

for the value unjustly received by the defendant. Bringing suit in this last form is not a ratification of the express contract, as some courts have believed,¹² because it is an action of *debt* based upon the receipt of a *quid pro quo* and not upon mutual assent. The better considered authorities hold that the unjust enrichment of the defendant added to his tortious act operates to create a non-contract debt in the plaintiff's favor.¹³

It should be observed that this is not inconsistent with the court's statement in *Prest v. Farmington* that "the duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained."¹⁴ No doubt this statement is strictly correct in its exact form. Damages for a tort cannot now be recovered in assumpsit, even though assumpsit was originally a tort action for damages. But the receipt and the unjust retention of benefits resulting from the tort are separate operative facts, and these are amply sufficient as a basis for the action of debt or its actual equivalent *indebitatus assumpsit*. This is not an action for damages for a tort; for those damages are measured by the amount subtracted from the plaintiff's estate. Nor is it an action for damages for breach of contract; for those damages would be measured by the value of the performance promised by the defendant. Instead, it is an action of debt based upon the receipt of a *quid pro quo* by the defendant, which under the existing circumstances creates a non-contractual duty in the defendant to pay back the value received. To enforce this duty, *indebitatus assumpsit* was the proper form of action at common law; under the codes of procedure the duty is the same, to be enforced by "civil action."

A. L. C.

THE COLLECTION OF ROYALTIES FROM THE SUB-ASSIGNEE OF A COPYRIGHT

In *Barker v. Stickney* (1918, K. B.) 119 L. T. 73, the plaintiff was the owner of a copyright which he assigned to P, the latter undertaking to pay a royalty. P became insolvent, and his receiver sold all his assets to the defendant, who took an assignment of the copyright and agreed to pay the royalty. The owner then sued for royalties

¹² *Ferguson v. Carrington*, *supra*; *Kellogg v. Turpie* (1879) 93 Ill. 265.

¹³ *Roth v. Palmer* (1858, N. Y. Sup. Ct.) 27 Barb. 652; *Crown Cycle Co. v. Brown* (1901) 39 Or. 285, 64 Pac. 451; *Dietz's Assignee v. Sutcliffe* (1883) 80 Ky. 650; *Kayser v. Sichel* (1861, N. Y. Sup. Ct.) 34 Barb. 84.

¹⁴ The court cites *Cooper v. Cooper* (1888) 147 Mass. 370, 17 N. E. 892, a case that has been shown most convincingly to be erroneous. See Keener, *Quasi-Contracts*, 321-326. Though followed in *Payne's Appeal* (1895) 65 Conn. 397, 32 Atl. 948, and in *Graham v. Stanton* (1901) 177 Mass. 321, 58 N. E. 1023, there are several decisions *contra*. *Fox v. Dawson* (1820, La.) 8 Mart. 94; *Higgins v. Breen* (1845) 9 Mo. 497. See Woodward, *Quasi-Contracts*, sec. 184.

on the contract made by the defendant with the receiver.¹ The court held that the plaintiff was a stranger to that contract and could maintain no action upon it,² and also that in this case the plaintiff had no vendor's lien upon the copyright.

It is the generally prevailing rule that when a contract is made by two persons for the benefit of a third, the latter may enforce it directly by action against the promisor.³ The essential justice and practical convenience of this rule is frequently demonstrated even in the jurisdictions where it does not prevail. Not only is it customary in such jurisdictions to pass statutes permitting a beneficiary to sue in certain cases,⁴ but new actions are continually being brought by beneficiaries in confident reliance on the justice of their claims; and the courts frequently manage, by making use of fiction and specious distinctions, not to disappoint such suitors. The cases in which this has been done in Massachusetts have been reviewed previously in this JOURNAL.⁵

A similar tendency is observable in England. Where the suit is in equity, the courts find the ready excuse that the relation is that of trustee and *cestui que trust*,⁶ without looking any too closely to discover the trust *res* or its amount. It is not that the promisor is held to be a trustee and accountable to the *cestui que trust*, but that the promisor owes a contractual duty, of which the promisee is a trustee for the benefit of the third party. His right is not dependent upon a settlement in trust; but a "trust" is conjured up in order to enforce his right.⁷

¹ Plaintiff's counsel seemed blissfully unaware that in England a third party beneficiary has no right. "The plaintiff in his pleading appears to place the defendant's liabilities upon a purely contractual basis," the opinion states.

