

California Law Review

Volume II

MARCH, 1914

No. 3

Contract Distinguished From Quasi Contract¹

The early common law did not recognize the validity of private agreements. Growth toward such recognition has been gradual and unsystematic, and was probably more influenced by the exigencies of procedure, the shifts and devices of counsel and the prejudices of judges than by any theory of contract.² This may account in a measure for the failure to appreciate the real nature of contract until in very recent times, and the omission by some contemporary courts, including the Supreme Courts of North Dakota and California, to distinguish between contracts and obligations quasi ex contractu.

There are two essential elements in the true contract,—agreement and obligation. Agreement results from the volition of the parties thereto, evidenced by words or overt acts. Obligation is imposed by law, but arises from and is defined by the agree-

¹ With special reference to the Civil Codes and the decisions in California, Montana and the Dakotas. In 1865, after a number of years of arduous labor, David Dudley Field and his associates reported a Civil Code for the State of New York, which the legislature passed, but the governor vetoed. The influence of the New York County Bar was sufficient to prevent the veto from being overridden. In 1867, the draft of this code was adopted in the Territory of Dakota. California adopted it in 1872 with some changes, not pertinent to the present subject. In 1877, Dakota readopted it as amended in California with modifications also not pertinent here. Montana has also adopted the California Civil Code. The Field Civil Code is the basis of portions of the Indian Contract Act. Code references are to the Civil Codes in the various states, as follows: Kerr's Cyc. Codes of California, Montana Revised Codes of 1895, North Dakota Revised Codes of 1905, and South Dakota Compiled Laws of 1908.

² See, Sir Frederick Pollock in *Ency. Britt.* 11th ed. Title, Contract; *Elliot on Contract*. Sec. 11.

ment to which it is attached. It might, therefore, be said that a contract is a legally enforceable agreement. An agreement is not legally enforceable unless it is between competent parties, is supported by consideration, and is not contrary to judicial notions of public policy.³

The Civil Codes define contract as follows:

"A contract is an agreement to do or not to do a specific thing."⁴

This section should be read in connection with the next succeeding section,⁵ which declares:

"It is essential to the existence of a contract that there should be:

- (1) Parties capable of contracting;
- (2) Their consent;
- (3) A lawful object; and
- (4) A sufficient cause or consideration."

These code provisions have been quoted and paraphrased in several decisions.⁶ They were intended to state the common law,⁷ but while they are too reminiscent of Blackstone to be regarded as an accurate statement of the present law, they are not likely to mislead anyone in practice.

The conventional classification divides contracts⁸ into three classes,—express, implied in fact, and implied by law. Much confusion, leading to erroneous decisions, has been caused by this classification, due to the suggestion it contains that contracts implied in fact and contracts implied by law are closely related. The truth is that express contracts and contracts implied in fact are the same in principle. Both arise from agreement. The difference between the two is superficial. In the former the vehicle of thought is words; in the latter, conduct, or words

³ Wald's *Pollock on Contracts*, 3rd ed. by Samuel Williston, page 7.

⁴ Civil Codes; Cal. § 1549, Montana § 2090, N. D. § 5280, S. D. § 1188. For a slightly different definition see *Robinson v. Magee* 9 Cal. 81, 83.

⁵ Civil Codes; California § 1550, Montana § 2091, North Dakota § 5281, South Dakota § 1189.

⁶ *Loaiza v. Superior Court*, 85 Cal. 11, 24 Pac. 707, 711. *Amer. Can Co. v. Agr. Ins. Co. etc.*, 12 Cal. App. 133, 137; 106 Pac. 720, 722. *Loma Prieta etc. Co. v. Hinton*, 12 Cal. App. 766; 108 Pac. 528, 530.

⁷ *Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695, 697.

⁸ This refers to simple contracts. The Codes destroy the effect of a seal.

and conduct.⁹ The so called "contract implied by law", on the other hand, while sometimes difficult to distinguish in practice from a true contract, is not a contract at all. It is obligation imposed by law regardless of agreement and to meet the ends of legal justice.

These distinctions are clearly set forth in Keener on Quasi Contracts. The learned author says:—¹⁰

"The terms, 'express contracts' and 'contracts implied in fact,' are used to indicate, not distinction in the principles of contract, but a difference in the character of the evidence by which a simple contract is proved. The source of the obligation in each case is the intention of the parties. The term 'contract implied by law' is used, however, to denote not the nature of the evidence, by which the claim of the plaintiff is to be established, but the source of the obligation itself. It is a term used to cover a class of obligations where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him notwithstanding the absence of intention on his part, and in many cases in spite of his actual dissent."

In *Rhodes v. Rhodes*,¹¹ Lord Justice Cotton, discussing the nature of the obligation incurred by a lunatic for necessaries, said:

"Now the term 'implied contract', is a most unfortunate expression, because there cannot be a contract by a lunatic. But whenever necessaries are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessaries out of his own property. It is asked, can there be an implied contract by a person who cannot himself contract in express terms? The answer is, that what the law implies on the part of such a person is an obligation, which has been improperly termed a contract, to repay money spent in supplying necessaries."

It will help to avoid confusion if the term "implied contract" is discarded altogether. "Tacit contract" may be substituted for

⁹ See *Nevills v. Moore Min. Co.*, 135 Cal. 561, 67 Pac. 1054.

¹⁰ P. 5.

¹¹ 44 Chan. Div. 94, 105.

