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WESLEY NEWCOMB HOHFELD

In the untimely death of Wesley Newcomb Hohfeld, Southmayd Professor of Law, Yale University has lost a scholar of marked distinction and the cause of legal scholarship everywhere has lost a devoted disciple. He coupled with rare idealism for the improvement of legal science an extraordinary power of analysis and an originality and independence of mind which have made his juristic thought unique. Upon the editors of the JOURNAL his death falls as a personal bereavement and an irreparable loss. Even before his call to the Yale Faculty, Professor Hohfeld had contributed to our pages; and from the moment of his arrival in New Haven he took marked interest in the JOURNAL and in the development and improvement of its editorial work. The privilege of consultation with him has been an inspiration to every editor who has had the fortune to know him. Nor was he ever too busy to be consulted; and in the discussion of legal problems his standard of scholarship and his broad knowledge spurred and guided us to the best of our accomplishment.

Professor Hohfeld was called to the Yale Law School in 1914. Although he was connected with Yale for only a comparatively short time, and held his degrees in arts and in law from other universities,

no graduate of Yale could have been more loyally devoted to the University. His whole heart and mind were wrapped up in the development of this School. Even during the long weeks of his illness his thoughts were constantly directed toward the School and his return to its work. His constructive imagination, his large vision, the optimistic courage with which he looked forward to improvement in legal education and to the gradual overcoming of defects in the administration of justice were a constant inspiration to his colleagues.

As a teacher Professor Hohfeld was stimulating to his students—particularly to the abler ones. He set for his class and for himself a high standard of scholarship—rigidly high. But many young lawyers who have come under his instruction and who as students thought his standards too severe have subsequently written him that the training he gave them in exact analysis and in accuracy of thought and statement had proven of inestimable value in their practice. Students and members of the faculty will miss his inspiration sorely.

Professor Hohfeld was a graduate of the University of California, receiving the degree of Bachelor of Arts in 1901. The following year he entered the Harvard Law School, being graduated with honors in 1904. During his law school years he was an editor of the HARVARD LAW REVIEW. Upon the completion of his course in law he returned to San Francisco and engaged in the general practice of law. After one year he began his career as a teacher of law, first as instructor of law in Hastings College of Law (University of California), then as a member of the faculty of Leland Stanford University, where he was rapidly promoted from instructor, to assistant professor, associate professor and professor of law. From Stanford University he was called to Yale. Professor Hohfeld was also connected during certain summer sessions with the law faculties of the Universities of California, Michigan, and Chicago.

His death was the result of endocarditis which followed a severe attack of grippe. Since last February he had been constantly confined to his bed. In the summer he returned to his sister's home in Alameda, California, where the end came on October 21st. He was thirty-nine years of age and was a bachelor. Both of his parents, two brothers, and three sisters survive him.

While Professor Hohfeld was a student of many branches of the law and possessed a memory which enabled him to acquire a knowledge unusually broad, it was in the field of analytical jurisprudence that his deepest interest lay; and it is in this field that he has made the greatest contribution to legal scholarship. His essay on *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* which was published in the YALE LAW JOURNAL for November, 1913, is believed by many to be the most important and original contribution to legal science which has appeared in a generation. His other writings also, all of which were published in legal periodicals, show a power of

analysis and an ability to deduce general principles from various and apparently dissimilar specific instances which give them distinctive value. Their very merits—the thoroughness of his studies, the closeness of his reasoning, and the exhaustiveness with which he treated the subjects discussed—have tended to limit the appeal of his writings to legal scholars and to prevent the average reader from becoming well acquainted with his work. This is a misfortune. Professor Hohfeld's writing, while dealing with fundamental concepts and theories, is always directed toward practical ends. He was interested in theory only so far as it would help lawyers, judges and legislators to develop the law scientifically. At the time of his death he had in preparation casebooks on Trusts, Evidence and Conflict of Laws, and had collected a mass of material for publication in further elucidation of the principles laid down and developed in his *Fundamental Conceptions*.

