

ings to the payment of the interest. The latter gave simply a remedy to the lessor, which it might or might not assert, at its own option.

There are many cases in which a promise made upon a valid consideration by one person to another, for the benefit of a third, can be enforced by the third person in his own name, although he was not privy to the consideration. As was said in *Austin v. Seligman*, 18 Fed. 522, where the general question was discussed:

"The result of the better-considered decisions is that a third person may enforce a contract made by another for his benefit whenever it is manifest from the language or terms of the agreement that the parties intended to treat him as the party primarily interested."

In the language of Folger, J., in *Simson v. Brown*, 68 N. Y. 355:

"The contract must be made for his benefit as its object, and he must be the party intended to be benefited."

The authorities cited in *Austin v. Seligman* and in the note to that case by Mr. Wharton are sufficient references in support of the proposition, and we shall not attempt to collate or review them.

It was as much for the benefit of the lessee as the lessor that the interest upon the bonds, which were a lien upon the property coming into the possession of the lessee, should be paid at maturity; and the terms of the covenant indicate that it was to be paid by the lessee as it matured, and directly to the trustees named in the mortgage. On the other hand, it is obvious that the covenant of article 3 to pay the expenses of pending litigation was intended to be satisfied by making the payment directly to the lessor. No other person was named, or apparently known, as the one to whom payment should or could be made.

In any view of the case, therefore, the decision of the court below was correct.

The orders are affirmed, with costs.

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#### MALOY v. DUDEN.

(Circuit Court of Appeals, Second Circuit. March 2, 1898.)

No. 67.

#### RES JUDICATA—PARTIES AND QUESTIONS CONCLUDED.

A member of a partnership in Brussels formed a partnership with a New Yorker, and the Brussels firm supplied to the New York firm its stock in trade. On the dissolution of the New York firm the Brussels firm sued the New York partner for an accounting of the partnership affairs, and to recover a balance alleged to be due. Before judgment the other partner in the Brussels firm died. On the accounting it was found that the New York firm was indebted to the Brussels firm in a specified amount, and judgment was given for plaintiff accordingly. *Held* that, as at the date of judgment the complainant was sole surviving partner of the Brussels firm, he was the real party in interest, so that the finding as to the amount due from the New York to the Brussels firm was conclusive, and could not be questioned in a subsequent suit by the New York member against the Brussels member as surviving partner of the Brussels firm.

Appeal from the Circuit Court of the United States for the Southern District of New York.

W. Wickham Smith, for appellant.

Ronald K. Brown, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This appeal presents the question whether the court below erred in deciding that upon the facts the plea of *res adjudicata* was a good defense to the suit. 77 Fed. 935.

The complainant, Maloy, was from 1878 to 1886 a partner with the defendant, Duden, in the mercantile firm doing business at New York City by the style of Duden & Co. By the partnership articles, Maloy was to have 25 per cent. of the proceeds, and Duden was to have 75 per cent. Neither partner contributed any capital, but Duden was a member of the firm of Duden & Co., of Brussels, and during the existence of the New York firm the Brussels firm supplied it with its entire stock in trade; sending to it goods direct from Brussels, or purchasing them elsewhere.

Upon the dissolution of the New York firm, Duden brought an action against Maloy for an accounting of the partnership affairs, and to recover a balance alleged to be due him. That action was originally brought in a state court, and was then removed to the United States circuit court. After a protracted litigation, it resulted in a decree adjudging Maloy indebted to Duden upon the partnership account for \$5,670, and to have no interest in the assets of the firm. Before that suit was at issue, Duden had become the sole surviving member of the Brussels firm. One of the principal issues litigated in the suit was as to the amount of the indebtedness owing by the New York firm to the Brussels firm. It was claimed by Duden that the amount was \$371,470, including interest. It was claimed by Maloy to be \$288,706. If it had been found to be as claimed by Maloy, there would have been a considerable balance due him from Duden in the firm account; if as claimed by Duden, nothing was due, but Maloy was indebted to Duden. The issues in the cause were referred to a master, and he found and decided that the New York firm was indebted to the Brussels firm for \$371,470, and that at the time of the dissolution of Duden & Co., of New York, the liabilities of that firm exceeded its assets. The findings of the master were confirmed by the circuit court. 43 Fed. 407. And the decree was subsequently affirmed upon appeal by the United States circuit court of appeals. 63 Fed. 183. The bill of complaint in the present suit was filed by Maloy, in behalf of the New York firm, against Duden, as surviving partner of the Brussels firm, and alleges that the New York firm was not indebted to the Brussels firm in the sum of \$371,470, and prays relief, that defendant account to the New York firm for the difference between that sum and the amount really owing to the New York firm, and for other supplementary relief.