"contract implied in fact" and "quasi contract" for "contract implied by law." This terminology is used by the leading English writers,¹² and is coming into general use in this country. The term "quasi contract" does not seem satisfactory to the writer but is employed because there is nothing better sanctioned by usage.¹³

Before turning to the authorities in the states under the Civil Codes, it may be observed that an appreciation of the true principles underlying contract and quasi contract is not merely of academic interest. It is often of practical consequence, for example, in determining whether or not a cause of action exists,¹⁴ in choosing the theory of a case,¹⁵ in applying the appropriate rule in damages,¹⁶ and in the construction of constitutional¹⁷ and statutory¹⁸ provisions.

The distinction between contract and quasi contract is recognized by Civil Codes. They declare:—¹⁹

"An obligation arises either from: (1) The contract of the parties: or (2) The operation of law. . . .

"An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."

The New York Code Commissioners, writing in 1865, appended the following note to these sections as they appeared in their draft of the proposed New York Civil Code: "The ordinary definition of an implied contract includes obligations imposed by law upon parties as between each other. These obligations are, however, considered in another part of this code."²⁰

¹² Wald's *Pollock* pp. 9-13, Anson pp. 9, 22-23.

¹³ See Woodruff on *Quasi Contracts*, § 4.

¹⁴ *Schaeffer v. Miller*, 41 Mont. 417, 109 Pac. 970. *Cheasley v. Soo Coal Co.*, 19 N. D. 18.

¹⁵ *Wright v. Sonoma Co.*, 156 Cal. 475, 105 Pac. 409.

¹⁶ *Turner v. Webster*, 24 Kans. 29.

¹⁷ *Scarborough v. Dugan*, 10 Cal. 305. *Louisiana v. New Orleans*, 109 U. S. 285.

¹⁸ *Pete Fuel Co. v. Tuck*, 53 Cal. 304. *Babcock v. Briggs*, 52 Cal. 502.

¹⁹ Civil Codes; Cal. §§ 1619-1621; Mont. §§ 2180-2182; N. D. §§ 5208, 5327-5329; S. D. §§ 1233-1235. Compare *Indian Contract Act*, Chap. V; *Commercial Laws of the World (American Edition)*, Vol. XVI, p. 55.

²⁰ *New York Civil Code 1865* §§ 789-791. See also Civil Codes; Cal. §§ 1708-1715, 1427-1428; Mont. §§ 2290-2297, 1920-1921; N. D. §§ 5386-5393, 5207-5208; S. D. §§ 1291-1298, 1114-1115.

In view of the clear distinction in principle between contract and quasi contract, the practical importance of this distinction and its unequivocal recognition by the Civil Codes, one might reasonably expect to find the judicial opinions in California, Montana, and the Dakotas dealing with the point, harmonious and just. They are, however, far from either. It may, indeed, be doubted whether or not the Civil Codes have had any influence upon the decisions. The controlling sections have rarely been cited, and so far as the writer's search discloses, never with a full understanding of their significance. In Montana and South Dakota, nevertheless, the distinction has been observed, while in North Dakota and California it has been disregarded.

Turning now to the cases, let us take a general view, and then proceed to a detailed examination, first of the cases involving tacit contract and later of the cases involving quasi contract.

An able discussion of the distinction between contract and quasi contract is found in *Schaeffer v. Miller*,²¹ a recent Montana case. The opinion is by Mr. Justice Holloway, who said in part:

"In treating of quasi contracts or contracts implied by law, as distinguished from contracts implied in fact, the supreme court of Pennsylvania in *Hertzog v. Hertzog*, 29 Pa. St. 465, a leading case upon the subject, says: 'In one case, the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other, it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty. We have, therefore, in law three classes of relations called contracts: (1) Constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contracts, where no proper contract exists, expressed or implied. (2) Implied contracts, which arise under circumstances which according to the ordinary course of dealing and the common understanding to men, show a mutual intention to contract. (3) Express contracts."

In *Siems v. Pierre Savings Bank*,²² a South Dakota case, it was said:

²¹ *Schaeffer v. Miller*, 41 Mont. 417, 109 Pac. 970, 972.

²² 7 S. D. 338, 64 N. W. 167, 168.

"While it may seem illogical for the law to imply a promise upon the part of one whose conduct and declarations clearly disprove any intention to promise, still it is constantly done. It is one of the fictions of the law which it seems convenient, if not necessary, to retain until the courts adopt the doctrine that such contracts are created by law, rather than implied by it. Thus, if a husband wrongfully expels his wife from his house, he is liable, as upon a contract implied or created by the law to any person who furnishes her with necessary supplies, although he gives notice to the tradesman himself that he will not pay for the same."

The North Dakota and California cases show no little confusion of thought. Thus in *Chesley v. Soo etc., Co.*,²³ which involved an obligation quasi ex contractu, the Supreme Court of North Dakota said:

"It is true that implied contracts are not entered into by express words but are manifested by the conduct of the parties; but they are made by the parties as a matter of law with equal effect as though the terms are stated expressly."

The California cases also show a failure to distinguish between contract and quasi contract. In *Smith v. Moynihan*,²⁴ where the question was whether or not the evidence showed a tacit contract, the court said:

"In general an implied contract, in no less degree than in an express contract, must be founded upon an ascertained agreement, the substantial difference being in the mere mode of proof by which they are respectively to be established. *The law will imply that a party did make such a stipulation as under the circumstances disclosed he ought upon the principles of honesty, justice and fairness to have made.*"²⁵

In *Decelis v. Porter*,²⁶ the action was upon an obligation quasi ex contractu. We find this comment in the opinion:

"If A objects to receiving the money of B, still, if he received it, and more especially if he uses it for his own

²³ 19 N. D. 18, 20, 121 N. W. 73.

