

Desny v. Wilder
46 Cal.2d 715
Supreme Court of California
June 28, 1956

Appeal from a judgment of the Superior Court of Los Angeles County and from an order denying motion to set aside the judgment. Stanley Mosk, Judge. Judgment affirmed in part and reversed in part; appeal from order dismissed. Action to recover the reasonable value of plaintiff's story used in a photoplay by defendants. Summary judgment for defendants reversed with directions as to one count of the complaint; affirmed as to other counts. Counsel: Milo V. Olson and Frank DeMarco, Jr., for Appellant. Pacht, Ross, Warne & Bernhard, Isaac Pacht and Gordon Stulberg as Amici Curiae on behalf of Appellant. O'Melveny & Myers, W. B. Carman, William W. Alsup, Everett B. Clary, Philip F. Westbrook, Jr., Louis W. Myers, Sidney Justin and Melville B. Nimmer for Respondents. Loeb & Loeb, Mitchell, Silberberg & Knupp, Cruikshank, Jones & Gershon, Herman F. Selvin and Harry L. Gershon as Amici Curiae on behalf of Respondents.

SCHAUER, J.

Plaintiff appeals from a summary judgment rendered against him in this action to recover the reasonable value of a literary composition, or of an idea for a photoplay, a synopsis of which composition, embodying the idea, he asserts he submitted to defendants for sale, and which synopsis and idea, plaintiff alleges, were accepted and used by defendants in producing a photoplay.

The Facts upon Which the Claim of Contract is Based. Construed agreeably to the rules above stated, it appears from the present record that defendant Wilder at the times here involved was employed by defendant Paramount Pictures Corporation (sometimes hereinafter referred to as Paramount) either as a writer, producer or director, or a combination of the three. In November, 1949, plaintiff telephoned Wilder's office. Wilder's secretary, who was also employed by Paramount, answered, and plaintiff stated that he wished to see Wilder. At the secretary's insistence that plaintiff explain his purpose, plaintiff "told her about this fantastic unusual story. ... I described to her the story in a few words. ... I told her that it was the life story of Floyd Collins who was trapped and made sensational news for two weeks ... and I told her the plot. ... I described to her the entrapment and the death, in ten minutes, probably. She seemed very much interested and she liked it. ... The main emphasis was the central idea, which was the entrapment, this boy who was trapped in a cave eighty-some feet deep. I also told her the picture had never been made with a cave background before." Plaintiff sought to send Wilder a copy of the story but when the secretary learned of its length of some 65 pages she stated that Wilder would not read it, that he wanted stories in synopsis form, that the story would first be sent to the script department, and "in case they think it is fantastic and wonderful, they will abbreviate it and condense it in about three or four pages, and the producers and directors get to see it." Plaintiff protested that he preferred to do the abbreviating of the story himself, and the secretary suggested that he do so. Two days later plaintiff, after preparing a three or four page outline of the story, telephoned Wilder's office a second time and told the secretary the synopsis was ready. The secretary requested plaintiff to read the synopsis to her over the telephone so that

she could take it down in shorthand, and plaintiff did so. During the conversation the secretary told plaintiff that the story seemed interesting and that she liked it. "She said that she would talk it over with Billy Wilder and she would let me know." Plaintiff on his part told the secretary that defendants could use the story only if they paid him "the reasonable value of it ... I made it clear to her that I wrote the story and that I wanted to sell it. ... I naturally mentioned again that this story was my story which has taken me so much effort and research and time, and therefore if anybody used it they will have to pay for it ... She said that if Billy Wilder of Paramount uses the story, 'naturally we will pay you for it.' " Plaintiff did not remember whether in his first telephone conversation with the secretary anything was said concerning his purpose of selling the story to defendants.⁶¹ He did not at any time speak with defendant Wilder. It seems clear, however, that one of the authorized functions of the secretary was to receive and deliver messages to Wilder and hence, as is developed infra, that on this record her knowledge would be his knowledge. Plaintiff's only subsequent contact with the secretary was a telephone call to her in July, 1950, to protest the alleged use of his composition and idea in a photoplay produced and exhibited by defendants. The photoplay, as hereinafter shown in some detail, closely parallels both plaintiff's synopsis and the historical material concerning the life and death of Floyd Collins. It also includes a fictional incident which appears in plaintiff's synopsis and which he claims is his creation, presumably in the sense of being both original and novel in its combination with the facts from the public commons⁶¹ or public domain.

The Contentions of the Parties and Amici Curiae. In his opening brief plaintiff states "It is conceded *for purposes of argument* [italics added] that the synopsis submitted by plaintiff to defendants was not sufficiently unique or original to be the basis for recovery under the law of plagiarism or infringement. It is conceded that the plaintiff first obtained the central idea or theme of his story, which involves the entrapment of a man in an underground cave and the national interest promoted by the attempt to rescue him, from the Floyd Collins incident which occurred in the 1920's.