Below is appended a list of Professor Hohfeld's publications:

- The Nature of Stockholders' Individual Liability for Corporation Debts* (1909) 9 COLUMBIA LAW REVIEW, 285.
The Individual Liability of Stockholders and the Conflict of Laws (1909) 9 COLUMBIA LAW REVIEW, 492; (1910) 10 *ibid.* 283; 10 *ibid.* 520.
The Relations Between Equity and Law (1913) 11 MICHIGAN LAW REVIEW, 537.
Some Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913) 23 YALE LAW JOURNAL, 16; (1917) 26 *ibid.* 710.
Vital School of Jurisprudence and Law (1914) Proceedings of Association of American Law Schools.
The Conflict of Equity and Law (1917) 26 YALE LAW JOURNAL, 767.
Culity Analysis in Easement and License Cases (1917) 27 YALE LAW JOURNAL, 66.

A WITHDRAWN PLEA OF GUILTY AS EVIDENCE AT A LATER TRIAL

In the case of *Heim v. United States*,¹ the Court of Appeals of the District of Columbia has recently recorded its decision that a plea of guilty, once withdrawn, shall not be used as evidence against the leader at a subsequent trial, no matter how limited by judicial instruction. The Chief Justice dissented in a carefully reasoned opinion. This decision is directly and admittedly opposed to a Connecticut decision² only two years old which, by a divided court, sustained a trial judge in admitting as evidence the defendant's withdrawn plea of guilty to a charge of murder.

This particular question has, strangely enough, met with little discussion. Prior to the Connecticut decision above mentioned,² there seem to have been remarkably few cases in which the point was

¹ (1918, D. C. App.) 46 Wash. L. Rep. 242, 50 Chi. Leg. News, 314.

² *State v. Carta* (1916) 90 Conn. 79, 96 Atl. 411.

decided; all of these proceeded independently; no authorities were cited; and in none was any very exhaustive reasoning indulged.

A very early Kentucky case³ permitted the withdrawn plea of guilty to be later used against the pleader. It is possible to distinguish that case from the present one, however, in that there the defendant stood by his plea through an appeal before withdrawing it. Fifty years later California swung the other way.⁴ This case, too, can be distinguished from the present. A California statute granted the defendant an absolute right to substitute one plea for another in a civil suit, and the Court placed its decision on legislative intent: if such absolute rights were conferred as to civil suits, a similar right in the much more serious criminal trials must be inferred. The previous year the Supreme Court of Missouri had decided the question in the same way⁵ but on a different and less tenable ground: that the withdrawn plea, if used as evidence in a later trial, would be conclusive against the defendant—just as it was conclusive in its original form as a plea—and thus the privilege of withdrawing would be made a nullity. Such reasoning clearly differentiates the Missouri decision from the principal case. In the latter it was conceded that the plea could be conclusive only while it stood as a plea. When used as evidence at a later trial, an instruction by the judge would make clear that it, like other evidence, was subject to explanation or refutation.⁶

Meanwhile the treatises had done as little to investigate the problem. Mr. Wigmore omitted the matter entirely from his work on Evidence, though he devoted considerable space to the related question, admissibility of a withdrawn civil pleading as evidence;⁷ Mr. Chamberlain passes it over in a hurried footnote,⁸ with but one citation (the California case) and no discussion; and other writers are equally lacking in any thorough examination of arguments, bare statements of "the law" being the usual treatment.⁹

It may therefore be said that the Connecticut and District of Columbia decisions (which range on opposite sides of the question and of which each was decided by a majority of one) together with their

³ *Commonwealth v. Ervine* (1839, Ky.) 8 Dana, 30.

⁴ *People v. Ryan* (1890) 82 Cal. 617, 23 Pac. 121.

⁵ *State v. Meyers* (1889) 99 Mo. 107, 119-120, 12 S. W. 516, 519.

