation*), imposes no obligation on the party making it, either in a moral or a judicial point of view. The reason of this is sufficiently obvious; agreements are held obligatory, in consequence of the manifest injustice in disappointing expectations deliberately raised; but if an offer be not accepted, no expectation can be regarded as raised, and no injustice is committed if the offer be not carried into execution. Hence in all systems of jurisprudence, it is held that an unaccepted offer may be retracted, and any exceptions to this rule are universally considered anomalous.[1] *Consent* is the essence of every agreement, and is formed of the intention signified by the promisor, and of the corresponding expectation signified by the promisee. This intention with this expectation, is styled the *consensus* of the parties; because the intention and expectation chime or go together, or because they are directed to a common object; namely, the acts or forbearances which form the object of the agreement.[2] Consent is in jurisprudence as essential to every contract as it is in morals to every agreement, and consequently there cannot be any contract in the proper sense of the term, where the promisor or promisee is, juridically speaking, incapa-

[1] Pothier, Oblig. No. 4; 1 Molitor des Oblig. en Droit Rom. p. 88, 252 Grot. de Bell. et Pac. ii. c. 11, § 16; Puchta Pandekten, § 251, 259; Thibaut, System, § 570; Payne *vs.* Cave, 3 T. R. 148; Routledge *vs.* Grant, 4 Bing. 653.

[2] See Austin's Prov. of Jur. 359, note.

ble of giving consent, or being capable and consenting, does not signify his consent in the manner required by law.

2. CONTRACTS EXPRESS AND IMPLIED (IN THE SENSE OF TACIT).

According as the consent of the parties to a contract is signified directly by some expression of will, or indirectly, so that it can only be gathered from attendant circumstances, is the contract said to be *express* or *tacit*. This division of contracts has reference entirely to the mode of proof, and not to any difference in the nature of agreements. A tacit agreement is as much a genuine agreement, as one which is expressed. Consent, in the sense already explained, is as essential to the one as to the other; and such consent being present and signified, the agreement is complete. This is illustrated by Mr. Austin,[1] with his usual clearness and accuracy: he says:— "The promisor signifies to the promisee, that he intends to do the acts, or to observe the forbearances, which form the object of his promise. If he signifies this his intention by spoken or written words (or by signs which custom or usage has rendered equivalent to words), his proffered promise is *express*. If he signifies this his intention by signs of another nature, his proffered promise is still a genuine promise, but is *implied* or *tacit*. If, for example, I receive goods from a shopkeeper, telling him that I mean to pay for them, I promise expressly to pay for the goods which I receive; for I signify an intention to pay for them, through spoken or written language. Again: having been accustomed to receive goods from the shopkeeper, and also to pay for the goods which I have been accustomed to receive, I receive goods which the shopkeeper delivers at my house, without signifying by words spoken or written (or by signs which custom or usage has rendered equivalent to words), any intention or purpose of paying for the goods which he delivers. Consequently I do not promise expressly to pay for the particular goods. I promise, however, tacitly; for by receiving the particular goods, under the various circumstances which have preceded and accompany the reception, I signify to the party who delivers them, my intention of paying for the goods, as decidedly as I should signify it if I told him that I meant to pay. The only difference

[1] See Austin, ubi sup. 356, 357.

between the express, and the tacit or implied promise, lies in the natures of the signs through which the two intentions are respectively signified or evinced."

Instances of genuine implied contracts exist, of course, in abundance. The following suffice for the purpose of illustration. The drawer of a bill of exchange impliedly promises to pay it if the drawee does not.[1] Where an express contract has been made for the sale of goods, and goods are sent not according to the contract, a promise to pay for them *quantum valent* is implied, if they are retained.[2] So, where an express contract is entered into, but is invalid, a promise to pay for what has been actually done on the faith of it, is properly implied.[3] Where a person receives goods under a bill of lading, and retains them, a promise on his part to pay what may be due for their freight is implied.[4] If a lessee, with the consent of his landlord, remains in possession after the expiration of the lease, a contract for a tenancy from year to year, upon the terms of the lease, so far as they are applicable to such a tenancy, is implied between the tenant and the landlord.[5]

