THE QUASI-CONTRACTUAL REMEDY IN CASES OF EXPRESS CONTRACT
INDUCED BY FRAUD

Legal duties are created by society for any sort of reason that seems good to society. Thus, where a harmful act has been done by the defendant with resulting profit to himself, the law can declare that these facts shall operate to create either a duty in the defendant to make good to the plaintiff for all the damage suffered by him or a duty in the defendant to restore to the plaintiff the amount of the profit wrongfully received by the defendant. Both of these alternative duties are secondary, remedial duties, created to redress the wrong done by a tortious act. The first is the duty that is enforced in the more common of tort actions like trespass and case. The second has come to be called a quasi-contractual duty, chiefly because the form of action in which it was recognized and enforced was assumpsit; by the use of fiction—so common in the growth of our law—the tort was said to be waived and a contract to be implied by the law. The use of the language of fiction, such as this, might well be expected to result in error and confusion. Such a result is made almost certain by the prevailing ignorance of the history and character of the common-law forms of

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action and by the failure to make an analysis of such a complex legal concept as "contract" into simpler and more fundamental concepts.

In the case of Prest v. Farmington (1918, Me.) 104 Atl. 521, the plaintiff sued for the reasonable value of work and labor performed for the defendant, and to a plea by the defendant that the work was done under express contract replied that the contract was induced by the defendant's fraud. It was held that the plaintiff could recover nothing beyond the agreed contract price, even though he could have recovered more in an action of deceit and even though the reasonable value to the defendant of the work done by the plaintiff was more than the agreed price. The court expressly says that in such a case "indebitatus assumpsit" lies only for the contract price; that "Where the parties have made a contract for themselves covering the whole subject-matter, no promise is implied by the law"; and that "The duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained."

The decision in this case can well be sustained for another reason given by the court, that the plaintiff had discovered the fraud at an early stage in the work and that his conduct since that time amounted to a ratification of the express contract. The same can be said of some of the cases cited by the court as authority. As to the other reasons, however, there must be vigorous dissent.

Indebitatus assumpsit is substantially identical with the action of debt. To maintain either action at common law, it was necessary to prove that the defendant had received a *quid pro quo*, and in both actions the measure of recovery was the value of that *quid pro quo*. Such value, however, might have been fixed at a liquidated sum by the parties, and this sum would then be the measure of recovery. In neither form of action was it necessary to prove an express promise by the defendant.

The action of assumpsit was the form to be used in any case where the defendant had made an actual promise for a consideration, even though this consideration did not consist of a *quid pro quo* received by the defendant and even though he had promised no liquidated sum. As long as this form of action was a true action of trespass on the case, the measure of recovery was the damage suffered by the plaintiff, the amount by which his estate had been decreased by his giving the consideration; but by an unconscious process it departed from its tort parent, and the measure of recovery came to be the value of the thing promised, the amount by which the plaintiff's estate would have been increased by complete performance.

It is obvious that there was a large field in which the two forms of action overlapped, but each had its distinct and separate field also:

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debt would lie in many cases where the defendant had never promised to pay, either expressly or by implication in fact; and assumpsit would lie even though the defendant had never received a quid pro quo and had not agreed to pay a liquidated sum of money.

The statement of the court in Prest v. Farmington that “Where the parties have made a contract for themselves, covering the whole subject-matter, no promise is implied by law” is one of those glittering generalities of which our legal literature is so full. It can be found repeated in scores of cases, and in a considerable number it has caused an erroneous and unjust decision. In its proper signification it means no more than that when two parties are contracting expressly they are not contracting tacitly, that when parties reduce their agreement to words their mutual intentions will be determined by those words and not by mere inferences from other conduct. Where there is an express contract no other should be implied in fact. This rule is properly applied in all cases where the legally operative facts are the words of agreement, even though the plaintiff may be seeking a remedy in an action of debt or indebitatus assumpsit. Where the remedy on the express contract has been barred by the statute of limitations, the law will not construct a quasi-contractual debt in order to avoid the effect of the statute. But on the other hand, there are many classes of cases where a quasi-contractual debt was constructed by the law in spite of the existence of an express agreement. Such is the case where the express contract is unenforceable because of the statute of frauds; or because of illegality, the plaintiff not being in pari delicto; or even because of the non-fulfillment of some condition precedent by

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2 Phelps v. Sheldon (1832, Mass.) 13 Pick. 52; Whiting v. Sullivan (1810) 7 Mass. 107; Steam Mill Co. v. Westervelt (1877) 67 Me. 446, 449; Stockett v. Watkins (1850, Md.) 2 Gill & J. 326, 341 (“The law sometimes implies contracts, but never where there is an express contract”); Walker v. Brown (1825) 28 Ill. 378, 383 (“As in physics two solid bodies cannot occupy the same space at the same time, so in law and common sense there cannot be an express and an implied contract for the same thing existing at the same time”); Young v. Hill (1876) 67 N. Y. 162, 174 (“there being an express contract for the payment of the debt . . . the law will not imply another and a different agreement for the same purpose. Expressed facit cessare tacitum”).

3 So the doctrine may very properly be applied where a workman sues for an additional sum over and above that for which he expressly agreed to do the work. Waite v. Merrill (1825) 4 Me. 102; Massachusetts General Hospital v. Fairbanks (1886) 129 Mass. 78; Phelps v. Sheldon, supra; Walker v. Brown, supra; Cutter v. Powell (1795, K. B.) 6 T. R. 320; Ladd v. Bean (1918, Me.) 104 Atl. 814.