²⁴ 44 Cal. 53, 62-63.

²⁵ The italics are the writer's.

²⁶ 65 Cal. 3, 2 Pac. 257, 3 Pac. 120.

purposes his objection to receiving it would count as nothing in defense of B's action to recover it. *By using the money he gives all the consent required. By such conduct his objection is waived and displaced and consent and approval take its place. It is equivalent to consenting originally.*"

Jennings v. Bank of California²⁷ involved a tacit contract. The court observed in the course of the opinion:

"An implied contract is one, the existence and terms of which are manifested by conduct or, in the language of a learned writer, 'is inferred from the conduct, situation or mutual relations of the parties and enforced by law on the ground of justice' (Metcalf, Contracts). *In the present case every consideration of justice leads to the implication of an agreement for security.*" (Citing Civil Code, Sec. 1621).

Let us now consider in more detail the cases involving tacit contract.

In Grant v. Dreyfus,²⁸ plaintiff was the keeper of a pasture, upon which horses of various persons including defendant, ran at large. Plaintiff inserted the following advertisement in the local newspaper:

"NOTICE.—G. Grant wants every horse taken out of Eagle Canon pasturage as quick as possible, and, if not, the owner will be charged fifty cents a day. G. Grant."

The defendant with knowledge of the advertisement left his horse in the pasture. The court held him liable at the rate of fifty cents per day.

By leaving the horse in the pasture defendant signified his acceptance of the terms imposed. The case is clearly one of tacit contract. There is no discussion of principle in the opinion, but the decision is in harmony with this view, otherwise defendant would have been held liable only for the reasonable value of the pasturage, and not according to the terms of the advertisement.²⁹

²⁷ 79 Cal. 323, 21 Pac. 852, 853.

²⁸ 120 Cal. XVII, 52 Pac. 1074. Compare Reed v. Hickey, 13 Cal. App. 136; 109 Pac. 38.

²⁹ For measure of recovery in quasi-contract of this type see, Keener on Quasi Contract, pp. 330, 244; Nevada Mining Co. v. Farnsworth, 89 Fed. 164 (Utah C. C.); Heinze v. McKinnon, 205 Fed. 366 (N. Y. C. C. A.)

Wright v. Sonoma Co.³⁰ on its facts is very close to Grant v. Dreyfus, the case just considered. In Wright v. Sonoma Co., the facts were these; the county by one of its road commissioners had been taking water from plaintiff's well under a bona fide claim of right, whereupon plaintiff served a written notice upon the road commissioner forbidding the taking of any more water, and advising that in the event he should disregard the notice, plaintiff "hereby demands" \$50.00 a day for each additional day the water should be taken. The road commissioner continued to take water until enjoined by court decree. Plaintiff then sued in express contract, alleging the foregoing facts; and demanded payment for the water taken, at the rate of \$50.00 per day. The court held that there was no express contract, and gave judgment for defendant, but suggested that "the only claim open to plaintiff was for the reasonable value of the water."

Both court and counsel seem to have overlooked the fact that if there was a true contract it was tacit and not express, because the acceptance, if any, was manifested by conduct. But the decision is correct. An acceptance of the terms of the notice could not be inferred from the taking of water, as it was from the use of the pastures in Grant v. Dreyfus, because in the present case, the taking was under claim of right.

Jennings v. Bank of California,³¹ presents an excellent illustration of tacit contract. A stock certificate, issued by a banking corporation, contained a condition that no transfer would be made upon the books of the company until after the payment of all indebtedness by the one in whose name the stock stood. The holder of a certificate, indebted to the bank in a large sum, transferred it to the plaintiff, who brought an action to compel the bank to register him as a stockholder. Although the opinion

³⁰ Wright v. Sonoma Co., 156 Cal. 475, 105 Pac. 409.

³¹ 79 Cal. 323, 21 Pac. 852. "Was there a contract for an equitable lien? We think that such a contract must be implied [inferred] from the conduct of the parties. We do not say that the mere acceptance by the stockholder of the certificate, without objection would constitute a contract, in the absence of subsequent dealings with reference thereto. It is not necessary to express an opinion upon such a case; but we think that the acceptance without objection of the certificate containing such a condition, and the subsequent borrowing money from the bank without anything to exclude the idea that the condition was to be binding amounts to an assent to it, so far as the particular loan was concerned, and that a contract is to be implied [inferred] that the stock was to stand upon the books as security for the loan." (21 Pac. 853). The court then added the erroneous observations quoted above.

confuses tacit contract and quasi contract the decision was for the defendant on the ground that there was a tacit contract between plaintiff's transferor and the bank giving the latter an equitable lien on the stock.

Peerless Glass Co. v. Pacific etc., Co.,³² arose on these facts: The parties had negotiated by mail for the sale and purchase of Mason fruit jars. Plaintiff, the intending seller, wrote in answer to an inquiry that the "freight allowance" would be seventy-four cents. He intended to convey the meaning that the freight rate would be seventy-four cents. Defendant understood him to mean that he would allow a discount of seventy-four cents and ordered the goods on that hypothesis. The goods were shipped. Defendant then learned of his mistake but he nevertheless accepted and used the goods. The court held that there was no contract but defendant was liable for the value of the goods which the evidence showed to be the contract price.

