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CONTRACTS--CHANGE OF CIRCUMSTANCES-CONSTRUCTIVE PROMISE

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CONTRACTS—CHANGE OF CIRCUMSTANCES—CONSTRUCTIVE PROMISE—In 1921 plaintiff and defendant entered into a contract whereby defendant agreed to give plaintiff "one-half of all moneys" which should be received "from any revivals of" the play " 'Alias Jimmy Valentine' including productions in New York City, 'on the road,' or 'in stock.' " [1] Plaintiiff's share was to be mailed direct to him under division orders from wherever the play was being produced, accompanied by box office statements. It was stipulated that "all contracts . . . or other arrangements . . . affecting the title to the dramatic rights (exclusive of motion picture rights) . . . or the production . . . in New York city, 'on the road,' or 'in stock' . . . shall be subject to our [plaintiff's] approval." Defendant had sold the silent motion picture rights prior to the contract and plaintiff had knowledge thereof. In 1921 talking motion pictures were unknown. In 1928 defendant sold the talking motion picture rights to the play. Plaintiff sued for half of the amount received. The court *held*, that plaintiff was entitled to recover on the theory of either an implied promise or of a constructive trust. O'Brien and Crouch, JJ., dissented. *Kirk LaShelle Co. v. Paul Armstrong Co.*, 263 N. Y. 79, 188 N. E. 163 (1933).

An implied promise is raised to reach a result which the parties indicate they intended to effectuate.[2] If the promise would have been made, had attention been drawn to the omission, the promise will be implied.[3] But courts are extremely reluctant to enlarge by implication where contracts express clearly and carefully the obligations assumed.[4] And an implied promise cannot be inserted as against the express terms of the contract [5] or to supply an omission which was obviously intentional.[6] The invention of silent motion pictures brought to issue the status of "dramatic reproduction" licenses granted previously. *Harper Bros. v. Klaw* [7] decided that even though the motion picture rights were part of

[1] The terms "revivals," "on the road," and "in stock" refer to stage productions. In the theatre world such is their settled connotation. Accordingly, plaintiff's express participation in profits is limited to the stage, i.e., "flesh and blood" acting.

[2] See generally, 3 WILLISTON, CONTRACTS, sec. 1293 (1920); 2 HIGH, INJUNCTIONS, 4th ed., sec. 1151a (1905); 170 L. T. R. 258 (1930); 13 C. J. 559 (1917). Various applications of the general rule are exemplified in Wood v. Lucy, Lady Duff-Gordon, 222 N. Y. 88, 118 N. E. 214 (1917) (promise implied to make a contract binding); Diamond Alkali Co. v. Tomson and Co., (C. C. A. 3d, 1929) 35 F. (2d) 117 (promise to purchase all requirements of business construed to include promise to continue in business); DuPont de Nemours Powder Co. v. Masland, (D. C. E. D. Pa. 1914) 216 Fed. 271 (implied promise of employee not to disclose trade secrets); Younger v. Caroselli, 251 Mich. 533, 232 N. W. 378 (1930) (implied promise that construction be usable for purpose intended); and, Freeport Sulphur Co. v. American Sulphur Royalty Co., 117 Tex. 439, 6 S. W. (2d) 1039 (1928) (implied promise of diligence in developing mine where royalty reserved).

[3] Dermott v. State, 99 N. Y. 101, 1 N. E. 242 (1885).

[4] Loyalton Electric Co. v. California Lumber Co., 22 Cal. App. 75, 133 Pac. 323 (1913); Nims v. Vaughn, 40 Mich. 356 (1879).

[5] Cliffe Co. v. DuPont Engineering Co., (D. C. Del. 1924) 298 Fed. 649; Macloon v. Vitagraph, Inc., (C. C. A. 2d, 1929) 30 F. (2d) 634; Dermott v. State, 99 N. Y. 101, 1 N. E. 242 (1885).

[6] Foley v. Euless, 214 Cal. 506, 6 Pac. (2d) 956 (1931).

[7] (D. C. S. D. N. Y. 1916) 232 Fed. 609.

the ungranted copyright, "there is implied a negative covenant on the part of the [grantor] not to use the ungranted portion of the copyright estate to the detriment, if not destruction, of the licensee's estate." The licensor could not produce without the consent of the licensee. *Klein v. Beach* [8] limited the rule to contracts made at a time when motion pictures were unknown but the Supreme Court rejected the distinction in the leading case of *Manners v. Morosco*.[9] The broad doctrine has been criticized.[10] But the suggestion of the court, that all must have known that "the market for the spoken play would be greatly impaired, if not destroyed," [11] is appealing. The instant case is sustainable even on the narrow view of *Klein v. Beach*, for talking motion pictures were unknown at the time of the agreement. And the clause "exclusive of motion picture rights" must have been intended merely to advise plaintiff that his grant was limited. The silent motion picture rights having been sold and no other motion picture rights being known, certainly defendant did not expressly reserve any such rights, assuming that the express reservation would matter. Accordingly, the clause could not have been intended to render inoperative the beneficial rights otherwise to be gained from the implied negative promise.[12] The provision "all contracts . . . affecting the title . . . subject to our approval" seems clearly to refer to the stage rights concerned and would not control the disposition of the talking motion picture proceeds. Accordingly, reliance thereon, if there be any, is erroneous.[13] The remedial device of a constructive trust leads to the same conclusion. As joint adventurers each owed the other the duty of finest loyalty.[14] The fiduciary relationship precluded competition or the grant of competitive rights.[15] And the disloyal adventurer is held accountable for the profits received.[16] Thus on either basis the decision is well grounded.

M. L.

[8] (D. C. S. D. N. Y. 1916) 232 Fed. 240, affirmed (C. C. A. 2d, 1917) 239 Fed. 108.

[9] 252 U. S. 317, 40 Sup. Ct. 335 (1920). *Cf.* Frohman v. Fitch, 164 App. Div. 231, 149 N. Y. S. 633 (1914).

[10] See the annotator's comment in 33 A. L. R. 311 at 312 (1924).

[11] The court quotes Harper Bros. v. Klaw, (D. C. S. D. N. Y. 1916) 232 Fed. 609.

[12] Of course, the parties ought to be able to contract in a manner which would bar the implied promise. The dictum in Macloon v. Vitagraph, Inc., (C. C. A. 2d, 1929) 30 F. (2d) 634, intimates that such would be the effect of an express reservation of merely "motion pictures and all other rights."

[13] To what extent reliance was placed on this provision is not clear. Apparently the court believed that defendant could not make "any agreement affecting the rights conveyed to appellant without its approval." (188 N. E. at 168). Surely it was never intended to delegate to plaintiff a veto power over all conceivable rights remaining in defendant, even though the granted rights were somehow affected. But if such was the intent of the parties, then plaintiff's case is that much stronger.

[14] Underhill v. Schenck, 238 N. Y. 7, 143 N. E. 773 (1924) (Cardozo, J., adopted Manners v. Morosco but emphasized also the trust aspect). See also Meinhard v. Salmon, 249 N. Y. 458, 164 N. E. 545 (1928).

[15] See note 14, supra.

[16] See note 14, supra.