4 Steam Mill Co. v. Westervelt, supra.


the plaintiff himself. Therefore, the mere existence of an express contract is not itself a sufficient reason for refusing to recognize a non-contract debt based upon the unjust enrichment of the defendant. Such enrichment is an additional fact to be given an operative effect different from that of the contract itself; the words of the parties are not the only operative facts to be considered.

Where the defendant has committed a tort, thereby enriching himself at the plaintiff's expense, there are numerous classes of cases where the plaintiff is given an alternative remedy. He can recover damages in a tort action, measured by the loss he has suffered and without reference to the gain of the defendant; or he can sue in indebitatus assumpsit for the amount of the defendant's wrongful gain. If he chooses the latter remedy, he is said to "waive the tort." This is so well established that the citation of cases is hardly necessary. It is not material by what particular kind of a tort the defendant enriched himself; the rule is everywhere applied where the tort consisted of fraud and deceit.

This being the case, there should be no variation in the application of the rule even though the deceit or fraud occurred in the formation of a contract. In such a case the tortious acts of the defendant should operate as follows: the plaintiff should have the legal privilege of not performing his part, and the legal power of rescission; or he can enforce a secondary right to damages for breach of contract in case the defendant fails to perform as agreed; or he can maintain suit for damages in the tort action of trespass on the case; or he can repudiate the contract, waive the tort, and sue in indebitatus assumpsit.


10 This is really a misdescription; for whichever remedy the plaintiff chooses, the tort is still one of the operative facts and must be proved. In indebitatus assumpsit, however, an additional operative fact must be proved—the *quid pro quo* or enrichment of the defendant.

11 See Arthur L. Corbin, *Waiver of Tort and Suit in Assumpsit* (1910) 19 YALE LAW JOURNAL 221. The plaintiff is given a similar choice of remedies in cases where the defendant has committed a breach of contract, enriching himself at the plaintiff's expense. *Snow v. Prescott* (1842) 12 N. H. 535; *Clark v. Manchester* (1872) 51 N. H. 594. The choice is between express assumpsit for damages suffered and debt (or indebitatus assumpsit) for value received.

12 This is universally true where the defendant obtained money from the plaintiff by fraud. No court doubts that the plaintiff can recover this money in indebitatus assumpsit, even though he might in the alternative have sued on the express contract or in tort for damages. *Morison v. Thompson* (1874) L. R. 9 Q. B. 480; *Steiner v. Clisby* (1894) 103 Ala. 181, 15 So. 612; *Byard v. Holmes* (1868) 33 N. J. L. 119.

13 Even where the defendant received value in goods or labor instead of money, authority is ample to sustain counts for work and labor and for goods sold. *Fenemore v. U. S.* (1797, U. S.) 3 Dall. 357 (stock obtained by fraud); Corbin, *Waiver of Tort* (1910) 19 YALE LAW JOURNAL, 221, passim.
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, 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.

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.” 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

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15 Ferguson v. Carrington, supra; Kellogg v. Turpie (1879) 93 Ill. 265.
17 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.\textsuperscript{1} The court held that the plaintiff was a stranger to that contract and could maintain no action upon it,\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{7}

\textsuperscript{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.

\textsuperscript{2} A contrary result was reached in Massachusetts. \textit{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 \textit{Lincoln v. Burrage} (1901) 177 Mass. 378, 381, 59 N. E. 67.

\textsuperscript{3} See Arthur L. Corbin (1918) \textit{27 Yale Law Journal}, 1008; Wald's Pollock, \textit{Contracts} (Williston's ed.) 237 et seq.

\textsuperscript{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.

\textsuperscript{5} (1918) \textit{27 Yale Law Journal}, 1026.


\textsuperscript{7} In \textit{Lloyd's 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. Thus do men permit their thought processes to be directed by mere words, like "agent" or "trust", or by ancient and unmeaning forms. 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. 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. 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.

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 equitable 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.

This 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.

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


The 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."

Werderman v. Société (1881) 19 Ch. D. 240; Bagot Tyre Co. v. Clipper Tyre Co. (1902) 1 Ch. 145; 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. 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. 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. For example, there is a privilege of making

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18 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.

19 The reasons for this limitation are not convincing.

20 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. 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. 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.

This 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.

"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, 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. 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."

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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.

Art. 4, sec. 1.
The federal statute passed in pursuance thereof reads as follows:

"And the said records or judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." 2

What effect do these provisions require one state to give to judgments duly rendered in other states? As is well known, great confusion has existed with reference to this matter, a confusion which has not yet been dissipated, if we may judge from the decision in the recent case of Kenney v. Supreme Lodge, etc., Loyal Order of Moose (1918, Ill.) 120 N. E. 631. The defendants in that case by their acts in Alabama had caused the death in that state of the plaintiff's intestate. The plaintiff sued and obtained judgment in Alabama under the wrongful death statute of that state. The judgment not having been paid, the plaintiff brought the present action in Illinois, basing his claim on the Alabama judgment. An Illinois statute provided that "no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state." The Supreme Court of Illinois sustained a plea to the jurisdiction, on the ground that the statute in question deprived the courts of Illinois of jurisdiction, not only over the original cause of action but also over a suit founded upon the judgment of another state based upon that cause of action. In reaching its conclusion the courts argued as follows: We have previously held that under our statute Illinois courts have no jurisdiction to entertain suits for damages for wrongful death where the death occurs outside the state. 3 The full faith and credit clause of the federal constitution does not prevent us from going behind a judgment of another state to examine into the nature of the original cause of action, and "if it appears that the courts would not have had jurisdiction of the subject matter of the original action, it will not have jurisdiction of the action on the judgment."