In all these cases a genuine consent is present, and is, in fact, signified, though not by express words. This consent, moreover, is no fictitious consent imputed by law, in spite of its non-existence in point of fact, as may be seen at once by supposing dissent to be signified. If I request a person to work for me, but say nothing as to payment, I tacitly agree to pay him for his services, and of course a mere mental reservation or unsignified intention on my part not to pay for them cannot affect the question. My conduct, so far as it can be taken into account by another, reasonably leads to an expectation of payment, and I am not at liberty to defeat the expectation so reasonably raised by myself. *De non existentibus et non apparentibus eadem est ratio.* But if there are circumstances, apparent, and rebutting the inference of any intention on my part to pay, as if the person were accustomed to work for me for nothing,— or if I stated, when I requested him to work, that he must not ex-

[1] Starke *vs.* Cheeseman, 1 Ld. Raym. 538.
[2] Hart *vs.* Mills, 15 M. & W. 85.
[3] Manor *vs.* Pyne, 3 Bing. 285.
[4] Dougal *vs.* Kemble, 1 Bing. 383.
[5] Doe *vs.* Amey, 12 A. & E. 46.

pect to be paid, no intention to pay is imputed to me by a *præsumptio juris et de jure*, and no contract is implied by law against the real facts of the case.[1] A tacit contract, in short, is not a fictitious but a genuine contract, which may be fairly inferred by a proper application of the rules of evidence. There may even be a genuine implied (*i. e.* tacit) contract, although dissent be expressed, if, notwithstanding such dissent, the whole evidence, when taken together, warrants an inference of assent. Thus, where a person, wishing to send fish by a railway, was told by a notice served upon him that fish would only be carried on certain terms, and he objected to those terms, but nevertheless sent the fish, the jury were held properly to have found that he had in fact agreed to send his fish upon the terms of the notice.[2] It is to be observed that the fish were not accepted upon his terms, or upon any terms other than those mentioned in the notice; and although he objected to those terms, the sending of the fish could only be looked upon as a waiver of his objections: *Protestatio facto contraria non valet.*

The above observations are, it is hoped, sufficient to show that whether a genuine contract exists or not, is a mixed question of law and fact, but that whether a contract is express or implied (*i. e.* tacit) is a pure question of fact, and depends entirely on the evidence by which the existence of the contract is proved. As the division of contracts into written and unwritten is a division founded only on their mode of proof, and does not turn on any difference in the nature of that consent, which is the basis of all agreements, so the division of contracts into express and implied (in the sense of tacit) has no reference to that consent, but solely to the evidence by which its existence is shown. It may, in truth, be said that the division into express and implied (in the sense of tacit) is not applicable to contracts at all, but only to the facts by which they are evidenced, and tallies, therefore, with the division of evidence into direct and indirect.

[1] See Moffatt *vs.* Laurie, 15 C. B. 583. Jewry *vs.* Busk, 5 Taunt. 302, was a case of this description, and one in which, in spite of Lord [Sir James] Mansfield, the jury clearly drew a wrong inference. [But the Court of Common Pleas agreed with the jury.—ED. L. REG.]

[2] Walker *vs.* The York and North Midland Railway Company, 2 E. & B. 750.

3. OF FICTITIOUS PROMISES, OR PROMISES IN LAW.

We pass now to a wholly different source of obligations, and proceed to consider the nature of what are called obligations arising *quasi ex contractu.*

Quasi contracts (which together with genuine tacit contracts, are usually called by English writers *implied* contracts) are not agreements at all. The consent without which no agreement can possibly exist, is in those transactions called *quasi* contracts wholly absent. Nevertheless, as will be hereafter shown, consent has been considered in our jurisprudence as essential, and has consequently been imputed by a fiction.