⁶ This seems to be much the sounder view. The moment that what was a plea of guilty ceases, by withdrawal, to be a plea it becomes evidence only, and it thereby becomes open to refutation. That it is in practice hard to refute has nothing to do with its quality in law; it has ceased legally to be conclusive.

⁷ 1 Wigmore, *Evidence*, sec. 815; 2 *ibid.* sec. 1063 ff.

⁸ 2 Chamberlain, *Evidence*, sec. 1243, n. 5.

⁹ Wharton, *Crim. Ev.* (10th ed.) sec. 638; Abbott, *Crim. Trial Brief*, 314; 2 *Encyc. Pl. & Pr.* 779; 8 R. C. L. 112; 12 *Cyc.* 426. The *Encyclopaedia of Evidence* seems to have omitted this matter entirely, although related questions are discussed elaborately. See *Encyc. Ev., Admissions*.

respective vigorous dissents, form at this date the only real treatise on the subject. They are an interesting composite.

The outstanding objection to the District of Columbia view would seem to be that it prohibits the use in evidence of a deliberate and voluntary confession made *in* court at the same time that it permits the use of a hasty, ill-considered confession made anywhere on earth except in the court room. The decision might be said with some show of truth to prohibit the use of good evidence, while permitting the use of evidence of dubious value. This is the reasoning urged in the majority opinion in the Connecticut case and by Chief Justice Smyth's dissent in *Heim v. United States*. If it is the sober fact that a prisoner's plea of guilty is a voluntary, deliberate, and well understood course of action, it should be good evidence of his guilt,—though not conclusive after withdrawal,—and the prisoner should suffer the consequences. Certainly the mere fact that it may be highly damaging evidence and hard to explain should be no reason for excluding it.

But a doubt arises as to whether in the life that men are living the prisoner's plea is truly a voluntary, deliberate and well understood course of action on his part. It is true that the trial judge carefully explains to the prisoner the seriousness of the plea before he allows it to be entered. But do not ignorant defendants—and a very considerable portion of criminal trials concern ignorant defendants—depend implicitly, after all, on the advice of counsel; and is not the judge's cautionary explanation in truth a warning only to the defendant's attorney? And if it be urged that even the ignorant comprehend a confession of guilt and know enough to deny what they have not done, may it not be asked in reply, "What stupid brain—or bright one either—exactly realizes the difference between pleading guilty to a charge of murder in the third degree and to one of first degree manslaughter?" The extrajudicial confession is at least wholly the prisoner's own. His pleas in court are likely to be those of his attorney.

If this be sound, it would seem to cut away much of the ground from under the arguments made in the cases on either side of the proposition. For if the "confession in open court" be in truth so dubious of credibility, the objection can hardly be made to its rejection that, as the most solemn and convincing of confessions, it should be admitted if any confession is admitted at all; while on the other hand the argument equally ceases to apply, that the confession should be excluded because so damaging to the prisoner as to nullify all effect of his change of plea.

The logical conclusion of the above discussion would be the admission in evidence of the withdrawn plea of guilty, accompanied by instructions of the court as to its effect—not only as to its non-conclusiveness, but also as to the influence which advice of counsel may fairly be supposed to have had on the entering of such a plea. Even then, there remains a question of policy. Some sorts of evidence are

excluded because thought more likely to prejudice than to convince. Can a court so instruct a jury as to convey the true weight of such technical evidence as this former plea? Is it desirable to distract attention from the issues of the trial by beating over before the jury the question of how far pleas and evidence represent not facts, but wits of counsel matched in a game? Will not a jury, almost inevitably, according to its temper either disregard the plea altogether, or attach to it despite instruction all that ruthless force which is here contended not to be due it, either in law or in fact? The decision in *Heim v. United States* seems after all the right one.

WHAT CONSTITUTES AN "INJURY" TO "REAL PROPERTY"?