It is obvious that in many cases there may be a difference between the reasonable value of goods and their contract price. The result reached in the case was correct, but the reasoning seems unsound. When the defendant retained the goods with knowledge of the mistake as to terms, it is submitted, that he tacitly accepted the offer in the sense in which it was made by plaintiff, and such is the view generally taken in similar cases.³³ He therefore should have been held for the contract price.

It will be observed that when the mistake is as to price and the goods are accepted and used after knowledge of the mistake, defendant's obligation necessarily is to pay the reasonable value of the goods, but the obligation is nevertheless contractual. The same thing is true when the contract is silent as to price.³⁴

Such contracts as those just referred to are somewhat difficult to distinguish in practice from obligations quasi ex contractu, to pay for benefits conferred.³⁵ If the mistake is not known to the defendant when the goods are accepted the obligation is quasi

³² 121 Cal. 641, 54 Pac. 101. See also *Reed v. Weule*, 176 Fed. 660. (Cal. C. C. A.)

³³ See *Williston on Sales*, sec. 460.

³⁴ See *Jules Levy & Bros. v. Mautz*, 16 Cal. App. 666, 117 Pac. 936; *Bank v. Price*, 12 S. D. 184, 80 N. W. 195.

³⁵ *Wald's Pollock on Contracts*, pp. 10-12, especially the American Notes.

contractual.³⁶ Whether or not the mistake is known before performance often involves a difficult matter of proof.

It is, of course, impossible to lay down a general rule to determine whether or not in a given case the proof shows a tacit contract.³⁷ But Lord Esher M. R. has made a generalization of value. In *Ex parte Ford*,³⁸ that learned judge, said: "Whenever circumstances arise in the ordinary business of life in which if two persons were ordinarily honest and careful, the one of them would make a promise to the other it may properly be inferred that both of them understood that such a promise was given and accepted."³⁹

This brings us to the cases involving quasi contracts. "Quasi contracts," said the late Professor Ames, "are founded (1) upon a record, (2) upon a statutory, official or customary duty, or (3) upon the fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another."⁴¹

³⁶ *Ibid* p. 11. "Here Webster never assented to a contract to work for \$1.50 per day. He agreed to do certain work, and did it; but his understanding was that he was to receive \$3.00 per day. Turner and Otis employed him to do that work and knew that he did it, but their understanding was that they were to pay \$1.50 per day. In other words, the minds of the parties met upon everything but the compensation, and as to that there was no *aggragatio mentium*. What, then, should result? Should he receive nothing because there was no mutual assent to the compensation? That were manifest injustice. Should his understanding bind both parties? That were a wrong to them. Should their's control? That were an equal wrong to him. The law, disregarding both, says, a reasonable compensation must be paid. . . . Justice is done to all parties by ignoring any promise or understanding as to compensation, and giving to the laborer compensation for the work done and requiring the party receiving the benefit of such work to pay a just and reasonable price therefore." per Brewer J. in *Turner v. Webster*, 24 *Kans.* 38.

³⁷ In the following cases a contract could not be inferred from the evidence: *Smith v. Moynihan*, 44 *Cal.* 53; *Nevills v. Moore Min. Co.*, 135 *Cal.* 561, 67 *Pac.* 1054; *Wright v. Sonoma Co.*, 156 *Cal.* 475, 105 *P.* 409; *Fisher and Hunter Co. v. New England etc. Co.*, 27 *S. D.* 221, 130 *N. W.* 841; *Murphy v. Murphy*, 1 *S. D.* 316, 9 *L. R. A.* 820, 47 *N. W.* 142; *International Society v. Hildreth*, 91 *N. W.* 70, 11 *N. D.* 262.

³⁸ 16 *Q. B. D.* 305, 307.

³⁹ Quoted in *Wald's Pollock on Contracts*, 3rd ed.

⁴⁰ 2 *H. L. R.* pp. 63-64, Ames, *Lectures on Legal History*, p. 160.

⁴¹ "4. In Roman Law there were certain cases of *negotiorum gestio* where defendant was liable, although there was no enrichment. There is nothing corresponding in English law, or, rather, there are only a few cases." MS. addition to above by Professor Ames, *Scott's Cases on Quasi Contract*, p. 18. On what constitutes a benefit in the law of quasi-contracts, see *Fabian v. Wasatch Orchard Co.*, 125 *Pac.* 860 (*Utah*); *Gillis v. Cobe*, 177 *Mass.* 584, 59 *N. E.* 455; and notes in *Pa. Law Rev.* Vol. 61, p. 330; *Columbia Law Rev.* Vol. V, p. 538. In *Zottman v.*

(I) *Upon a record.* The early writers and judges called a judgment a "contract of record" or a "contract implied by law," but at the present time the obligation of a judgment is generally recognized as quasi contractual.⁴² The nature of the obligation, it seems, has never been considered in Montana and the Dakotas, but in a number of California cases it has been held contractual.⁴³ Thus the California Supreme Court has held a judgment to be a contract within the protection of the federal constitution,⁴⁴ and that the justices' court act giving jurisdiction in contract confers jurisdiction to sue upon a judgment.⁴⁵ *Larrabee v. Baldwin*, is inconsistent with these cases. The court was called upon to construe a statute which made "each stockholder . . . individually and personally liable for his proportion of all the debts and liabilities of the company contracted or incurred during the time that he was a stockholder." The action was upon a judgment rendered after defendant became a stockholder but upon an obligation incurred by the corporation prior thereto. It was contended that the judgment was a contract which created a new obligation. The court held otherwise, saying through Sawyer C. J.,⁴⁷ "The claim . . . that the judgment is itself a contract creating a new debt . . . is too absurd to re-