"It is appellant's [plaintiff's] contention, however, that in spite of this, the lower court committed reversible error in granting a summary judgment in this case for the reason that the summary judgment had the effect of denying the

⁶¹ The term "public commons" is used and defined by Mr. William B. Carman of the Los Angeles Bar (of counsel for defendants) in a paper appearing in 42 Cal.L.Rev. 52, 59. Mr. Carman says, "I have used the words 'public commons' to describe ... elements which can under no circumstances constitute private property, and avoided the more usual 'public domain,' because the latter phrase leads to confusion. 'Public domain' of course includes these elements, but it includes also any pre-existing published works which were not initially protected by statutory copyright, or on which such protection has expired; in fact this is its usual technical meaning. Such works are freely open for use by either plaintiff or defendant, but it is not the law that plaintiff's claim of a property interest is inevitably defeated by the prior existence of similar material in works in the 'public domain.' " "For the purposes of this opinion it is, however, unnecessary to observe the distinction suggested by Mr. Carman.

plaintiff the right to prove that his idea or synopsis was the subject of a contract wherein the defendants promised to pay him for it if they used it. It is clear that 'ideas,' as such, may still be the subject of a contract in California and may be protected, as such, even though not protectible under the laws of plagiarism."

Plaintiff also asserts that he "is not suing defendants for plagiarizing his idea but is suing defendants because they agreed to pay him the reasonable value of the use of his idea and story synopsis if they used his idea" and that "defendants so used plaintiff's idea and synopsis but refused to pay him as they agreed." But the complaint, as already shown, alleges that "Plaintiff conceived, originated and completed [and offered for sale to and defendants accepted submission of and thereafter used] a certain untitled literary and dramatic composition (hereinafter called 'Plaintiff's Property') based upon the life of Floyd Collins."

If plaintiff is seeking to recover for a mere abstract, unprotectible idea, he must meet certain rules; if he seeks recovery for a literary composition in which he conceivably had a property right, the rules are quite different, as will subsequently be shown.

It may be that plaintiff's concessions and arguments, in the light of the pleadings and evidence, are intended to suggest that there is some nebulous middle area between an abstract idea and a literary composition, wherein the idea has been cast in "concrete" form but not "concrete" enough to constitute a literary property. (See generally, Melville B. Nimmer of the Los Angeles Bar, writing in 27 So. Cal. L. Rev. 140-144, and cases cited.) However, for the purposes of this case at least, we find it unnecessary and undesirable to recognize any such hybrid, although we are aware that the Supreme Court of the United States has spoken of a "quasi property" right in news gathered and disseminated by a news service agency.[^] The plaintiff here, we conclude, must stand or fall, and this case will be resolved, on rules applicable to ideas on the one hand or literary property on the other.

This court, of course, is not bound to accept concessions of parties as establishing the law applicable to a case.[^] It is also to be noted that plaintiff's concession is qualified by the words "for purposes of argument." Hence, although plaintiff makes it clear that he is not suing for "plagiarism or infringement," we feel constrained to the view that in the light of the entire record we cannot disregard a possible property right interest in the literary composition as a subject of contract, express or implied, which could afford a basis for recovery.

Defendants concede, as they must, that "the act of disclosing an unprotectible idea, if that act is in fact the bargained-for exchange for a promise, may be consideration to support the promise." They then add, "But once the idea is disclosed without the protection of a contract, the law says that anyone is free to use it. Therefore, subsequent use of the idea cannot constitute consideration so as to support a promise to pay for such use." And as to the effect of the evidence defendants argue that plaintiff "disclosed his material before ... [defendants] did or could do anything to indicate their willingness or unwillingness to pay for the disclosure. The act of using the idea, from which appellant attempts to imply a promise to pay, came long after the disclosure ... Accordingly, even if a promise to pay could be found ... it came after the disclosure had been made and is

therefore unenforceable.” The conclusion of law asserted in the last sentence, insofar as it might be applicable to an express (whether proved by direct or by circumstantial evidence) promise to pay for the service (the conveyance of the idea) previously rendered from which a profit has been derived, for reasons which hereinafter appear (*infra*, pp. 803-804), is not tenable.