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2 U. S. Rev. St. sec. 905; U. S. Comp. St., 1916, p. 2431. It is interesting to note that the Australians, who considered very carefully the relevant provisions of our constitutional law when framing the corresponding portions of the Commonwealth of Australia Constitution Act (1900) 63 and 64 Vict, ch. 12, obviously were of the opinion that we had not gone far enough, for they provided as follows: "Sec. 51. The Parliament shall have power to make laws with respect to: (xxiv.) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States; (xxv.) The recognition of the laws, the public Acts and records, and the judicial proceedings of the States." "Sec. 118. Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State." For a discussion of the scope of the powers thus conferred upon the Australian Parliament see Quick and Garran, Annotated Constitution of the Australian Commonwealth, 613-621.

Any such result is of course opposed to the view expressed in an early case by Chief Justice Marshall, to the effect "that the judgment of a state court should have the same credit, validity and effect in every other state in the United States which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court of the United States."* 

Although dicta in later cases threw much doubt upon the validity of Chief Justice Marshall's statement, the Supreme Court followed it in 1908 in the case of *Fauntleroy v. Lum,* in which the majority of the court, speaking through Mr. Justice Holmes, said: "We assume that the statement of Chief Justice Marshall is correct." In the case last cited the Mississippi Supreme Court interpreted a Mississippi statute worded in a manner similar to that in the instant case so as to deprive Mississippi courts of jurisdiction both of the original cause of action and of a suit founded upon a Missouri judgment based upon that cause of action. This was reversed by the Supreme Court of the United States, four justices dissenting. The decision in the principal case seems clearly to be in conflict with the decision in *Fauntleroy v. Lum* and an attempt to revert to the dicta found in earlier cases.

Aside from the authority of *Fauntleroy v. Lum,* the propositions of the Illinois court are, it is submitted, demonstrably unsound. Even as applied to the original cause of action the interpretation of the state statute is open to serious criticism, as the argument of Mr. Justice Holmes in *Fauntleroy v. Lum* clearly shows. The statute reads that "no action shall be brought or prosecuted," etc. Now the statute of frauds reads: "No action shall be brought," etc., but no one imagines that it is directed to the jurisdiction, i.e., the power, as distinguished from the duty, of the court to act.

If the view of the court in the principal case should prevail, apparently judgments of other states could be prevented from having consequences of any importance in a given state by means of a very simple device. Let the state enact, for example, a statute providing that the state courts shall not have jurisdiction of suits based either on any tort cause of action where the tort is committed out of the state, or on the judgment of another state founded upon such a tort cause of action; if we accept the view taken in the principal case, the full faith and credit clause is not violated, for Illinois is not bound to confer jurisdiction on her courts. By a series of similar statutes a state could, if it so wished, close the door to the enforcement in the state courts of practically all judgments of other states, for, since execution can not be issued in one state on the judgments of other

*Hampton v. McConnell (1818, U. S.) 3 Wheat. 234. The italics in this and following quotations are those of the present writer.
*210 U. S. 230, 28 Sup. Ct 641.
states, the only way to give them validity in other states is to permit new judgments based upon them to be entered. The mere statement of this result ought to suffice without more to convince one of the unsoundness of the proposition upon which it is based.

Equally startling is the proposition of the Illinois court that “where an action is brought upon a judgment rendered in another state, the court may examine into the nature of the cause of action upon which the judgment is founded, for the purpose of determining whether it would have jurisdiction of the subject-matter of the action, and if it appears that the court would not have had jurisdiction of the original action it will not have jurisdiction of the action on the judgment.”

Surely this proposition cannot be supported, consistently with the full faith and credit clause and the act of Congress passed in pursuance thereof. It is entirely within the powers of State X to deny, if it so pleases, jurisdiction to its courts over action for torts committed outside the state—that no one denies. This denial is, of course, based upon the subject-matter of the suit—a foreign tort. But if after personal service the injured person has obtained a judgment against the tort-feasor in a state court which, under the law in force where the suit is brought, has jurisdiction, and the judgment debtor has without paying the judgment gone into State X, may the latter close the doors of its courts to the judgment creditor merely by saying: “Our law gives our courts no jurisdiction”? This cannot be the law unless the full faith and credit clause is to be reduced to a nullity, and that will not happen so long as the decision in *Fauntleroy v. Lum* stands. Moreover, aside

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*The only authority cited is the well known case of *Wisconsin v. Pelican Ins. Co.* (1888) 127 U. S. 265, 8 Sup. Ct. 1370. While some of the *dicta* in that case may give the Illinois court aid and comfort, the decision settled merely that the original jurisdiction given to the United States Supreme Court by article 3, sec. 2 of the Constitution is confined to “controversies of a civil nature,” which the judgment in question was not. The case raised absolutely no question under the full faith and credit clause. The *dicta* referred to were effectually disposed of by Holmes, J., in *Fauntleroy v. Lum*, cited above.

It is beyond the scope of the present Comment to discuss the validity of the commonly recognized doctrine that a state may refuse to give effect within its borders to the judgments of other states based upon penal laws. The leading case in the federal Supreme Court—*Huntington v. Atrill* (1892) 146 U. S. 657, 13 Sup. Ct. 224—while recognizing the doctrine in the opinion, does not actually establish it, for the decision was that the judgment in question was based upon a law not penal in character and therefore entitled to full faith and credit. Early American cases in the state courts gave effect to judgments based upon penal laws. *Spencer v. Brockway* (1824) 1 Ohio, 259; *Healy v. Root* (1831 Mass.) 11 Pick. 389; *Indiana v. Helmer* (1866) 21 Ia. 370.