The term *quasi* contract has been adopted from the Institutes of Justinian. Speaking of obligations, it is laid down: *Sequens divisio in quatuor species deducitur: aut enim ex contractu, aut quasi ex contractu; aut ex maleficio, aut quasi ex maleficio.*"[1] Then in another place, we find the nature of *quasi* contracts determined thus: "*Post genera contractuum enumerata, despiciamus etiam de iis obligationibus quæ* NON *proprie quidem* EX CONTRACTU *nasci intelligentur, sed tamen* QUIA NON EX MALEFICIO *substantiam capiunt,* QUASI EX CONTRACTU *nasci videntur.*"[2] From this it appears that a *quasi* contract is an event giving rise to an obligation, and is characterized negatively; first, by not possessing the essentials of a contract; and, second, by not being unpermitted, and so falling within the class of *maleficia.* By the old Roman law, contracts and torts were regarded as the primary sources of obligations. Subsequently, other sources were also admitted, although they were neither contracts nor torts. Gaius[3] says, "*Obligationes aut ex contractu nascuntur aut ex maleficio, aut proprio quodam jure ex variis causarum figuris.*" It is these last which are divided by Justinian into *quasi* contracts and *quasi* torts. Both are distinguished from genuine contracts and genuine torts by the absence of those characteristics which are essential to such contracts and torts respectively; and each is further distinguished from the other by being—the first an event not unlawful, the second an event unlawful.

[1] Inst. iii. tit. 13, § 2.

[2] Inst. iii. tit. 27.

[3] Dig. xliv. tit. 7, de O. et A. fr. 1, pr.

M. Ortolan, in his excellent commentary on the Institutes, writes: "The event which occasions an obligation *quasi ex contractu*, contains no agreement; there is no mutual accord between the parties, by virtue of which the obligation arises, and no contract in any sense can be said to exist. On the other hand, the event is one not juridically unpermitted, and cannot therefore be termed a tort or a *quasi* tort."[1] The legal obligation *quasi ex contractu* arises from the flagrant moral injustice which would otherwise be allowed to be committed with impunity; it arises *ex re*, by the force of circumstances, *utilitatis, æquitatis causâ.*[2] Hence it is that persons who are altogether incapable of contracting, may, nevertheless, be obliged *quasi ex contractu:* and this shows conclusively the absurdity of the theory that consent, express or implied, is essential to such an obligation. To say that a person has no sufficient will to bind himself *ex contractu*, and yet that the same person can only be held bound *quasi ex contractu* by virtue of a presumed exercise of will, is to utter in the same breath two wholly inconsistent propositions. And yet we find writers, both foreign and English, treating *quasi* contracts as permitted transactions, which give rise to obligations by virtue of a presumed consent. Having shown that such a theory is not warranted by the *corpus juris*, and that any consent in the class of cases now under discussion has no existence in point of fact, but is purely fictitious, we shall endeavor to discover the reasons which have led to the adoption of the fiction in our own system of jurisprudence.

Previously to the Statute of Westminster 2, the only common forms of action,[3] by which a right *in personam* could be enforced, were *covenant, debt, detinue,* and *trespass.* Of these, trespass was an action *ex delicto*, which did not in any case lie for a nonfeasance, or even for a misfeasance, unless done *vi et armis*. Debt only lay to recover a liquidated sum of money, and not damages for a breach of contract or other cause. Detinue lay for the recovery of a

[1] 2 Ortolan Explic. des Instit. lib. iii. tit. 27.

[2] See Dig. xliv. tit. 7, de O. et A. fr. 5, and 1 Molitor des Oblig. en Droit Rom. § 7.

[3] The writs of account, annuity, conspiracy, and deceit, and the writs of assize, &c., may be left out of consideration, without affecting the general accuracy of the statements in the text.

certain specific chattel, detained in breach of good faith, but was not applicable to anything else; and covenant only lay in case of a contract formally embodied in a deed. The Statute of Westminster 2, c. 24,[1] introduced another class of actions *in personam*, called generically actions on the case, and characterized rather by negative than by positive features. No one of them was *covenant*, or *debt*, or *detinue*, or *trespass*, and each of them was originally unlike any other of them, inasmuch as the writ upon which each was founded was framed with special reference to the circumstances peculiar to the occasion which led the applicant to seek redress. The Masters in Chancery had, by the terms of the statute, ample power to frame new writs upon the model of any of the writs previously established, and so to extend any of the old actions to cases more or less like those to which they had been strictly confined. This power was not, however, exercised to its full extent; for during the first century after the passing of the Act the new actions appear seldom to have been brought; and in nearly all of those which are to be met with in the books the writs were framed in *tort* on the model of the writ of trespass *vi et armis*.[2] Not guilty was the general issue,[3] and *trespass* on the case was the general name of the class.[4] In the reign of Henry IV., actions on the case became common, and it is in his reign that we first find traces of actions of assumpsit as a distinct sub-class of actions on the case. Actions founded on the non-performance of an express contract, not under seal, were by no means favored by the judges of those times.[5] On two occasions actions were brought, in which the declaration alleged a promise (*Quare cum, &c., assumpsisset, &c.*) and a breach; but the judges set their faces against the attempt, and decided that the defendant, having been guilty of no misfeasance