Relative to the subject of inferred or implied contractual liability, amici curiae Association of Motion Picture Producers, Inc., National Broadcasting Company, Inc., and Four Star Films, Inc., are concerned with the state of the law. They fear that what they conceive to be quasi contractual situations, wherein the law equitably but fictionally presumes of one the making of a promise which he not only did not make but never intended to make, will be confused with circumstances which evidence actual meeting-of-the-minds but unspoken contracts; i.e., what they appear to consider to be properly termed implied-in-fact contracts. They caution us that in a situation such as this, “One party cannot, by unilateral words or deeds, thrust upon another a contractual relationship unless the latter has, by his own words or deeds, consented thereto” and that “In the absence of manifest assent to the same thing upon the same terms by both parties, there is no contract.” With the first of these cautionary propositions we unqualifiedly agree. Our agreement with the second, as will hereinafter appear, must depend on what it meant by “manifest assent.” We do not agree with the further proposition, asserted or implied by defendants and their related amici, that an idea which before conveyance has sufficient value to constitute consideration for a promise to pay its reasonable value necessarily and *ipso facto* upon disclosure becomes devoid of value so that as a matter of law it cannot support a promise then – and only then – made to pay its reasonable value. A promise, made in advance of disclosure, to pay for the act of conveyance or disclosure of an idea which may or may not have value is one thing. A promise, made after conveyance of the idea to the promisor, to pay reasonable value for an idea which does have value to the promisor and which has been conveyed to, and has been used by, him is another contract, the possible enforceability of which is discussed *infra*.

From what has been indicated above it appears necessary for us in the proper disposition of this case, having in mind the problems which apparently will confront the trial court at a trial on the merits and the duty imposed on us by section 53 of the Code of Civil Procedure, to consider not only (1) the rules for recovery pertaining to the conveyance of ideas, as such, but also (2) the question whether the synopsis of plaintiff’s untitled composition could on any view of the evidence be deemed entitled to the status of a literary property, and (3) the rules defining rights of recovery, so far as pertinent on this record, if plaintiff has a literary property in his composition.

The Law Pertaining to Ideas. Generally speaking, ideas are as free as the air and as speech and the senses, and as potent or weak, interesting or drab, as the experiences, philosophies, vocabularies, and other variables of speaker and listener may combine to produce, to portray, or to comprehend. But there can be circumstances when neither air nor ideas may be acquired without cost. The diver who goes deep in the sea, even as the pilot who ascends high in the troposphere, knows full well that for life itself he, or someone on his behalf, must arrange for

air (or its respiration-essential element, oxygen) to be specially provided at the time and place of need. The theatrical producer likewise may be dependent for his business life on the procurement of ideas from other persons as well as the dressing up and portrayal of his self-conceptions; he may not find his own sufficient for survival. As counsel for the Writers Guild aptly say, ideas “are not freely usable by the entertainment media until the latter are made aware of them.” The producer may think up the idea himself, dress it and portray it; or he may purchase either the conveyance of the idea alone or a manuscript embodying the idea in the author’s concept of a literary vehicle giving it form, adaptation and expression. It cannot be doubted that some ideas are of value to a producer.

An idea is usually not regarded as property, because all sentient beings may conceive and evolve ideas throughout the gamut of their powers of cerebration and because our concept of property implies something which may be owned and possessed to the exclusion of all other persons. We quote as an accurate statement of the law in this respect the following language of Mr. Justice Brandeis, dissenting in *International News Service v. Associated Press* (1918), *supra*, 248 U. S. 215, 250 [“An essential element of individual property is the legal right to exclude others from enjoying it. If the property is private, the right of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified. But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is, that the noblest of human productions – knowledge, truths ascertained, conceptions, and ideas – become, after voluntary communication to others, free as the air to common use.”⁶² Of similar import, but stated negatively: “The doctrine that an author has a property right in his ideas and is entitled to demand for them the same protection which the law accords to the proprietor of personal property generally finds no recognition either in the common law or in the statutes of any civilized country.” Whether the theory upon which this court sustained recovery in the *Golding* case may properly be classed as a property rights theory is not clear but it is clear that California does not now accord individual property type protection to abstract ideas. This accords with the general weight of authority. “There may be literary property in a particular combination of ideas [and this must presuppose an expression thereof] or in the form in which ideas are embodied. There can be none in the ideas.” Neither common law nor statutory copyright extends protection to an idea as such. “[O]nly in the ‘expression’ of a copyrighted work does any monopoly inhere; the ‘theme,’ the ‘plot,’ the ‘ideas’ may always be freely borrowed.”

The principles above stated do not, however, lead to the conclusion that ideas cannot be a subject of contract. As Mr. Justice Traynor stated in his dissenting opinion in *Stanley v. Columbia Broadcasting System* (1950), *supra*, 35 Cal.2d

⁶² The general rule as stated by Justice Brandeis is not disputed in the majority opinion but the latter recognizes what is termed a “quasi property” right in news gathered by the respective competing agencies (see p. 73 of 39 S.Ct. [248 U. S. 215, 250, 63 L.Ed. 211, 225]) and resolves the case on theories applicable to unfair competition.

653, 674: “The policy that precludes protection of an abstract idea by copyright does not prevent its protection by contract. Even though an idea is not property subject to exclusive ownership, its disclosure may be of substantial benefit to the person to whom it is disclosed. That disclosure may therefore be consideration for a promise to pay ... Even though the idea disclosed may be ‘widely known and generally understood’ [citation], it may be protected by an express contract providing that it will be paid for regardless of its lack of novelty.”⁶ Amici supporting plaintiff add, “If a studio wishes to have an idea disclosed to it and finds that idea of sufficient value to make use of it, it is difficult to see how any hardship is involved in requiring payment of the reasonable value of the material submitted.” The principles enunciated in the above quotation from Justice Traynor’s dissent are accepted as the law of California⁷ and we have no quarrel with amici’s postulation. This case, however, remains to be resolved.