*However, it must be noted that much of the reasoning, although not necessarily the decision, of Mr. Justice Holmes in *Anglo-American Provision Co. v. Davis Provision Co.* (1903) 191 U. S. 373, 24 Sup. Ct. 92 bears out the contention of the Illinois court. In that case the learned justice wrote: “It has been laid down . . . in [previous cases] that this provision of the Constitution estab-*
from all other considerations, may it not fairly be argued that the purpose of the Illinois statute—if indeed it had any definite purpose—had been attained when the plaintiff sued and obtained judgment elsewhere than in Illinois? So far as one can fathom the depths of legislative wisdom, the object of the Illinois legislature in limiting their statute relating to death by wrongful act in the manner stated was to prevent Illinois courts from being vexed with the determination of facts—including foreign law—relating to death outside the state. Into none of these does an Illinois court have to go when suit is brought there on the judgment of another state. To permit the injured person (the administrator of the person killed) to sue in Illinois on the judgment of the other state would not, therefore, involve the evils—real or supposed—aimed at by the statute. 7 Be it noted also that the words of the statute, literally construed, embrace only the action upon the original cause of action—a tort action "on the case"—and not the action on the judgment—an action of "debt on a record." 8 It is only by giving to the words of the statute an unnecessarily broad construction that the court is able to reach its conclusion.

From whatever angle the matter is approached, therefore, whether of reason or of authority, we must conclude that the decision in the principal case denies to the judgment of a sister state that full faith and credit which is demanded by the federal Constitution and the statute of Congress passed in pursuance thereof.

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lishes a rule of evidence rather than of jurisdiction. The Constitution does not require the State of New York to give jurisdiction to the Supreme Court against its will." As applied to the case then before the court this was true, for the plaintiff was a foreign corporation. If we accept it as generally true, however; it is difficult to see how the decision in Fauntleroy v. Lum can stand, for there the United States Supreme Court refused to follow the construction given by the Mississippi Supreme Court to a state statute. If the State was not bound to give any jurisdiction to its courts, on what ground does the United States court depart from the state court's interpretation of the state statute?

7 One can not but wonder why the Illinois legislature should desire to place any such limitation upon the bringing of actions. We constantly permit suits in our state courts for torts committed outside the state boundaries. As the Illinois law stands, even if full faith and credit be given to judgments of other states, one who according to the law of the state where the act is done has tortiously killed another may take himself and his property into Illinois and remain free from any enforcement of the resulting liability, unless by chance the one to whom he is liable is a citizen of another state and can sue in the federal courts.

Another State has recently been added to the lengthening list of jurisdictions which recognize the existence of a "right of privacy." The circumstances which presented the question to the Supreme Court of Kansas were both novel and interesting. The defendant, proprietor of a store, surreptitiously took moving-picture films of a woman customer who was making purchases in his store; these films he caused to be enlarged and to be exhibited at a public theater to advertise his wares. The customer, alleging that the pictures were made and used without her knowledge or consent, brought an action for damages, and apparently contended that the defendant's conduct wronged her in two respects: (1) as a violation of her right of privacy, and (2) as a false and libellous representation that she had sold to the defendant the privilege of using her picture for advertising purposes, which brought upon her the ridicule and contempt of people in the community. There was no proof of special damage, and the trial court sustained a demurrer to the evidence. This action was reversed by the Supreme Court, which held that the plaintiff's right of privacy had been violated and that recovery could be had without proof of special damages. Kunz v. Allen (1918, Kan.) 72 Pac. 532.

In recent years scarcely any subject has evoked more controversial debate both in the courts and in legal periodical literature than has the so-called right of privacy. When the question was first presented to the New York courts, less than twenty years ago, the absence of precedent and the general disinclination of the law to protect individuals against injuries merely to their sensibilities, caused a majority of the court to deny the existence of such right. As is well known, this decision produced a popular clamour for legislation which resulted in the passage by the New York legislature of a statute which forbade the unauthorized use of a person's name or picture for purposes of advertising or trade, and gave the injured individual a preventive remedy by injunction as well as a remedial action for damages.


2 Roberson v. Rochester Folding Box Co. (1902) 171 N. Y. 538, 64 N. E. 442. This well-known case was a suit for an injunction to restrain the unauthorized use of the plaintiff's picture to advertise a brand of flour. There was a strong dissenting opinion by Gray, J.


For an interesting case holding that it was tortious under this statute to use in a moving-picture film the name and the purported likeness of the
Without such legislation the courts of Georgia recognized the right of privacy, and other courts have followed in their train; although the decisions have not been unanimous in admitting the right.

The opinion in the Kansas case under discussion unfortunately makes no effort to clarify the nature or to define the limits of the right of privacy. It merely cites with approval passages from the Pavesich case, which considers the claim to privacy as a personal right having “its foundation in the instincts of nature,” and passages from Munden v. Harris, which considers it “a property right of material profit.” Between these two views, the opinion makes no choice. Indeed, it may be thought to approve them both.

The interest which a person has in the prevention of the publication of his picture without his consent may be of three sorts: (1) the desire to preserve his mental peace and comfort from disturbance by distasteful publicity; (2) the possible profit he may make from his photograph, if it has commercial value; and (3) the interest in his reputation, the loss of which by the false implication that he has sold the privilege of using his picture for advertising purposes—if such implication does in fact arise from the use of it—may cause him mental distress or may prevent his entering into desirable social or business relations with other persons. Should the law protect all or any of these interests and is it necessary to recognize a right of privacy in order to do so?