[1] See it in 2 Inst. 404.

[2] See 3 Reeve, Hist. 89; Bro. Ab. Accion sur le Case.

[3] Ebrington *vs.* Doshant, 1 Lev. 142.

[4] A century has not yet elapsed since actions on promises were commonly called actions on the case. See Vigers *vs.* Aldrich, 4 Burr. 2483; Jacques *vs.* Withy, 1 T. R. 557.

[5] See Bro. Ab. Accion sur le case, and the cases referred to in 1 Ashe's Promptuary, p. 11, § 12.

or malfeasance, was not liable at all.[1] This naturally drove persons aggrieved by the non-performance of a deliberate promise into the Court of Chancery,[2] a course which seems to have induced the common law judges to take a somewhat more liberal view of the cases subsequently brought before them. The growing spirit of liberality can be distinctly traced in the decisions pronounced during the reigns of Henry VI. and Edward IV., and brought together by Mr. Reeve in his History of English Law;[3] and in the reign of Henry VII. it was finally settled that an action on the case for the non-performance of a promise would lie.[4] The modern action of assumpsit was thus at length introduced. There is, however, no trace as yet of an action of assumpsit based upon a fictitious contract.[5] Such an innovation could not be expected to be made without opposition, or in the absence of the most urgent necessity. The necessity is obvious, for the reader will have no difficulty in imagining cases where a remedy ought certainly to exist, and where, nevertheless, no satisfactory remedy was provided by any of the original writs upon which actions at law were based.

Take, for example, the case of money paid by mistake in satisfaction of a debt erroneously supposed to be due. The money paid ought clearly to be returned, but the means by which its return could be compelled were by no means obvious or satisfactory. Covenant was out of the question; trespass equally so; trover or detinue would not lie, inasmuch as the ownership in the particular coins paid had been transferred; account was doubtful and tedious; debt presupposed a contract,[6] and even if it lay, the plaintiff was liable to be defeated by an unscrupulous wager of law, or by a mistake as to the amount which ought to be returned.[7] An action on the case for a nonfeasance, in other words, an action of assumpsit, was the only satisfactory form of action left. But that had not as yet been sustained, except where there was an actual agreement between the parties. In the case supposed, there is no

[1] 3 Reeves, Hist. Eng. Law, 245. [2] 1 Spence, Eq. Jur. 243.
[3] 3 Reeve, 394. [4] 4 Reeve, 171. [5] 3 Reeve, 396.
[6] See the argument in Harris *vs.* De Bevoice, 2 Ro. Rep. 440.
[7] 3 Bl. Com. 155.

agreement whatever for the return of the money; assumpsit, therefore, would not lie, and there was no remedy unless by a subpœna out of Chancery. In this difficulty, a promise to return the money was imputed by a fiction,[1] and by means of this fiction the remedy by assumpsit was made available. The fictitious promise was called a *promise in law*, an *implied* promise. A denial by the defendant that he made any promise in point of fact, was wholly useless; he ought to return the money, and the fiction was necessary as a means whereby to compel him so to do. The great advantages which an action of assumpsit had over the action of debt, as well as over every other form of action on the case, and the small departure from established forms which the above fiction rendered necessary, are sufficient to account for its origin and subsequent rapid extension.