The lawyer or doctor who applies specialized knowledge to a state of facts and gives advice for a fee is selling and conveying an idea. In doing that he is rendering a service. The lawyer and doctor have no property rights in their ideas, as such, but they do not ordinarily convey them without solicitation by client or patient. Usually the parties will expressly contract for the performance of and payment for such services, but, in the absence of an express contract, when the service is requested and rendered the law does not hesitate to infer or imply a promise to compensate for it.⁸ In other words the recovery may be based on contract either express or implied. The person who can and does convey a valuable idea to a producer who commercially solicits the service or who voluntarily accepts it knowing that it is tendered for a price should likewise be entitled to recover. In so holding we do not fail to recognize that free-lance writers are not necessarily members of a learned profession and as such bound to the exalted standards to which doctors and lawyers are dedicated. So too we are not oblivious of the hazards with which producers of the class represented here by defendants and their related amici are confronted through the unsolicited submission of numerous scripts on public domain materials in which public materials the producers through their own initiative may well find nuclei for legitimately developing the “stupendous and colossal.” The law, however, is dedicated to the proposition that for every wrong there is a remedy (Civ. Code, § 3523) and for the sake of protecting one party it must not close the forum to the other. It will hear both and seek to judge the cause by standards fair to both. To that end the law of implied contracts assumes particular importance in literary idea and property controversies.

The Law Pertaining to Contracts, Express, Implied-in-Fact and Implied by Law, and Quasi Contractual Obligations, as Related to Ideas and Literary Property. The parties and amici, from their several viewpoints, discuss the law of contracts and caution us not to confuse the rules insofar as such rules may differentiate respectively among contracts which are express or implied-in-fact or implied-in-law, meaning by the latter expression to denote a quasi-contractual obligation imposed by law. We agree that whether a contract be properly identified as express or as implied-in-fact or inferred from circumstances; or whether the bargain meets the subjective test of a meeting of minds or is held to reside in the objective evidence of words and acts with or without a meeting of

minds; or whether the obligation be recognized as implied by law from acts having consensual aspects (and therefore often termed implied-in-fact); or whether the obligation be imposed by law because of acts and intents which, although tortious rather than consensual, should in justice give rise to an obligation resembling that created by contract and, hence, should be termed quasi-contractual, is important here to the extent that we recognize the situations and discriminate appropriately in the governing rules.

An eminent writer says that “The elements requisite for an informal contract ... are identical whether they are expressly stated or implied in fact,” citing e. g., *Lombard v. Rahilly* (1914), 127 Minn. 449 [149 N.W. 950], holding “A ‘contract implied in fact’ requires a meeting of the minds, an agreement, just as much as an ‘express contract’; the difference between the two being largely in the character of the evidence by which they are established”; see also *Silva v. Providence Hospital of Oakland* (1939), 14 Cal.2d 762, 773. (Williston on Contracts, rev. ed., vol. 1, p. 8.) The same author describes quasi contracts by declaring that “as quasi contractual obligations are imposed by the law for the purpose of bringing about justice without reference to the intention of the parties, the only apparent restriction upon the power of the law to create such obligations is that they must be of such a sort as would have been appropriately enforced under common-law procedure by a contractual action. Indeed even this limitation is too narrow, for a bill in equity or a libel in admiralty might be the appropriate means of enforcing some quasi contractual obligations. As the law may impose any obligations that justice requires, the only limit in the last analysis to the category of quasi contracts is that the obligation in question more closely resembles those created by contract than those created by tort. On the other hand, a true contract cannot exist, however desirable it might be to have one, unless there is a manifestation of assent to the making of a promise. Furthermore, the measure of damages appropriate to contractual obligations differs from that applicable to quasi contracts ... It is also true that quasi contractual obligations are not so universally based on unjust enrichment or benefit as is sometimes supposed.”⁶³ There are many cases where the law enforces in a contractual action a duty to restore the plaintiff to a former status – not merely to surrender the benefit which the defendant has received.”~

From what has been shown respecting the law of ideas and of contracts we conclude that conveyance of an idea can constitute valuable consideration and can be bargained for before it is disclosed to the proposed purchaser, but once it is conveyed, i. e., disclosed to him and he has grasped it, it is henceforth his own and he may work with it and use it as he sees fit. In the field of entertainment the producer may properly and validly agree that he will pay for the service of conveying to him ideas which are valuable and which he can put to profitable use. Furthermore, where an idea has been conveyed with the expectation by the