If the law aims to protect the interest first mentioned, it is necessary to admit the existence of a right of privacy, and to recognize it as a right of personality, and not merely as a property right. A person's picture may be used in a way which deprives the owner of no possible pecuniary profit but causes acute mental distress.

plaintiff, obtained by photographing another made up to represent him, see Binns v. Vitograph Co. (1911) 210 N. Y. 51, 103 N. E. 1108.

*Pavesich v. New Eng. Life Ins. Co. (1904) 122 Ga. 190, 50 S. E. 68. This is the leading case in support of the right of privacy. It was an action for damages for the unauthorized use, for advertising purposes, of the plaintiff's picture and an alleged statement by him in favor of life insurance.


*Supra, note 4.

*Supra, note 5.

*This was the situation in Hillman v. Star Publishing Co., supra, note 6. The court refused to recognize the existence of a right of privacy, but felt that an injustice was being done which called for legislation.
the right is viewed merely as a property right which protects the pecuniary interest of the plaintiff, it is difficult to understand the allowance of damages for wounded feelings. In the aspect of a property right, the damages should be determined by the commercial value of the privilege of using the plaintiff's photograph. The cases, however, make no such limitation and, as in the principal case, require no proof of special damage. It is believed, therefore, that the right of privacy should be frankly recognized as a personal right protecting the plaintiff's interest in the preservation of his peace of mind from disturbance by unjustifiable publicity.

Laymen, it is submitted, would unhesitatingly affirm that the law should protect such an interest. Considerations, historical and practical, which have made the courts so reluctant to give remedies for mental distress and wounded sensibilities alone are not present to the minds of laymen. Despite these considerations, the right of privacy is making its way to recognition by the courts, and rightly so. New discoveries in the art of photography and reproduction, the growth of a journalism which considers nothing sacred or immune from public scrutiny, and an increased importance which advancing civilization gives to things emotional and spiritual, require that the law should grow away from the notion that only the physical welfare of the individual can receive legal protection.

If the interest to be protected by the law is the third one above mentioned, it would seem that no right of privacy need be invoked. Familiar principles of libel will furnish the injured plaintiff redress, if in fact the unauthorized publication of his picture is equivalent to a representation that he has sold the privilege of using it, and such a representation would bring him into ridicule or contempt. Few, if any, of the previous cases have raised the issue squarely whether the mere publication of a photograph for advertising purposes does by

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[^22]: It may be argued that damages for feelings may be allowed, as incidental to the injury to a property right, as they are in seduction, for example. But a more logical explanation seems to be found in considering the right as a right of personality. It must be admitted, however, that to view the right solely in this aspect causes embarrassment in the application of the remedy by injunction. But, as intimated in *Vanderbilt v. Mitchell* (1907) 72 N. J. Eq. 910, at 919, equity should depart from the antiquated view that it can enjoin only violations of property rights.

[^23]: Space does not here permit any attempt to delimit the right of privacy so as to avoid conflict with the principles of free speech and freedom of the press. The subject is alluded to in several of the cases cited above.


[^25]: Cases such as *Peck v. Chicago Tribune Co.* (1909) 214 U. S. 185, 29 Sup. Ct. 554, must be distinguished, because in them the libel consists in libellous words which, by reason of the accompanying photograph, are understood to be published of and concerning the plaintiff.
implication amount to a libellous representation of this character.\textsuperscript{14} The opinion in the principal case may be thought to approve, though not as explicitly as could be wished, the contention that the defendants' conduct was libellous.\textsuperscript{15}

**MISTAKE OR FRAUD AS A GROUND FOR ANNULING MARRIAGE**

An interesting problem in the law of marriage arising out of the present war was presented not long ago to the Tribunal Civil de la Seine. \textit{Re Schoenberg} (1918) 45 \textit{Clunet} 666. The question was whether the fraudulent concealment on the part of the husband that he was a subject of an enemy country was sufficient to entitle the wife to an annulment of the marriage. The facts briefly were as follows: A Frenchwoman married one Schoenberg in Paris on August 25, 1914. Schoenberg had told her falsely that he was an Alsatian by birth, and therefore a Frenchman by nationality, and the marriage certificate recited the same facts. He was in fact a German subject and had been born in Darmstadt. The wife petitioned for an annulment of the marriage and the court granted it.\textsuperscript{1} Would the same decision be reached in this country, in England, and elsewhere? A comparative study of the problems presented by cases or legislative provisions dealing with the annulment of marriage may be of interest.

Art. 180 of the French Civil Code allows annulment where the consent has not been freely given or there has been a mistake as to the person.\textsuperscript{2} The article assumes that there has been a consent to marry but that such consent is "defective." If there were no meeting of the minds the marriage would be deemed "non-existing" that is, void, instead of being "nul," that is, voidable. Ordinary contracts may be annulled in France on the ground of duress, fraud or mistake. By

\textsuperscript{14} In \textit{Henry v. Cherry}, supra, note 6, the count for libel, which the court held insufficient, contained no allegation that the publication of the plaintiff's picture constituted a false representation that he had sold the privilege of using it. In the \textit{Pavesich} case, the \textit{Chinn} case, and \textit{Munden v. Harris}, supra, the publication of the picture was accompanied by a testimonial or statement falsely ascribed to the plaintiff, and which if true would hold him up to ridicule.