The fiction being established, it became customary to talk of express contracts, and contracts implied by law, and to divide contracts into express and implied—a division which, in the sense in which the word *implied* is used, is inadmissible, if the word contract is to retain any definite signification. The fictitious nature of implied promises was clearly seen by Lord Holt. In *Starke* vs. *Cheeseman*, 1 Ld. Raym. 538, he is reported to have said: "The notion of promises in law is a metaphysical notion, for the law makes no promise but where there is a promise of the party;" and in *Anon.* 6 Mod. 131, he says, "There is no such thing as a promise in law." The meaning of this is, that a promise in law, also called an implied promise, is not a genuine promise at all. The circumstances which, as the phrase goes, raise a promise in law, are indefinite in number, and cannot be said to have more characters in common than these; namely, first, the negative one of absence of any genuine agreement, express or tacit; and, second, the positive one of being such as on the plainest principles of morality give rise to an obligation which, in the opinion of common law judges, ought to be enforceable at law, but which,

[1] A similar fiction, "*making a privity*," was applied to actions of account, and thence to actions of debt. See Finlason's Lead. Cases on Pleading, 79; Core's Ca. Dyer, 20 *a*.

nevertheless, cannot be properly enforced except by means of an action in form *ex contractu*. According to Blackstone, contracts *implied* by law are "such as reason and justice dictate, and which, *therefore*, the law presumes that every man has contracted to perform."[1] This passage, it must be admitted, is very unsatisfactory. Justice and reason dictate no contract in any case whatever; such agreements as people choose to make are recognized, and are "in justice and reason" to be upheld or condemned, according to their nature, and the circumstances under which they were made; but where there is, in fact, no genuine agreement, either express or tacit, no *fictitious agreement* is dictated, either by justice or by reason. Unsatisfactory, however, as the passage is, we have thence authority for saying, that it is impossible accurately to determine, by definition, the limits of the class of cases in which a fictitious promise has been or will be imputed.

4. OF IMPLIED REQUESTS.

The theory of implied requests is, in part, precisely similar to that of implied promises, both as regards its origin and the purposes for which it was invented. In order to enforce certain clear moral obligations, arising in the absence of any genuine agreement, whether express or tacit, a promise to perform them was, as we have seen, imputed by a fiction. To make this fiction of use in those cases where that which was regarded as the consideration for the fictitious promise was past and executed, it was further necessary, if there had been in fact no express or tacit request on the part of the obligor, to suppose that what had been done by the obligee had been done at the request of the former, to whom the promise was imputed. It is, in general, both morally and otherwise, very just and reasonable that a person shall not be permitted unasked to do another a kindness, and then make him pay for it.[2] As a rule, no person is bound to pay for a benefit which he never sought to obtain. On the other hand, morally it is very unjust,

[1] 3 Bl. Com. 159; Ib. 162; and Comyn, Contr. 4.

[2] Hunt *vs.* Bate, Dyer, 272 *a*; Galway *vs.* Mathew, 10 East, 264; Stokes *vs.* Lewis, 1 T. R. 20; Child *vs.* Morley, 8 T. R. 610.

although in this country it has long been held legally just, that an express promise to pay for an unsought benefit actually received should be deemed invalid.[1] There are, however, cases where a person is manifestly entitled to compensation for what he has done, although he did not do it at the request, express or tacit, of the person who ought to make the compensation. Thus, if one of two sureties pays the whole of a debt guaranteed by both, he clearly ought to be indemnified by the other to the extent of one-half of the debt paid. A fictitious promise to indemnify would not alone be sufficient; for the consideration for it is wholly past, and the person paying (we will suppose) neither became surety, nor paid the debt at the request, express or tacit, of his co-surety. To remedy this objection, a fictitious request is imputed, and then the fictitious request, together with the payment, supports the fictitious promise to indemnify. This promise, in its turn, serves as a foundation for a declaration in assumpsit; and so justice is done.[2]

Cases are also to be found where a fictitious request has been imputed, in order to support an *express* promise. An express promise to pay for a benefit unsought, but actually obtained, has been held invalid for want of a proper consideration. This monstrous doctrine, however, has been softened down, by supposing the express promise to be evidence of a request preceding the benefit obtained.[3] This is manifestly not a legitimate inference. An express promise to pay for what has been done, the evidence of an intention to confer a right on the promisee to require such payment, but is clearly no evidence whatever that the promisor *previously* requested the doing of what he has undertaken to pay for. Previously to the promise, the promisor may have done nothing whatever to raise an expectation of payment, and it is absurd to say that from the promise anything like a prior request can be legitimately inferred. The doctrine relating to executed considerations, renders a fictitious request as necessary where the promise is genuine, as where it is itself fictitious. Speaking generally, the modern cases show that

[1] Hunt *vs.* Bate, Dyer, 272 *a*; Bull. N. P. 147 *a*.