⁶³ The doctrine of unjust enrichment is regarded as usually underlying recovery in quasi contractual situations. (See *Matarese v. Moore-McCormack Lines* (1946, C.C.A.2d), 158 F.2d 631, 634; *Stanley v. Columbia Broadcasting System* (1950), supra, 35 Cal.2d 653, 675, Traynor, J., dissenting.)

purveyor that compensation will be paid if the idea is used, there is no reason why the producer who has been the beneficiary of the conveyance of such an idea, and who finds it valuable and is profiting by it, may not then for the first time, although he is not at that time under any legal obligation so to do, promise to pay a reasonable compensation for that idea – that is, for the past service of furnishing it to him – and thus create a valid obligation. As said in 12 American Jurisprudence 603, section 110, “there is considerable authority which supports the view that the moral obligation arising from a benefit of a material or pecuniary kind conferred upon the promisor by past services, rendered in the expectation that they were to be paid for – or, at least, if rendered upon the assumption by the person rendering them, though mistaken, that they would create a real liability – and, otherwise, in circumstances creating a moral obligation on the part of the promisor to pay for the same, will support an executory promise to do so, although there was, previous to such promise, no legal liability or promise, perfect or imperfect.”⁶⁴ But, assuming legality of consideration, the idea purveyor cannot prevail in an action to recover compensation for an abstract idea unless (a) before or after disclosure he has obtained an express promise to pay, or (b) the circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, show a promise of the type usually referred to as “implied” or “implied-in-fact.”⁶⁴ That is, if the idea purveyor has clearly conditioned his offer to convey the idea upon an obligation to pay for it if it is used by the offeree and the offeree, knowing the condition before he knows the idea, voluntarily accepts its disclosure (necessarily on the specified basis) and finds it valuable and uses it, the law will either apply the objective test (discussed, *supra*, pp. 801-802) and hold that the parties have made an express (sometimes called implied-in-fact) contract, or under those circumstances, as some writers view it, the law itself, to prevent fraud and unjust enrichment, will imply a promise to compensate.

Such inferred or implied promise, if it is to be found at all, must be based on circumstances which were known to the producer at and preceding the time of disclosure of the idea to him and he must voluntarily accept the disclosure, knowing the conditions on which it is tendered. Section 1584 of the Civil Code (“[T]he acceptance of the consideration offered with a proposal, is an acceptance of the proposal”) can have no application unless the offeree has an opportunity to reject the consideration – the proffered conveyance of the idea – before it is conveyed. Unless the offeree has opportunity to reject he cannot be said to accept.⁶⁵ The idea man who blurts out his idea without having first made his bargain has no one but himself to blame for the loss of his bargaining power. The law will not in any event, from demands stated subsequent to the unconditioned disclosure of an abstract idea, imply a promise to pay for the idea, for its use, or for its previous disclosure. The law will not imply a promise to pay for an idea from the mere facts that the idea has been conveyed, is valuable, and has been

⁶⁴ Such “implied” or “implied-in-fact” contracts are, we think, more accurately described as express contracts proved by circumstantial evidence.

used for profit; this is true even though the conveyance has been made with the hope or expectation that some obligation will ensue. So, if the plaintiff here is claiming only for the conveyance of the idea of making a dramatic production out of the life of Floyd Collins he must fail unless in conformity with the above stated rules he can establish a contract to pay.

From plaintiff's testimony, as epitomized above (pp. 791-793), it does not appear that a contract to pay for conveyance of the abstract photoplay idea had been made, or that the basis for inferring such a contract from subsequent related acts of the defendants had been established, at the time plaintiff disclosed his basic idea to the secretary. Defendants, consequently, were at that time and from then on free to use the abstract idea if they saw fit to engage in the necessary research and develop it to the point of a usable script. Whether defendants did that, or whether they actually accepted and used plaintiff's synopsis, is another question. And whether by accepting plaintiff's synopsis and using it, if they did accept and use it, they may be found to have implicitly – by the rules discussed supra, pages 798-802 – agreed to pay for whatever value the synopsis possessed as a composition embodying, adapting and implementing the idea, is also a question which, upon the present summary judgment record, is pertinent for consideration in reaching our ultimate conclusion. That is, if the evidence suggests that defendants accepted plaintiff's synopsis, did they not necessarily accept it upon the terms on which he had offered it? Certainly the mere fact that the idea had been disclosed under the circumstances shown here would not preclude the finding of an implied (inferred in fact) contract to pay for the synopsis embodying, implementing and adapting the idea for photoplay production.

The Law Pertaining to Literary Property. “Literary property” is a general term which is used either to describe the interest of an author (or those who claim under him) in his works (whether before or after publication or before or after copyright has been secured) or to denote the corporeal property in which an intellectual production is embodied. (Bouvier's Law Dict. (1940), p. 731; 34 Am.Jur. 400, § 2; 18 C.J.S. 139, § 3.) Literary property in an intellectual production is afforded protection by the common law.