San Francisco, 20 Cal. 96, 81 A. D. 96, plaintiff had entered into a contract with the city to construct an iron fence around a public square. The contract called for a wooden base and failed to provide for painting the fence. Individual members of the council directed plaintiff to put in a stone base and paint the fence which he did. He was not permitted to recover in quasi contract for the extra work. See opinion of Field, J. pp. 107-108; see also *U. S. v. Pac. Ry.*, 120 U. S. 240; *Wald's Pollock* 3rd ed. p. 11; *Columbia Law Rev.* Vol. XI, p. 85. But the scope of the quasi contract is beyond the purview of this paper. See Keener on Quasi Contracts: Woodward, the Law of Quasi Contracts, Chap. 1; and notes in *Columbia Law Rev.* Vol. VII, pp. 123, 418, id. VIII, pp. 58 and 654. See also *Rebman v. San Gabriel Land Co.*, 95 Cal. 390, 30 Pac. 564; *De Celis v. Porter* 65 Cal. 3, 2 Pac. 257, 3 Pac. 120; *Rose v. Foord*, 96 Cal. 152, 30 Pac. 1114; *Richeter v. Union etc. Co.*, 129 Cal. 367, 62 Pac. 39; *Hayes v. County of Los Angeles*, 99 Cal. 74, 79, 33 Pac. 766; *Babcock v. Briggs*, 52 Cal. 502.

⁴² See Elliot on Contracts, Sec. 2 n. 7, collecting the cases.

⁴³ *Robinson v. Magee*, 9 Cal. 81; *Scarborough v. Dugan*, 10 Cal. 305; *Stuart v. Lander*, 16 Cal. 372, 375; *Reed v. Eldredge*, 27 Cal. 247; *Wallace v. Eldredge*, 27 Cal. 498; *Bean v. Loryea*, 81 Cal. 153, 22 Pac. 513.

⁴⁴ *Robinson v. Magee*, 9 Cal. 81 (1858); *Scarborough v. Dugan*, 10 Cal. 305, 308; *Contra, Louisiana v. New Orleans*, 109 U. S. 285. See Note, *Columbia Law Rev.* Vol. 12, p. 272.

⁴⁵ *Stuart v. Lander*, 16 Cal. 372, 375; *Contra, Dusenbury v. Speir*, 77 N. Y. 144; *O'Brien v. Young*, 95 N. Y. 428; *Compare, Gutta Percha, etc. Co. v. Mayor*, 108 N. Y. 276, 15 N. E. 402.

⁴⁶ 35 Cal. 155.

⁴⁷ id. p. 168.

quire argument to refute it. That a judgment is a contract of record, in a certain legal sense, may be conceded, but it creates no such new liability, as the statute in question contemplates." It is to be hoped that in the next case involving the question, the California Supreme Court will have its attention called to *Larrabee v. Baldwin*, and the decisions in other jurisdictions.

(2) *Upon a statutory or official duty.* In Montana⁴⁸ and South Dakota,⁴⁹ it has been held, in accordance with the view now general,⁵⁰ that obligations arising from official and statutory duties are quasi contractual and not contractual.

The point is neatly illustrated in *Oppenheimer v. Regan*,⁵¹ a Montana case. An action for damages was brought in the justice's court against a sheriff for failure to satisfy a judgment out of funds in his hands. The statute gave the justice civil jurisdiction of the contract. The court held that the justice was without jurisdiction in the action, saying: "The gist of the action is the recovery of damages for nonperformance of official duty, and the penalty imposed by law for the nonperformance."

The California statute imposing personal liability upon stockholders in proportion to their holdings for "all debts or liabilities contracted or incurred" by the corporation has been the subject of a conflict of authority. In one line of cases judicial opinion has it that the obligation arising from the statute is contractual,⁵² while in another it has been held that the obligation is imposed by law, i. e. is quasi contractual.⁵³

The leading case for the first view is *Kennedy v. California Savings Bank*.⁵⁴ The question there presented was whether or not a suit against stockholders upon their statutory liability would support an attachment,—which will issue only in actions grounded upon contract. Defendant had moved to dissolve the attachment for two reasons, the first of which was "that said

⁴⁸ *Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695.

⁴⁹ *Board of Education v. School Dist. No. 19*, 23 S. D. 429, 122 N. W. 411.

⁵⁰ *Elliot on Contracts*, sec. 3. n. 9, collecting the cases.

⁵¹ 32 Mont. 110, 79 Pac. 695.

⁵² *Dennis v. Superior Court*, 91 Cal. 548, 27 Pac. 1031; *Kennedy v. Calif. Sav. Bank*, 97 Cal. 93, 31 Pac. 846; *McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418; *Miller & Lux v. Katz*, 10 Cal. App. 576, 102 Pac. 946; *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 110 Pac. 942; *Kiefhaber Lumber Co. v. New York Lumber Co.*, 15 Cal. App. 37, 113 Pac. 691.