\textsuperscript{15} Professor Wigmore contends that the law goes beyond the principles of libel and recognizes a person's right not to have a belief or utterance falsely attributed to him. This subject is closely related to the right of privacy, and Professor Wigmore's interesting article "The Right against False Attribution of Belief or Utterance" (1916) 4 Ky. L. J. 1, should be read in this connection.

\textsuperscript{1} The petition was granted on the ground of mistake, the nationality of a person being regarded by the court as an element of his civil personality and in time of war as an essential element of such personality.

\textsuperscript{2} Art. 180 of the French Civil Code provides as follows:

"A marriage which has been contracted without the free consent of both parties, or without the free consent of one of them, can only be avoided by the parties themselves, or by the party whose consent was not freely given.

"When there has been a mistake as to the person the marriage can only be avoided by the person who was led into the mistake."
reason of the fact, however, that Art. 180 speaks of “free consent” and “mistake” and omits all direct reference to “fraud,” the conclusion is drawn that a marriage cannot be attacked on the ground of fraud as such. And this appears to have been the intent of the codifier. Misrepresentation was such a common practice in connection with marriage—as is shown by the French adage “en mariage trompe qui peut”—that it was deemed necessary in the interest of the stability of marriage, to exclude it as a ground of annulment. In the case under discussion it was incumbent, therefore, upon the petitioner to prove that the fraud resulted in a mistake as to the person within the meaning of Art. 180.

What does the French law mean by “mistake as to the person”? According to one view, which accepts the view expressed by Pothier, the mistake must relate to the physical identity of the person. Another, which appears to have been the view of the French courts until 1862, allows annulment if it concerns “essential” or “substantial” qualities of the person. The prevailing view to-day, established by a decision of the united chambers of the court of Cassation in 1862, holds that the mistake must affect the identity, physical or civil, of the person and that mistake as to quality is not sufficient. The courts say that the mistake in order to affect the identity of the person must relate to the “complete civil person” and not merely to a part thereof. It is difficult, however, to grasp what the French courts mean by this. Impotence, illegitimate birth, pregnancy and conviction of crime

*Baudry-Lacantinerie & Houques Fourcade, Traité de droit civil, Des personnes, vol. 2, nos. 1710, 1738; Dalloz, Codes annotés, Nouveau code civil, art. 180, n. 37; Colin & Capitant, Cours élémentaire de droit civil français, 154.

*2 Laurent, Principes de droit civil français, nos. 293 et seq.

*Pothier, Mariage, nos. 312-313.

*Mariage has been annulled on the following grounds: (1) pregnancy at the time of marriage where the husband had no improper relations with his wife prior to the marriage. Trib. Civ. Chaumont, June 9, 1858, D. 61, 5, 305; (2) illegitimate birth. Trib. Boulogne, Aug. 26, 1853, D. 53, 3, 56; S. 54, 2, 114; (3) conviction of an infamous crime and consequent loss of civil rights. Cass. Feb. 11, 1861, D. 61, 1, 49; (4) ignorance that the husband was a professed monk. Colmar, Dec. 6, 1811, Dalloz, Jurisprudence générale, Mariage, no. 71, note.

Annulment has been denied for impotence. App. Toulouse, Mch. 10, 1858, D. 59, 2, 40.


*Napoleon called it a mistake as to family. 9 Penet, Recueil complet des travaux préparatoires du code civil, 46.

*Cass. Jan. 15, 1872, D. 72, 1, 52; App. Riom, June 7, and Aug. 2, 1876, D. 77, 2, 32. See also 2 Baudry-Lacantinerie & Houques Fourcade, n. 1743; Colin & Capitant, 166.

*App. Bordeaux, Mch. 21, 1866, D. 66, 2, 87; S. 66, 2, 269.

*2 Baudry-Lacantinerie & Houques Fourcade, no. 1743; Colin & Capitant, 166.
and loss of civil rights are not regarded by them as sufficient grounds under Art. 180 for annulling a marriage. Nor is concealment by the husband that he is a Catholic priest or a professed monk. Such annulment will be granted, however, where a party, in order to pass off as member of a family to which he does not belong, forges the papers establishing his civil status. The question of a mistake regarding the nationality of the husband apparently did not arise before Re Schoenberg. Dalloz was at one time of the opinion that if a Frenchwoman believed a foreigner to be a French citizen she would be entitled to have the marriage annulled if the erroneous belief was induced by fraudulent representations on his part. Later the learned author reached the conclusion, however, that such an exception could not be justified. Other French writers maintain likewise that a mistake regarding nationality does not affect the civil identity of the party and hence is not a ground for annulment. The effect of the existence of war with reference to the problem is not considered by them.

In other countries also much difficulty has been experienced in determining the grounds upon which the annulment of a marriage should be authorized. The only general agreement that can be found is of a negative nature. All regard it as an unwise policy to apply the rules governing ordinary contracts in this respect. Beyond this there is great diversity of opinion. The most extreme position is taken by the English courts which bind the parties "for better or for worse," annulment of the marriage being granted only if there is no reality of consent. If the party was capable of consenting and has consented the English courts do not ask how that consent was obtained.