² A contrary result was reached in Massachusetts. *Paper Stock D. Co. v. Boston D. Co.* (1888) 147 Mass. 318, 17 N. E. 554. The court satisfied its own mind that it was not recognizing a right in a contract beneficiary. "By accepting the assignment (the assignee) must be held to have accepted the license and promised to pay the royalty to him" (the original licensor). This is quite right, but the promise is made to the licensee and not to the original owner. A labored effort to show the contrary was made in *Lincoln v. Burrage* (1901) 177 Mass. 378, 381, 59 N. E. 67.

³ See Arthur L. Corbin (1918) 27 YALE LAW JOURNAL, 1008; Wald's Pollock, *Contracts* (Williston's ed.) 237 *et seq.*

⁴ Thus life insurance beneficiaries are everywhere permitted to sue on the policy. Mass. St., 1894, ch. 225. Mortgagees are thus permitted to sue the mortgagor's grantee who has assumed the debt. Mich. Comp. Laws, 1897, sec. 519; Conn. Gen. St., 1902, sec. 587. Laborers and material men may sue on contractors' bonds: 30 U. S. St. at L. 906, 33 U. S. St. at L. 811; Mass. St., 1909, ch. 514, sec. 23.

⁵ (1918) 27 YALE LAW JOURNAL, 1026.

⁶ *Tomlinson v. Gill* (1756) Ambler, 330; *Moore v. Darton* (1851) 4 DeG. & Sm. 517; *Gregory v. Williams* (1817) 3 Mer. 582; *Page v. Cox* (1851) 10 Hare, 163; *Touche v. Metrop. Ry. Co.* (1871) L. R. 6 Ch. 671, 677.

⁷ In *Lloyds v. Harper* (1880, C. A.) 16 Ch. D. 290, Fry, L. J. said, "Where a contract is made for the benefit and on behalf of a third person, there is an

Again, if the promisee has the accidental forethought to say that he is acting as the agent of the beneficiary, even though the latter knows nothing whatever of the matter at the time, it is possible for the beneficiary to ratify and enforce the contract.⁸ Thus do men permit their thought processes to be directed by mere words, like "agent" or "trust", or by ancient and unmeaning forms.⁹ Even in the absence of any expression of agency a wholly artificial privity between the beneficiary and the promisor has, in some cases, been constructed by the court.¹⁰

Another method of giving a beneficiary a remedy against the promisor is to be found in the enforcement of an actual or constructive vendor's lien. In the principal case the court held that the plaintiff had no vendor's lien on the copyright for the reason that there were no words in his original assignment to P indicating an intention to reserve a lien.¹¹ Had such an intention been expressed, however, it is clear that a lien would have been recognized, with the result that the sub-assignee would have had to pay the royalty he promised, at least to the extent of the profits he had made.¹²

The recognition of a vendor's lien and the creation of a duty in the sub-assignee to pay royalties direct to the vendor is merely one more indirect method of dodging the rule (supposed to prevail in England and Massachusetts) that a contract between two parties cannot create rights in a third. This is true even though the sub-assignee's duty to

equity in that third person to sue on the contract, and the person who has entered into the contract may be treated as a trustee for the person for whose benefit it has been entered into." Lush, L. J. said, "Where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B, and recover all that B could have recovered if the contract had been with B himself." Here Lloyds sued as *trustee*. In *Tomlinson v. Gill*, *supra*, the beneficiary sued in his own name, and the defendant had to pay the sum promised irrespective of the value of the consideration received by him from the promisee. The same was true of *Gregory v. Williams*, *supra*, and other cases.

⁸This does not at all shock the logical sense of Sir Frederick Pollock, who says (Wald's Pollock, *Contracts*, 229): "The consent of the principal is referred back to the date of the original act by a beneficent and necessary fiction." Such a fiction is equally available and beneficent, even though the promisee does not describe himself as an *agent* of the beneficiary. But a *fiction*, as such, is neither necessary nor beneficent. Instead, it darkens the mind to the essential similarity between two classes of cases.