⁵³ *Green v. Beckman*, 59 Cal. 545; *Hunt v. Ward*, 99 Cal. 612, 34 Pac. 335; *King v. Armstrong*, 9 Cal. App. 368, 99 Pac. 527.

⁵⁴ 97 Cal. 93, 31 Pac. 846.

action is upon a statutory liability and not upon a contract." A divided court upheld the attachment. The basis of the decision appears from the following excerpt:⁵⁵

"The necessary legal effect of the conditions prescribed (by the statute) is that a corporation when created becomes the agent of its stockholders to make such contracts and incur such liabilities as are authorized by law and its articles of incorporation. . . . It would seem, therefore, that an action against a stockholder to recover his proportion of the amount due upon a contract made by a corporation, which is only an agency adopted by him, for the transaction of business, was essentially an action founded on contract."

The proposition that the relation of principal and agent exists between stockholders and corporation must be dismissed as a figure of speech.⁵⁶ The theory of contractual liability is usually placed upon a different ground, namely, that the rules of positive law become terms of the stockholder's subscription contract and the stockholder therefore contracts for a personal liability according to the tenor of the statute.⁵⁷ This theory is equally untenable. If there be such terms in the stockholder's contract, they are placed there by the courts. In other words, they are "conditions imposed by law," and the basis of such conditions is quasi contractual.⁵⁸ The stockholder's contract is with the corporation and not the creditor. To permit the creditor to sue upon this contract would certainly present an interesting innovation upon the beneficiary doctrine, which apparently has not been considered by the profession.

Whether or not the stockholder's obligation is truly upon contract may be tested by applying it to situations such as these: Supposing that it be stipulated in the articles of incorporation that stockholders shall not be individually or personally liable for any of the corporate debts or liabilities; or supposing that the statute declaring the stockholders liable be passed after

⁵⁵ 97 Cal. at p. 96. 31 Pac. at p. 847.

⁵⁶ "Whenever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created by the charter; and not the contract of the individual members." Taney C. J., in *Bank of Augusta v. Earle*, 13 Pet. 519, 587, 10 L. ed. 274.

⁵⁷ See *Whitman v. Oxford National Bank*, 176 U. S. 559, 44 L. ed. 587.

⁵⁸ Keener on Quasi Contracts, p. 225; Costigan, *The Performance of Contracts*, pp. 7-8.

incorporation,—are the stockholders personally liable in either event? Surely there is neither express nor tacit assent. Nevertheless, the California Supreme Court has held stockholders personally liable in just such cases.⁵⁹ The writer has no quarrel with the decisions, but the opinions place the liability upon contract. Is it not clear that its true basis is quasi contractual?

No decisions have been found in Montana or the Dakotas dealing with this question. The American law generally is in flux. The preponderance of judicial opinion regards the obligation as contractual.⁶⁰ But it is believed that many of the cases adopting that theory are distinguishable. The point has usually arisen in actions brought in sister states upon the statutory liability. Under the circumstances, the precise inquiry has been whether or not the court has jurisdiction in view of the familiar rule that courts of the forum will not enforce penal statutes of a foreign jurisdiction. On this question the authorities divide. Many hold the statutes to be penal.⁶¹ The courts holding the statutes to be not penal, generally do so on the ground that the statutory obligation is contractual,⁶²—which seems to involve a contradiction in terms. The doctrine that the obligation is contractual apparently owes its existence to the argument that it is not penal. Waiving the question as to whether a statutory obligation may be contractual, does not this reasoning involve a non-sequitur? Must a statute be either penal or contractual? Remedial statutes, having no relation to contract, are often enforced in sister states, for example, statutes authorizing actions for wrongful death.⁶³

Not only are the authorities holding the statutes making stockholders personally liable to be penal, contrary to *Kennedy v. Bank*, but there is also good authority that the obligation is quasi contractual. There are decisions to that effect in New York, Massachusetts, New Hampshire, Rhode Island, the United

⁵⁹ *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 110 Pac. 942; *McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418.

⁶⁰ *Elliot on Contracts*, Sec. 3 n. 11; *Cook on Corporations* 6th Ed., Vol. I, pp. 585, 588, 591-594; but see *id.* Sec. 214, 217, 223, at pp. 595-599, and note in 22 L. R. A. n. s. 256.

⁶¹ *Cook on Corporations*, 6th Ed. Vol. I, pp. 595-599; Compare, *Wharton on Conflict of Laws*, 3rd ed. pp. 245-247.

⁶² *Cook on Corporations*, 6th Ed. Vol. I. pp. 585, 588, 591-594.

⁶³ *Powell v. Great Northern Railroad*, 102 Minn. 448, 113 N. W. 1017. See *Hancock National Bank v. Farnum*, 20 R. I. 466, 40 Atl. 341.