The provisions of the Italian Code are practically identical with those of the French Code. The courts have given to those provisions,

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22 A Baudry-Lacantinerie & Houques Fourcade, no. 1741; Colin & Capitant, 166; Planiol, Traité élémentaire de droit civil (6th ed.) no. 402.
24 Dalloz, Jurisprudence Générale, Mariage, no. 72.
25 Baudry-Lacantinerie & Houques Fourcade, no. 1739; Colin & Capitant, 166.
26 In Moss v. Moss [1897] P. 262, 269, Sir F. H. Jeune, President, said:
"I believe in every case where fraud has been held to be ground for declaring a marriage null, it has been such fraud as has procured the form without the substance of agreement, and in which the marriage has been annulled, not because of the presence of fraud, but because of the absence of consent ... But when there is consent no fraud inducing that consent is material."
27 Art. 105, Civil Code. The draft of the civil code prepared by the government read "essential" mistake. The senate dropped the word "essential" for two reasons, (1) because it would renew the old controversy, raised in the canon law, with respect to the question what constitutes an "essential" error; (2) because annulment should be granted only if the mistake related to the
however, a more liberal interpretation than is done in France. They accept in general the view followed by the French courts until 1862. The following have been held sufficient grounds for annulment: concealment by husband that he was a Catholic priest; a prior religious marriage, constituting no marriage according to the temporal law; illegitimacy; fraudulent concealment of his nationality by a Turk; fraudulent assurance of chastity by the wife, but not mere concealment of unchastity. Art. 107 of the civil code contains the specific provision that a marriage may be annulled on account of manifest and incurable impotence existing at the time of the marriage.

According to Fiore a mistake as to nationality is not a ground for annulment under the Italian code. The courts have not passed upon the precise point. The cases granting an annulment as against a Turkish husband who had falsely represented that he was a Frenchman involve of course a mistake as to nationality but the real ground of those decisions was the fact that under his national law the husband was authorized to take other wives.

The most recent codes adopt a still more liberal attitude in the annulling of marriages on account of mistake or fraud. The German code allows the marriage to be avoided if the mistake relates to such personal identity of the person. The Commission of Coordination kept the wording of the senate but made it clear that it did not have the meaning attributed to it by that body. See Prudhomme, *Code civil italien*, 35-36 note.

The Italian jurists are greatly divided as regards the true meaning of Art. 105 of the code. Ricci and De Filippis hold that it refers exclusively to mistakes relating to the physical person. Bianchi and Lomonaco, on the other hand, maintain that it refers to the person's civil personality and not to his physical person. Borsari, Fiore and others agree with the majority of the French writers that a “mistake as to the person” includes all mistakes affecting a person's physical as well as civil identity. The identity is deemed affected if the mistake causes a difference in the “essence” of the person. See i Ricci, *Corso di diritto civile* (2d ed.) no. 209; i2 De Filippis, *Corso completo di diritto civile italiano comparato*, sec. 88; i4 Bianchi, F., *Corso di codice civile italiano*, no. 74; i5 Lomonaco, *Istituzioni di diritto civile* (2d ed.) 351 et seq., *Nozioni di diritto civile italiano* (2d ed.) 94; i6 Borsari, *Commentario del codice civile italiano*, art. 105, sec. 283; i Fiore, *Il diritto civile italiano*, no. 386.

23 Naples, Nov. 23, 1874, La Legge 1874, 1, 576.
25 Court of Turin, May 9, 1870, Giurisprudenza italiana, 1870, 2, 339; App. Turin, June 5, 1900, Foro Italiano, 1900, 1, 1098 and note by Gabba.
26 App. Brescia, Oct. 19, 1883, La Legge, 1883, 2, 775; S. 86, 4, 1; Cass. Turin, July 31, 1883, Foro Italiano, 1883, 1, 937; S. 86, 4, 1 and note by Chavegrin.
27 Rome, Dec. 6, 1903, Monitore dei tribunali, 1904, 95.

29 i Fiore, *Il diritto civile italiano*, no. 386.
characteristics of the other spouse as would have deterred him from concluding the marriage.  

The precise meaning of the provisions of the German code remains still to be settled by the courts. As regards mistake most of the German writers\(^2\) are satisfied that the framers of the code meant by the term “personal characteristics” only such qualities as lie in the person himself and not those which connect him with a certain state, a certain religion or a certain family. According to this view a mistake as to nationality would not be sufficient to annul a marriage.\(^2\) Engelmann\(^9\) says that the personal qualities may be either physical, mental or moral. Under physical qualities he includes physical capacity to fulfil the marital obligations, contagious, loathsome or inheritable diseases, pregnancy and unchastity of the woman. Under mental qualities he enumerates insanity, mental weakness and gross ignorance. Under moral qualities he mentions unkindness, drunkenness, violent temper, idleness, inclination to cheat, and prodigality.

The Swiss code\(^8\) has a provision on the subject of mistake which

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\(^{2}\) The code provides as follows as regards mistake and fraud:

Art. 1333 “A marriage may be avoided by a spouse who, at the conclusion of the marriage, was under a mistake as to the identity of the other spouse or as to such personal characteristics of the other spouse as would have deterred him from concluding the marriage with knowledge of the state of affairs and with intelligent appreciation of the nature of marriage.”

Art. 1334. “A marriage may be avoided by a spouse who has been induced to contract the marriage by fraud concerning such circumstances as would have deterred him from concluding the marriage with knowledge of the state of affairs and with intelligent appreciation of the nature of marriage. If the other spouse was not guilty of the fraud, the marriage is voidable only if the latter knew of the fraud at the celebration of the marriage.”

“A marriage may not be avoided on the ground of fraud concerning pecuniary circumstances.”