[2] Cowell *vs.* Edwards, 2 Bos. & P. 268.

[3] See 1 Wms. Saund. 264 *b*.

where there is an express promise, and the only consideration for it is past and executed, that express promise is invalid, unless there was in fact a previous request. Such is the general rule; and a rule more fitted to favor gross breaches of faith, can hardly be conceived. The doctrine, however, is fortunately not without exception, for there are cases where, in order to raise an obligation on the part of the promisor, a previous request by him will be imputed by a fiction;[1] and there are others, as in the case of a promise to pay a barred debt, where the promise is held binding in the absence of any such fiction. It would seem that there is only one class of cases in which a request will be imputed solely to support an express promise; viz. cases like *Wing* vs. *Mill*, 1 B. & A. 104, where the plaintiff of his own accord did that which the defendant was legally compellable to do, and the defendant afterwards, in consideration thereof, promised to pay. All the other cases in which a request is imputed, will, on examination, be found to turn, not on the absence or presence of a genuine promise, but on the existence or non-existence of circumstances from which a promise will be imputed. If the circumstances are such that a promise would be imputed, then, if necessary, a previous request will likewise be imputed. For example, where the plaintiff has been compelled to do that which the defendant ought legally himself to have done; or where the defendant has adopted and received the benefit of what the plaintiff, without being requested, did for him. In all such cases, whether there be a genuine promise to pay or not, is immaterial. The genuine promise, even if there be one, goes for nothing: in other words, "where an executed consideration is one from which the law will imply a promise, no express promise made in respect of that consideration can be enforced, if it differ from the promise which the law would imply from the same consideration."[2]

From what has preceded, it appears that the expression implied promise, means sometimes a genuine but tacit promise, and sometimes, and more often, a promise which is wholly fictitious; and

[1] See Chitty on Contracts, 4th ed. p. 62.

[2] Smith on Contracts, 119, 2d ed.; Chitty on Contracts, 63, 4th ed. See, too, 1 Wms. Saund. 264 *a*, note *a*.

that this last meaning is that which also attaches to the expression promise in law. The reasons which gave rise to and have preserved these fictitious promises, have been traced to the disinclination of the common law judges to depart from the old established forms of pleading. The doctrine of implied requests, which is so closely connected with that of implied promises, has been traced to the necessity of escaping from the cruel consequences of a logical application of the rule which does not allow a permitted act, past and gone, to give rise to an obligation on the part of one who did not request its performance, or even to be sufficient to support a subsequent express promise by him. To say that, under such and such circumstances, the law implies a promise, is, it is submitted, neither more nor less than equivalent to saying that the circumstances supposed give rise to an obligation to compensate, and that such obligation can be enforced at law by an action in form *ex contractu*. What those circumstances are it is not necessary now to examine. There is one question,[1] however, which forces itself upon the attention, and which ought perhaps to be answered in this place, viz., what is the distinction between an obligation which gives rise to what is called an implied promise, and any other obligation which does not arise either from a genuine contract or from a tort? Without discussing this question at length, the writer ventures to submit that there is essentially none at all, unless it happen, as in some cases it may, that one is relative and the other absolute.[2]

N. L.

[1] Raised in Govett *vs.* Radnidge, 3 East, 70; Smith *vs.* White, 6 Bing. N. C. 218; Pozzi *vs.* Shipton, 3 A. & E. 963; and Brown *vs.* Boorman, in error, 11 Cl. & Fin. 1. On this subject, see an article in 1 Law Mag. N. S. 192.

[2] In some states of America *assumpsit* lies for taxes, 20 Amer. Jur. 6. So in our own country an action in form *ex contractu* lies for money payable by act of Parliament, or a by law. Com. Dig. action. *assumpsit*, A. 1.