States Supreme Court and in other jurisdictions.⁶⁴ In one of the ablest and most learned opinions⁶⁵ dealing with the question, the Supreme Court of New Hampshire, speaking through Blodgett, C. J., said, quoting from an earlier case:

"The liability which the plaintiff seeks to enforce is a mere creature of the statute, having none of the elements of a contract, whether express or implied. It is a naked, statutory liability, entirely unknown to the common law, for the indebtedness of the corporation, however it may accrue, whether from the breach of a contract or the commission of a tort. The stockholder is not liable upon the contract in the one case, nor for the tort in the other, but, under the statute, for the debt against the corporation which may grow out of either."⁶⁶

The writer is aware that the question under discussion is one of statutory construction. But upon what theory of construction can a statute, imposing personal liability upon stockholders for "all debts and liabilities contracted or incurred (by the corporation)" be held to create a contract, which must arise from agreement of the parties thereto? The legislature itself seems to have regarded the statute as imposing an obligation *ex lege*,⁶⁷ and this construction has been accepted by the courts in a number of cases under the statute of limitations.⁶⁸ Can it be that the obligation is quasi-contractual for some purposes and contractual for others? It is submitted that the doctrine of

⁶⁴ *Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 54, 113 Am. St. 863, 77 N. E. 877; *New Haven etc. Co. v. Linden Spring Co.*, 142 Mass 349; *Crippen v. Loughton*, 69 N. H. 540, 46 L. R. A. 467, 76 Am. St. 192, 44 Atl. 538; *Hancock National Bank v. Farnum*, 20 R. I. 466, 40 Atl. 341; *Cristopher v. Norvell*, 201 U. S. 216, 50 L. ed. 732. See also cases collected 69 N. H. 540, 551-552, S. C. 76 Am. St. 192, 198-199.

⁶⁵ *Crippen v. Loughton*, *supra*.

⁶⁶ "Certainly, the ordinary elements of a contract are wanting. The minds of the stockholder and corporation creditor have not met upon the subject matter of the original debt; no credit has been given to the stockholder directly; he has not directly received the consideration, nor has he made a promise, express or implied. There is nothing between them which at common law would be regarded as a contract. But the statute imposes a liability upon grounds of equity and public policy. . . . We are aware that the greater number of cases call the liability a contract . . . but we think it much more accurate to say that the liability is a statutory liability simply, incidental to the ownership of stock, than to say that it is a contract." per Stiness J. in *Hancock National Bank v. Farnum*, 20 R. I. 466, 471, 40 Atl. 341, 343.

⁶⁷ Code of Civil Procedure, Cal., sec. 338 sub 1.

⁶⁸ Cited in Note 53.

Kennedy v. Bank is unsound. Perhaps one can not expect that it will be speedily overruled, but until it is, the law in California must be charged with a failure to accept the principle that an obligation imposed by statute is quasi contractual.

(3) *To prevent unjust enrichment from benefits conferred.*

That portion of the law of obligations quasi ex contractu which seeks to prevent unjust enrichment is of very wide scope, how wide may be gathered from the fact that it has recently been the subject of an extensive treatise. It will be necessary to confine the discussion here to the cases arising under the principle, so often invoked in practice, that one may not retain money which in equity and good conscience belongs to another. The duty following from this principle is often erroneously treated as contractual.⁶⁹ Its true nature has been observed in Montana⁷⁰ and South Dakota, but disregarded in North Dakota. The cases in California are in conflict.

Schaeffer v. Miller,⁷² a recent Montana case, is instructive on the point. In the course of negotiations for the purchase of real estate from the defendant, plaintiff had paid defendant money on account of the purchase price. The negotiations fell through, and plaintiff brought action for the recovery of the money paid. Defendant pleaded that the action was barred by the three year statute of limitation, governing obligations other than contract. Plaintiff contended that the statute was not applicable as the action was on an implied contract, and so governed by the five year statute. The Supreme Court of Montana upheld the plea. In the course of a well reasoned opinion, it was said:⁷³

"There was not any agreement between Miller and Schaeffer that Miller should return the money if the negotiations failed, or at all. There was not any meeting of minds and not any consideration; therefore there was not any contract as that term is generally understood. But Miller received money which in equity and good conscience

⁶⁹ "In one word the gist of the action is that defendant, from the circumstances of the case is obliged by the ties of natural justice and equity to refund the money." per Lord Mansfield in *Moses v. Macpherlan*, 2 Burr 1005, 1 W. Bl. 219. See also notes in Pa. Law Rev. Vol. 61, pp. 341-343, 425.

⁷⁰ *Schaeffer v. Miller*, 41 Mont. 417, 109 Pac. 970.

⁷¹ 7 S. D. 338, 64 N. W. 167. See also note in Columbia Law Rev. Vol. VIII, p. 125.

⁷² 41 Mont. 417, 109 Pac. 970.

⁷³ 41 Mont. 417, 109 Pac. at 971-972, 973.

he ought to turn over to Schaeffer, and upon this fact alone the law implies a promise on his part to do so; and this obligation created or implied by law, is termed by the courts and law writers a quasi contract, a contract implied by law, or a constructive contract. It is a pure legal fiction; it lacks two of the essential elements of a contract as defined in . . . the Revised Codes, and as generally understood."

A similar question was before the Supreme Court of North Dakota in *Chesley v. Soo Coal Co. et al.*,⁷⁴ The issue raised was whether or not after the disaffirmance of a corporate contract, the officers were personally liable in an action to recover back the consideration. The statute made officers of foreign corporations, which had failed to comply with the requirements for admission, personally "liable on any and all contracts of such foreign corporations made within the state." The corporation of which defendants were officers, came within the class referred to. The court held the defendants personally liable. The following⁷⁵ from the opinion by Morgan, C. J., discloses the reasoning of the courts.