\(^{7}\) Kipp & Wolff, Familienrecht, 76 (vol. 4 of Lehrbuch des bürgerlichen Rechts, by Enneccerus, Kipp & Wolff (1st & 2d ed.); 4 Planck, Bürgerliches Gesetzbuch (3d ed.) 66; Engelmann, Familienrecht, 103 (vol. 4 of Staudinger's Kommentar zum bürgerlichen Gesetzbuch, 7th & 8th ed.). However, Opet & Blume do not feel certain that the above distinction is sanctioned by the code, and they express a doubt concerning mistakes relating to legitimate birth, religious belief and conviction for crime. Opet & Blume, Das Familienrecht des bürgerlichen Gesetzbuchs, 62 (vol. 4 of Kommentar by Biermann, Blume, etc.). Endemann holds that a mistake as to “social identity” suffices. He mentions the case of an adventurer who, having forged the requisite papers, pretends to be a highly respected and well-to-do personage. 2 Endemann, Lehrbuch des bürgerlichen Rechts (8th & 9th ed.) 202.

\(^{8}\) In addition to the authors cited in the preceding note see Rietzschel, Die Anfechtung der Ehe wegen Irrtums über persönliche Eigenschaften des anderen Ehegatten, 104 Archiv für die civilistische Praxis, 339, 362; Seidemayer, Ueber Personen- und Eigenschaftsirrtum bei der Eheschließung nach dem bürgerlichen Gesetzbuch, 46 Jhering's Jahrbücher, 183, 217.

\(^{9}\) Engelmann 102.

\(^{10}\) The provisions concerning mistake and fraud read as follows:

Sec. 124. “A spouse can contest the marriage, (1) if by mistake he has allowed himself to be betrothed, either because he did not desire the perform-
is similar to the corresponding German section. It speaks, however, of the "characteristics" of the other party instead of the "personal" characteristics. The question has been raised by the writers whether this omission was not intended to extend the grounds of annulment of the German code so as to include mistakes as to qualities which do not inhere in the person itself but which relate to nationality, religion and the like. It is generally assumed that this was the intention of the legislators. According to this view a mistake as to nationality might be a sufficient ground for the annulment of a marriage.

Japan allows a marriage to be annulled if it was entered into as the result of fraud or coercion. In what sense the term "fraud" is to be understood does not appear.

According to the Brazilian Code of 1916 a marriage may be annulled on account of an "essential" mistake as to the person. With a view of avoiding the uncertainties necessarily resulting from a too general provision, the legislation has taken the precaution to indicate what mistakes shall be regarded as essential with respect to marriage. It enumerates the following: (1) mistake relating to the identity of the other party, his honor, or reputation, provided the mistake is of such a nature that married life with the other party would be intolerable; (2) conviction of an infamous crime; (3) incurable physical defect or a grave form of a contagious or inheritable disease endangering the health of the other spouse or of the offspring; (4) mistake as to virginity of the wife.

The American courts have declined to take the severe view of the English law; they grant an annulment when the fraud goes to the very essence of the marriage contract. Marriage has been annulled in this country on the ground of pregnancy of the wife at the time of the marriage, which she concealed from her husband who had not sustained improper relations with her, and on account of incurable venereal disease. Impotency also is a ground for annulment or for

ance of the betrothal itself or because he did not wish the betrothal with the betrothed person; (2) if he was led into the marriage by a mistake as to the characteristics of the other party to the marriage, which are of such significance that without their existence the marital relation cannot be imputed to him.

Sec. 125. "A spouse can contest the marriage, (1) if he has been craftily deceived as to the respectability of the other spouse, either by that party or by a third person with that party's previous knowledge, and has been induced thereby to marry; (2) if a disease of the other spouse which may greatly endanger the health of the complainant or of the offspring of the marriage has been concealed from him."

Egger, Das Familienrecht des schweizerischen Zivilgesetzbuch, 61.

Art. 785, Civil Code.

Art. 218, Civil Code.

Art. 219, Civil Code.

Reynolds v. Reynolds (1862, Mass.) 3 Allen 605 is the leading case on the subject. See also i Bishop, Marriage & Divorce, sec. 165 et seq.

See Ann. Cas. 1914C 1292.

See 12 Ann. Cas. 28.
On the other hand, neither the concealment of unchastity by the wife or of her prior marriage which has been dissolved by the death of the third party or by divorce, nor the concealment of a previous condition of insanity or of the fact that the party is a kleptomaniac will entitle the other party to an annulment of the marriage. It may be assumed also that the concealment by a husband of the fact that he is a subject of an enemy country will be regarded by our courts as not going to the essence of the contract.

The problem of annulment is of course one of legislative or judicial policy. The English system has the great advantage of certainty but it leads to intolerable conditions as between husband and wife. The French system is very close to the English. It is interesting to note, however, that the strictness of the code in this regard has seemed in the eyes of the courts so unjust to the parties that they have in effect annulled its provisions by granting a divorce whenever there has been a fraudulent concealment of nationality, health, religion or past conduct. The German and the Swiss codes, on the other hand, err on the side of too great liberality. Engelmann goes so far as to hold that under the provisions of the German code a marriage may be annulled on account of mental or moral qualities, including gross ignorance, unkindness, violent temper, idleness and proclivity to cheat. The sound view would appear to lie between these two extremes. In the estimation of the writer American law represents more nearly the correct doctrine in the matter under consideration than the law of any of the above countries. Although our law is more liberal in the annulment of marriages for mistake and fraud than the English and French its attitude toward the subject must be characterized as conservative if we compare it with the law of Brazil, Germany, Italy and Switzerland.

E. G. L.

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See Ann. Cas. 1913A 128.

See Ann. Cas. 1914C 1202.


Lewis v. Lewis (1890) 44 Minn. 124, 46 N. W. 323.

Colin & Capitant 166. Such a fraudulent concealment is regarded as a "grave injury" within the meaning of Art. 231 of the Civil Code.