⁹It will be remembered that Maitland said "The forms of action we have buried, but they still rule us from their graves."

¹⁰*The Satanita*, L. R. [1895] P. 248, [1897] A. C. 59; *Gardner v. Denison* (1914) 217 Mass. 492, 105 N. E. 359.

¹¹The court feels that injustice has been done. "I must therefore hold, though with doubt and regret, that the plaintiff in the present case has no vendor's lien for unpaid royalties; and that the defendant has no legal duty to account to the plaintiff.

¹²*Werderman v. Société* (1881) 19 Ch. D. 246; *Bagot Tyre Co. v. Clipper Tyre Co.* [1902] 1 Ch. 146; *Paper Stock D. Co. v. Boston D. Co.*, *supra*.

pay is limited to the extent of profits that he has made. The reservation of a lien does not make either the original purchaser or his sub-assignee a trustee of the copyright. No such effect is produced by a lien on corporeal property, and the rule in case of patent and copyright should be the same.¹³ The lien is merely a limitation upon the power of assignment by the purchaser by means of the retention of a property interest in the vendor. This property interest enables the vendor or licensor to subject the *res* to the satisfaction of some primary claim that arises out of the operative facts of a sale or license; and he can do this as against a sub-assignee with notice, whether the latter has made a promise to pay royalties or not. The mere retention of a lien does not operate in itself to create this primary claim to royalties, as against either the first licensee or purchaser or the sub-assignee; nor does it create a right to profits made by user of the *res*. Therefore, when the courts recognize a duty in the sub-assignee to pay royalties to the licensor, the fact that operates to create this duty is his promise to the first licensee.

The duty thus created is a debt and not merely the duty of a trustee to account; and this is true even though the court declares that the debt is measured by and conditional upon the receipt of profits.¹⁴ To the extent of the debt thus created the original licensor becomes a creditor-beneficiary of the contract between the first purchaser and the sub-assignee.

The fact that the sub-assignee has property that can be applied by the licensor or vendor (property upon which there is a "charge") is no reason for creating a duty in the sub-assignee. Society does not decree that A must pay B's debt to C merely because C happens to hold A's son as a hostage or because C has a mortgage on A's land or a vendor's lien on A's copyright. The fact that C has legal rights and powers with respect to one bit of A's property (e. g., his privileges and rights under the assigned copyright) is not a reason for giving C an additional right to subject A's other property to C's uses by judgment and execution. If C gets this additional right it is because A promised B for a consideration to pay the debt to C.

Patents and copyrights are often spoken of as "grants" or "franchises" and are also described as "property". Analysis shows that they are merely bundles of legal relations between the holder and all other persons; they are innumerable legal relations of right, privilege, power, and immunity.¹⁵ For example, there is a *privilege* of making

¹³ So in *Dansk v. Snell* [1908] 2 Ch. 127, all that the plaintiff asked was to have the patent sold and applied to satisfy his claim against the first purchaser.

¹⁴ The reasons for this limitation are not convincing.

¹⁵ These legal relations are "innumerable" because each relation is a relation with *one* other person. The holder of a copyright has not one right against all other persons; instead, he has a right, a power, and a privilege with respect

and selling, a *right* that another shall not make or sell, a *power* to assign or to license others, and *immunity* from the destruction of these relations by any voluntary act of another. This bundle of relations may properly be described as property, for they are "multital" in character—the rights are rights *in rem*.¹⁶ However, they do not necessarily or usually accompany any physical *res*, and their assignment is not effected, as in the case of chattels or land, by a change in physical possession.