The basic distinction between the rights in and to literary productions as they may exist at common law and as they are granted by statutory copyright is that the common law protects only a property right while the copyright statute grants a limited monopolistic privilege. (34 Am.Jur. 401, § 2.) (39) Plaintiff here has no statutory copyright. His claim as to the synopsis, therefore, necessarily must rest in a common law property right or in contract. He has chosen to rest it in contract. If plaintiff has a literary composition it may be the subject of a property right and its use by defendants, if established, could entitle him to remedies, notwithstanding the concessions he has made, which would be unavailable if he had only an idea to be appropriated or to be the subject of contract.

It is not essential to recovery that plaintiff's story or synopsis possess the elements of copyright protectibility if the fact of consensual contract be found. Neither can we hold, on the state of the record, that plaintiff's synopsis is devoid of the elements necessary to give it some measure of such protectibility. While the trial court, or an appellate court on a sufficient record, may determine the

specific extent of an author's property right in any particular work^ it is unnecessary on this appeal to define the limits more exactly than has already been done, supra, pages 806-808 (see also infra, pp. 814-815).

The Law Applied to the Facts. Here, as conceded by defendants for purposes of their summary judgment motion, plaintiff, in accordance with his testimony, submitted his synopsis to them through defendant Wilder's secretary and such submission included a declaration by both plaintiff and the secretary that defendants were to pay for his story if they used it. The mere fact that at the time of plaintiff's first telephone call to Wilder's office he described the central idea of the story to the secretary in response to her insistence that he explain the purpose of his call would not as a matter of law deprive plaintiff of the right to payment for the story as discussed by him and the secretary when he again spoke with her two days later and at her request read his synopsis to her, for her to take down in shorthand for defendants' consideration; the two conversations appear to have been parts of a single transaction and must be construed as such. The affidavits submitted on behalf of defendants by Wilder and by an officer of Paramount to the effect that neither Wilder nor Wilder's secretary had authority to negotiate contracts for the purchase of scripts do not compel the conclusion as a matter of law that an implied (inferred) contract binding defendants to pay for plaintiff's story was not created if (as is hereinafter shown) the record discloses any substantial evidence indicating that defendants did accept and make use of plaintiff's composition.

Factually it would be inconsistent, and legally it would be untenable, for the defendant corporations to deny that Paramount's employees, Wilder and the secretary, had authority to negotiate contracts for the purchase of literary material and at the same time to permit them to act as agents for the procurement of material offered for sale, and to use the material so acquired while disavowing the authority of the agents. Certainly if the secretary had accepted from plaintiff any other item of merchandise, such, for example, as office supplies, which plaintiff left with her with the statement that he was offering them for sale and that if used by defendants plaintiff expected to be paid therefor, defendants' subsequent use of such property would be held to give rise to an inferred or so-called implied-in-fact promise on their part to make payment. As hereinabove shown (supra, p. 802), Civil Code, section 1589, provides: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." If the secretary had authority to receive and transmit messages to her employer – such as messages offering to sell a story embodying a writer's idea for a photoplay – and to take down in shorthand for transmission to her employer the script of a synopsis, she also necessarily had authority to receive and transmit the conditions and terms of the offer. Her knowledge of those terms and conditions is the knowledge of her employers. (Civ. Code, § 2332; *Chapman College v. Wagener* (1955), 45 Cal.2d 796, 802 [291 P.2d 445]; see also Civ. Code, § 3521: "He who takes the benefit must bear the burden.") On this issue the evidence would support a finding that plaintiff's synopsis reached defendants through the secretary, and that they are chargeable with knowledge of the conditions on which the synopsis was offered.

With respect to whether defendants used plaintiff's composition, it may be first noted that defendants presented no affidavits in any way denying such use, but merely exhibited their photoplay to the court for purposes of comparison between plaintiff's synopsis and defendants' production. Defendants also produced extracts from a magazine and newspaper to which plaintiff had already freely testified in his deposition that he had referred in preparing his story. A script of the photoplay was, however, attached to plaintiff's complaint as an exhibit, and plaintiff has provided an outline comparing his synopsis with defendants' scenario. Defendants in their brief have likewise outlined the story of their photoplay.