"The precise question before us is: What was the status of the contract and of the parties thereto after plaintiff had rescinded it? The rescission of it wiped out the contract, so far as basing any affirmative action on it relating to its enforcement, or for damages for its breach. It destroyed all its vitality, and the relation of the parties thereto as an express contract was the same as though it never had been entered into. This much is conceded by both parties. Whether the conceded obligation of the defendant company to restore everything of value which had been received by it under the contract before it was rescinded can now be enforced against the officers of the company is the issue in this case. In other words, does section 4698, supra, make officers of a foreign corporation not complying with our statute pertaining to their right to transact business in this state liable on the implied contracts of the corporation? The language of the section is that they are liable "on any and all contracts of the corporation." This language is

⁷⁴ 121 N. W. 73, 19 N. D. 18.

⁷⁵ *id.* at n. 20.

broad enough to include contracts implied by law. We think it would be failing to give effect to the language of the section to restrict its application to express contracts. The rescission of the express contract does not affect rights growing out of it thereafter as implied obligations on the part of the defendant company. Contracts are classified as express or implied by the statute of this state, and section 4698 in effect makes officers liable upon a breach of either by the corporation."

The court apparently did not recall that there is such a species as the tacit contract, and failed to appreciate the true basis of obligations quasi ex contractu. The decision, it is submitted, is erroneous.

The California cases are in conflict. The question has arisen under the attachment statute, which restricted attachments to actions "upon a contract express or implied, for the direct payment of money."

In *Pete Fuel Co. v. Tuck*⁷⁶ it was held that an attachment may be issued in aid of an action to recover back money, paid under a contract to furnish machinery which had been disaffirmed for failure of consideration. On the other hand, in *Babcock v. Briggs*⁷⁷ the court summarily decided that an action in assumpsit for money had and received, growing out of trover which had been waived, would not support an attachment.

In *Pete Fuel Co. v. Tuck* the court said:⁷⁸

"The authorities appear to be uniform to the effect that when a sum of money has been paid upon a consideration which has entirely failed, the law implies a promise to refund it. On the facts stated in the complaint there was, therefore, an implied contract for the direct payment of money, which brings the case within the very terms of the statute defining the cases in which an attachment will issue."

It has been held that the provisions of the statute of limitations governing contracts are not applicable where the plaintiff disaffirms the contract, and proceeding in avoidance thereof, sues

⁷⁶ 53 Cal. 304.

⁷⁷ 52 Cal. 502.

⁷⁸ 53 Cal. at p. 305.

to recover back the consideration.⁷⁹ In *Richter v. Union etc. Co.*,⁸⁰ a case involving the point, the court said in the course of the opinion:

"But the action is not for a breach of the original contract, but upon an obligation growing out of the failure to perform it. . . . the statute could not begin to run until he, (the plaintiff), made his election to rely on the contract and to sue for the money paid to the defendant under it."

It will be observed that a court may appreciate the distinction between contract and quasi contract and still hold that the legislature intended to cover quasi contract by the term "contract" or the phrase "contract express and implied."⁸¹ But can a court properly so hold in face of the sections of the Civil Code providing that "An obligation arises either from: (1) The contract of the parties; or (2) The operation of law." "A contract is either express or implied; an express contract is one the terms of which are stated in words and an implied contract is one the existence and terms of which are manifested by conduct?"⁸²

From the foregoing pages it appears that the conventional term "implied contract" embraces the mutually exclusive ideas of tacit contract and quasi contract. The Civil Codes use the objectionable term, but in the sense of tacit contract alone. The cases in California, Montana and the Dakotas are not in agreement. In Montana the true principles have been clearly understood, lucidly expounded, and correctly applied. The South Dakota decisions are sound. In the single case where an appreciation of the distinction was necessary to the decision, the North Dakota Supreme Court has gone wrong. The California courts fail to discriminate between the two obligations, and the cases are involved in contradictions and inconsistencies.

Many obligations quasi ex contractu, as those arising from judgments and official or statutory duties, do not bear the remot-

⁷⁹ 96 Cal. 154, 30 Pac. 1114, 129 Cal. 367, 62 Pac. 39. Compare *Nevada Min. Co. v. Farnsworth*, 89 Fed. 164 (C. C. Utah); *Tabor v. Big Pittsburg etc. Co.*, 14 Fed. 636 (C. C. Colo.) See *Woodward, Quasi Contracts*, §§ 260-262.

⁸⁰ 62 Pac. at p. 41.

⁸¹ *Nevada Min. Co. v. Farnsworth*, supra

⁸² Civil Code, Cal., §§ 1428, 1619-1621.

est superficial resemblance to the true principle. It was fully appreciated by the Roman jurists,⁸³ but common lawyers have been slow to grasp it. Does not the explanation lie in this? The early common law exalted procedure over substantive law. If a suitor could not bring his grievance within an existing writ or formula he was turned away remediless. Some cases of quasi contract received legal sanction in the action of *assumpsit*, before the recognition of the validity of simple contracts.⁸⁴ In the course of time *assumpsit* became the remedy for practically all breaches of contract as well as for breaches of duty other than tort. Looking at the form rather than the substance, the common law came to regard *assumpsit* as an action *ex contractu* and all matters cognizable in *assumpsit* as contracts. This furnishes a good illustration of the truth of a remark attributed to Lord Mansfield, "nothing in law is so likely to mislead as a metaphor."

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⁸³ See Maine's Ancient Law, 3rd ed., p.332; Scott's cases on Quasi Contracts, pp. 1-3.

⁸⁴ See Keener, Quasi Contract, pp. 14-16; Ames, History of Assumpsit, Harv. Law Rev. Vol. II, pp. 1, 53; Jenks, Short History of English Law, Chap. 10; Schaeffer v. Miller, *supra*.