This last fact causes the court to have difficulty in understanding a vendor's lien in case of a copyright.¹⁷ In thinking of a lien the mind looks for some physical *res*, a sort of hostage to be held as security. Corporeal existence and physical possession are important facts. And yet property with respect to land or to any physical *res* is like patent or copyright property in this: they both consist of rights, powers, privileges, and immunities. On the foreclosure of a lien on some physical *res*, the lienor does not necessarily get physical possession. The lien itself consists merely of rights and powers, and is of value because it enables the lienor to cause the extinguishment of the rights, powers, privileges, and immunities of the delinquent vendee and the creation of similar relations in a new purchaser in return for cash. So in the case of patent or copyright—upon non-payment of royalties by a buyer or licensee, it is quite possible to give to the seller or licensor the advantage of the rights, powers, privileges, and immunities of which patent or copyright consists. They may all be given back to him or they may be sold to some purchaser for cash. This is the chief advantage conferred by any vendor's lien on a physical *res*.

The enforcement of a lien on a copyright would result in depriving the delinquent assignee or licensee of his privileges to make and sell, his rights that others should not make or sell, and his powers to assign. As against the lienor, the delinquent assignee has no immunity from their destruction. The lienor or the buyer at judicial sale gains privileges, powers, and rights similar to those of which the assignee

to *each* other person. This is why Professor Hohfeld coined the word "multital" to describe such relations. See (1917) 26 YALE LAW JOURNAL, 710, 716.

¹⁶This is why patents and copyrights are not *choses in action*. The rights involved in a *chose in action* are rights *in personam* and point to some *res* or *chose* that can be reduced to possession. Here the only rights are rights to mere forbearance, and are *in rem* or "multital." For a discussion of the meaning of the term "rights *in rem*" see article by Hohfeld, *supra*.

¹⁷"I confess that this second point causes me great difficulty. I can well understand a vendor's lien in the case of land. . . . In the case of a copyright or patent it seems to me that the doctrine of a vendor's lien presents great embarrassment in the application. But in view of the authorities, it must be taken that such a lien may exist." *Barker v. Stickney*, *supra*, at page 76, citing *Dansk v. Snell*, *supra*.

has been deprived;—that is, he may proceed to make and sell, he can assign, and for his benefit others must forbear.

In the case under discussion, if the sub-assignee owes any duty to the plaintiff, it is by reason of the contract of assignment between the assignee and the sub-assignee. Of that contract the plaintiff is a creditor-beneficiary, and if it gives him a right against the sub-assignee to the payment of royalties, he can enforce that right by the enforcement of a vendor's lien upon the copyright (in case he reserved a lien) or he can get a judgment or decree that the sub-assignee shall pay the royalties promised. But if it does not give him such a right against the sub-assignee, he should be given neither a judgment for payment nor a decree for an accounting; he is entitled to the benefits of his lien and nothing more. If there were a physical *res* the lienor would get it or have it sold, but he would get no accounting. There being no physical *res*, he must be content with the incorporeal *res*, the copyright itself.

It appears therefore that a decree that the sub-assignee shall account is the recognition of a right in a creditor-beneficiary created by a contract between two other persons, a contract to which he was not a party. Such an account had been decreed in previous English cases,¹⁸ and such would have been the decree in *Barker v. Stickney* had the court been able to discover a lien reserved. In the one Massachusetts case on the point it was held to be the sub-assignee's duty to the plaintiff to pay the royalties as promised, and not merely to pay the royalties to the extent of profits made.¹⁹ By such means the unjust rule denying legal rights to a contract-beneficiary can be gradually undermined and abandoned.

A. L. C.

FULL FAITH AND CREDIT TO JUDGMENTS OF OTHER STATES

The full faith and credit clause of the federal constitution provides that

"Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."²¹

¹⁸ See cases cited in note 12, *supra*.

¹⁹ *Paper Stock D. Co. v. Boston D. Co.*, *supra*. See also *Forbes v. Thorpe* (1911) 209 Mass. 570, 95 N. E. 955. This is exactly paralleled by the holding that where property is left to X by will, on condition that a payment be made to A, the acceptance of the property by X creates a legal duty enforceable at law by A, a duty to pay the amount specified even though it exceeds the value of the property received by X. *Felch v. Taylor* (1832, Mass.) 13 Pick. 133; *Adams v. Adams* (1867, Mass.) 14 Allen, 65; *Bishop v. Howarth* (1890) 59 Conn. 455, 22 Atl. 432; *Messenger v. Andrews* (1828, Ch.) 4 Russ. 478.

²¹ Art. 4, sec. 1.