Plaintiff's Synopsis:

Plaintiff's synopsis of his story, submitted to defendant Wilder's secretary as related hereinabove, stated that the "story deals with the sensational and tragic end of Floyd Collins who lost his life in a cave in Ky. in 1925 and held the whole nation in suspense. ... Since 1925 to the beginning of World War II only the Lindbergh stories ... have outdone the Collins story for sustained interest. F. Collins lived with his family in a cave region of Ky. ... It was underneath his father's farm where F. C. discovered the great Crystal Cave in 1917. Collins was obsessed with cave exploration since his boyhood. He gained reputation for discovering many relics left by the Indians which he sold to the tourists ... F. was very much in love with a girl named Alma ... In the spring of 1918 the Crystal Cave was opened for commercial tourists trade ... On January 30, 1925, F. was on his way to enter a narrow aperture, his last excursion into the cave land. In all his previous trips Floyd had learned to fear a huge egg-shaped boulder weighing approximately 100 lbs. which was held in place, sharp point downward, by a small wedge rock, for he knew it meant disaster if he should brush against it. The joy of his new discovery overcame his natural caution. The heavy heel of his new boots struck the rock wedge. Down it crashed with the speed of a lightning flash, falling across his left ankle and pinioning both legs, for his right leg had been doubled beneath the left. He was held prisoner ... F's father ... spread the alarm. Telephones were busy ... and soon the whole countryside was aroused ... The first reporter to reach F. was William Burke Miller ... [who told Collins] 'The world is coming, old man,' ... F. told the reporter of a horrifying dream he had had, and he feared the curse of the dead Indians for having disturbed their graves. [The idea of the dreams and fears of the trapped man with respect to a curse of dead Indians was fictional or original with plaintiff, rather than historical fact.] ... Lieutenant Burdon from the Louisville Fire Department who was led to F. by ... Miller, ... said, 'There is only one way to save Collins without maiming him, and that is to sink a shaft to him.'"A stream of machines and men was moving down the clay road ... Opposition develops between the natives and the rescue crew. ... An ugly situation was imminent."The Louisville Courier-Journal was bringing the F. C. sensational news every day on the front page. W. Burke Miller's

acceptance of danger was instigated, by the lure of Pulitzer Prize which later was awarded to him. Cave City was rapidly taking on the appearance of a Klondike gold rush town. ... Miller was the only reporter who saw F. He placed an elec. light bulb around F's neck and fed him. ... [A] general contractor ... brought an acetylene torch to burn away the rock that held F, but he never got a chance to use it. ... Rumors spread around that it was all a hoax and a publicity scheme, and that Floyd had fallen victim of foul play. Doc Hazlett feared that by now pneumonia might set in as F. was growing weaker. ... Special reporters ... came ... from all sections of the country. ... Special trains stopped at Cave City to unload travelers and equipment. ... Many people regarded the occasion as a picnic. ... F's father resented feebly the behavior."The shaft was sinking steadily toward the cavern. F. lay dying. ... Extremely suspicious accusations were made by some reporters in regard to the rescue of F. C. Gov. Field summoned the Board of Military Inquiry ... [which] was also directed to run down a most unfortunate story dispatched by two reporters who considered the whole thing a giant publicity scheme and a hoax ..." The story ends with Collins' death.

Defendants' Photoplay Scenario:

From material provided by plaintiff and defendants, it appears that the scenario of defendants' photoplay also commences with a mention of Collins, comparing him to "Lindbergh over the Atlantic," and referring to the year 1925, Kentucky, and "The guy pinned way down in the cave. One of the biggest stories that ever broke. Front page on every paper in the country for weeks." Defendants state in their brief that their photoplay "does not purport to be a biography of the life of Floyd Collins ... Its characters, plot and development are wholly imaginative. Its theme is to portray what might have happened to a group of ... fictional characters in 1950 if they had come into contact with a situation similar to the Floyd Collins incident of 1925."According to defendants' description of their photoplay, the central character is Charles Tatum, a reporter for a newspaper in Albuquerque, New Mexico. Tatum had once been a big-time newspaper man, but is now down on his luck and looking for an opportunity to regain his former prominent position. While traveling through New Mexico he stops at a roadside stand and finds that Leo Minosa, one of the proprietors, has just been trapped in an old Indian cliff dwelling nearby. Tatum recognizes in this event a chance to create an incident similar to the Floyd Collins incident and to exploit it in his own selfish interest. Playing on the greed of the local sheriff and of the trapped man's wife, Tatum succeeds in getting the exclusive right to enter the cave and interview the victim, who expresses fear of "The Indian dead. They're all around here. This is a tomb ... with mummies four hundred years old." Tatum contrives to prolong the rescue operation so as to increase public interest in the affair and thus increase the value of his exclusive accounts of the event. He builds the affair into a horrible carnival of cheap publicity, pandering to the morbid curiosity of the

public. He exacts enormous fees for his exclusive stories of the entrapment and rescue operations and his two selfish, inhuman assistants (the sheriff and the wife) avidly grasp at the profit to be made from the big build up. The only difficulty is that the rescue operation is prolonged too long and the trapped man dies. Tatum is left with the realization that his careless disregard of consequences has made him in effect a murderer. He falls out with the wife and sheriff and is himself killed.