It is undoubtedly true, as contended for by the appellant, that, if the adjudication in the former suit would not operate as an estoppel

against the defendant in any suit that he might see fit to bring against the New York firm to recover a larger sum than was decided in the former suit to be owing, it cannot operate as an estoppel in his favor. It is insisted that it would not, because, in his capacity as surviving partner of the Brussels firm, he was not a party to the former suit. But he was the Brussels firm, in fact and in law, precisely as he is in the present suit.

We entertain no doubt that if in the former suit it had been decided that the New York firm owed the Brussels firm only one-half as much as was in fact owing, and Duden, suing as surviving partner of the Brussels firm, should seek, in an action against the complainant, to re-examine the matter, Maloy could avail himself of the former adjudication, and insist upon it as a finality. The Brussels firm was represented in the controversy by the man who was all there was of that firm,—the only person who had authority to sue or defend for it, to collect its demands or release them, or represent it in any business transaction.

To give full effect to the principle by which parties are held bound by a judgment, and are not permitted to re-examine the controversy decided by it, not only those who are nominal or formal parties are considered, but so are all others who are identified in interest with either of the immediate parties, and who actually participate in conducting the controversy. The real principal who is behind the formal party, and is actually represented by him throughout the controversy, is the real party; and in order to invoke a judgment as an estoppel, for or against him, it is always competent to show what the real situation was, and what part in promoting or defending the suit was actually taken by him. 1 Greenl. Ev. § 523; *Lovejoy v. Murray*, 3 Wall. 1; *Robbins v. Chicago City*, 4 Wall. 657. It is upon this principle that it has often been held that the owner of a patent can invoke a former adjudication of its validity as an estoppel in a subsequent suit against an infringing defendant, although the defendant was not a party of record in the former suit. *Miller v. Tobacco Co.*, 7 Fed. 91; *Manufacturing Co. v. Miller*, 41 Fed. 357; *David Bradley Mfg. Co. v. Eagle Mfg. Co.*, 6 C. C. A. 661, 57 Fed. 985.

It is obvious that, if the complainant in the present suit could obtain a decree, he could not reap any advantage by it, but, on the contrary, Duden would derive the fruits of the decree. In any action between complainant and Duden to determine the respective interests of the parties in the recovery, the former suit would conclude their rights; and it would have to be decided that the complainant has no interest in the recovery as a firm asset, and that he has no claim against Duden for anything arising out of their partnership accounts, because these things have been decided in the former suit, and that decision is conclusive between them whenever and wherever those issues arise. The case for the complainant does not rest upon any substantial basis, because in no event can he succeed in reaching a result which will be beneficial to him.

The decree of the circuit court is affirmed, with costs.

## WHITTEN v. BENNETT et al.

(Circuit Court of Appeals, Second Circuit. March 2, 1898.)

No. 62.

**1. FALSE IMPRISONMENT—ARREST UNDER VALID WARRANT.**

Arrest under a warrant, valid in form, issued by competent authority on a sufficient complaint, is not false imprisonment, though the indictment under which the warrant was issued was procured maliciously, and by artifice and misrepresentation, for the purpose of extorting money. The proper remedy in such case is not an action for false imprisonment, but for malicious prosecution. 77 Fed. 271, affirmed.

**2. MALICIOUS ABUSE OF PROCESS.**

An action for malicious abuse of process does not lie when the process has been used for the purpose which by law it was intended to effect. Such an action presupposes that the arrest under the process was justifiable and proper in its inception, and is founded on grievances arising in consequence of subsequent proceedings.

In Error to the Circuit Court of the United States for the District of Connecticut.

William H. Baker, for plaintiff in error.

William L. Bennett, for defendants in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the plaintiff in the court below to review a judgment for the defendants upon demurrers to the complaint.

The complaint, after stating facts showing the requisite diversity of citizenship between the parties to confer jurisdiction upon the court, and averring the defendant Bennett to be the duly-authorized executor of the last will and testament of Tilton E. Doolittle, deceased, alleges in substance that at a term of the superior court of New Haven county, in Connecticut, the grand jury found an indictment against the plaintiff, charging him with the crime of murder in the second degree; that the grand jury did not intend to indict the plaintiff, but were misled into indorsing the indictment as a true bill by the artifice and misrepresentation of Doolittle, who was the prosecuting attorney for New Haven county; that Doolittle procured the indictment maliciously, and for the purpose of extorting money from the plaintiff; that upon the application of Doolittle the governor of Connecticut granted a requisition upon the governor of Massachusetts, in which state the plaintiff then was, for the surrender of the plaintiff as a fugitive from justice, and the governor of Massachusetts issued an executive warrant for the arrest and rendition of the plaintiff, and designated the defendant Leete to execute it; and that the plaintiff, by the instruction of Doolittle, was arrested by the defendant Leete and imprisoned upon said warrant, and in consequence thereof sustained damages, etc.

We are of the opinion that the complaint does not state any cause of action. It does not allege that Doolittle actually used the indictment and the warrant of rendition for any oppressive purpose, although it avers that he procured them for the purpose of such use. The process