In defendants' motion picture script the trapped man expresses a fear of the curse of dead Indians, as did Collins in the fictional portion of plaintiff's synopsis. Other similarities between plaintiff's story and the scenario of defendants' picture are these:

Defendants' Scenario

Cave where Minosa trapped was on property owned by him and father.
Minosa operated Indian Curio Shop.
Minosa cave open to tourist trade.
Minosa's difficulty in extricating himself from cave was due to large flat slab wedged against wall of his cell, which slanted across him, pinning him down.
Minosa's father calls sheriff.
Tatum is first reporter to arrive; tells Minosa not to worry, as "They'll get you out."
Tatum suggests setting up a drill on top of the mountain and going straight down; this is done.
Local miners object that drilling is unnecessary.
Tatum comments that the news story is "Big. As big as they come, I think. Maybe bigger than Floyd Collins," and refers to fact that reporter on Collins story received a Pulitzer Prize.
Carnival trucks are described, and persons operating concessions are shown; excursion train is referred to; rescued equipment assembled and public address system used.
Minosa's father protests.
Doctor diagnoses pneumonia.

Plaintiff's Story

Cave where Collins trapped was underneath father's farm.
Collins sold Indian relics to tourists.
Crystal Cave open to tourist trade.
Rock wedge fell across Collins' left ankle and pinioned both legs, holding him prisoner.

Collins' father spread alarm.
Miller is first reporter to reach Collins, and tells him, "The world is coming, old man."
Lt. Burdon says, "There is only one way to save Collins without maiming him, and that is to sink a shaft to him."
Opposition develops between the natives and the rescue crew.
Collins story carried on front page of Louisville newspaper every day; Miller was later awarded Pulitzer Prize.

Cave City took on appearance of Klondike gold rush town; special reporters came; special trains stopped to unload travelers and equipment; occasion regarded as picnic by many.
Collins' father resented the behavior.
Doc Hazlett fears pneumonia.

Tatum is only reporter who saw Minosa. Other reporters are suspicious of the “whole set-up and criticized and complained about Tatum’s control of the situation”; one threatened to “take this all the way to Santa Fe. To the Governor.”

Minosa dies.

Miller is only reporter who saw Collins. Some reporters make accusations expressing strong suspicions with respect to lack of good faith in rescue of Collins; governor summons Board of Military Inquiry; two reporters considered whole thing a giant publicity scheme and hoax. Collins dies.

For the purposes of appellate review of this summary judgment proceeding it is apparent from the comparisons above tabulated, and from the outlines which are set out in the margin, that a factual issue, rather than one of law, is presented as to whether defendants used plaintiff’s synopsis or developed their production independently thereof. (See *Yadkoe v. Fields* (1944), *supra*, 66 Cal.App.2d 150, 159-160; cf. *Sutton v. Walt Disney Productions* (1953), 118 Cal.App.2d 598, 603.) Particularly does this appear true in view of the fact that plaintiff submitted his synopsis to defendants in November, 1949, and that as early as July, 1950, the latter were producing their photoplay which, despite their assertion that it “does not purport to be a biography of the life of Floyd Collins ... Its characters, plot and development are wholly imaginative,” obviously does bear a remarkable similarity to plaintiff’s story both in respect to the historical data and the fictional material originated by plaintiff.

It has been suggested that this court view the photoplay (which defendants in their brief offer to make available) in order to determine whether a triable issue of fact exists. The scope of the implications in that suggestion is persuasive to us that the issues here are not for summary disposition. In the light of the conclusions we have reached on the evidence already discussed it appears that viewing the photoplay would relate merely to the weight of the evidence. (See *Kurlan v. Columbia Broadcasting System* (1953), *supra*, 40 Cal.2d 799, 806-807.) We therefore find it unnecessary to view the film.

At the trial the trier of fact should proceed with nicety of discrimination in applying the evidence to resolve the issues. Inasmuch as plaintiff’s story is taken from the public domain, and as both his story and that of defendants are in principal substance historically accurate, it must be borne in mind that the mere facts that plaintiff submitted and offered to sell to defendants a synopsis containing public domain material and that thereafter defendants used the same public domain material, will not support an inference that defendants promised to pay for either the synopsis or for the idea of using the public domain material. The plaintiff can have no property right in the public domain facts concerning Floyd Collins or in the abstract idea of making a photoplay dramatizing those facts. On the other hand, the fact that plaintiff used the public domain material in constructing his story and synopsis would afford no justification whatsoever for defendants to appropriate plaintiff’s composition and use it or any part of it in the production of a photoplay – and this, of course, includes the writing of a scenario for it – without compensating plaintiff for the value of his story. And the further

fact, if it be a fact, that the basic idea for the photoplay had been conveyed to defendants before they saw plaintiff's synopsis, would not preclude the finding of an implied (inferred-in-fact) contract to pay for the manuscript, including its implemented idea, if they used such manuscript.

- The judgment is affirmed as to the second and third counts of the complaint, but as to the first count it is reversed and the cause is remanded for further proceedings not inconsistent with the views expressed in this opinion.

Gibson, C. J., Shenk, J., Traynor, J., Spence, J., and McComb, J., concurred.