The opinion in the recent case of *Johnson v. Rouchleau-Ray Iron Land Co.* (1918, Minn.) 168 N. W. 1, leads one to reflect upon the inadequate analysis in many legal opinions dealing with "injuries" to "real property." In that case it was found by the jury that acts of the defendant had created on its own land a dangerous condition which threatened to result at any moment in a physical invasion of the plaintiff's land, and that as a consequence the market value of that land had been substantially diminished.¹ In holding that the plaintiff was not entitled to damages the court said: "He rests his claim for damages squarely upon fear or apprehension that because one slide has occurred another is likely to happen at any time which might strike his property, and that as the result of such apprehension the market value of his property has been greatly diminished. Respondent's [plaintiff's] contention cannot be sustained. To recover damages for *injury to real property*, resulting from negligence, *the owner must wait until the injury or damage has actually happened*. It is the *damage*, and not the anticipation thereof, that *gives rise to the cause of action*."² Without, for the moment, questioning the soundness of the result reached, one may raise a doubt as to the adequacy of the reasons given. It is apparently assumed by the court that "injury" or "damage" to "real property" must always consist of some kind of physical interference with the "property." It must be confessed that many common law cases give countenance to this assumption. All reasoning of this kind fails to take notice of an ambiguity in the word "property," with the result that legal and non-legal conceptions are hopelessly confused and erroneous results sometimes reached. At times the word is used to denote the physical object to which various legal³ rights, etc., relate; at other times it signifies the aggregate of legal rights, privi-

¹ For full statement of facts, see RECENT CASE NOTES, *infra*.

² The italics are those of the present writer.

³ "Legal" is here used as including both common law and equitable jurial relations.

leges, powers and immunities which together constitute a particular complex legal interest "in the property."⁴ There can of course be no "injury" to the physical object—the "property" in that sense—until there is an actual invasion of it by material particles. This does not of itself tell us whether acts whose results fall short of a physical interference with the material "property" in question are or are not legal wrongs. It is still possible that "ownership"⁵ of the physical "property" may include rights not to have the sale value or perhaps the rental value of the "property" depreciated by acts of the kind involved in the case before us.

The consideration of a concrete case will perhaps illustrate what is meant. Suppose in the case in hand the "property" had been in possession of a tenant of the plaintiff; that this tenant had refused to renew his lease because of the threatening condition on the defendant's land; that as a further consequence the plaintiff had been unable to obtain other tenants and so had lost for a time an amount equal to the rental value of the "property." In such a case it is, *a priori*, conceivable that a just system of law would require one who had negligently produced this result to compensate the plaintiff. If so, in a system of law of that kind the "owner" of property would as a part of his "ownership" have legal rights against others that they refrain from causing loss to him in the manner stated. Whether under our system of law an owner has rights of this kind is another question and one which will be discussed in a moment. The point now made is, that by directing their attention too much to the mere physical "property" the courts miss the real point at issue, *viz.*, whether one who does things of the kind in question does not "legally injure"—*i. e.* violate a legal right of—the owner of the "property" whose value has been thus affected.

Even if we should conclude that an owner of property as such has not rights of the kind suggested, there is another possibility to be discussed, *viz.*, that acts which produce results of the kind under discussion violate rights which each one of us has simply as a human being, rights which can perhaps best be generally described as "rights to undiminished financial condition." By this general phrase is meant rights that others shall not intentionally or negligently cause financial loss, except under certain privileged circumstances.

One or two concrete examples from our existing body of law will perhaps make more clear the foregoing somewhat abstract discussion. (1) In our law of torts we find a wrong called "Slander of Title."

⁴ Cf. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE LAW JOURNAL, 16, 21.

⁵ "Ownership" as here used is merely a symbol for the complex legal interest, *i. e.*, the aggregate of jural relations (rights, privileges, powers and immunities) vested in the one who is said to "own" the physical "property."

This species of tort is broader than its name would indicate and covers "the publication of false statements, disparaging the title or property interests of the plaintiff, with the intention of causing him damage and resulting in actual damage to him."⁶ Here is no physical invasion of the tangible "property" (physical object owned). Shall we regard this as a violation of property rights which with other rights, privileges, etc., constitute the plaintiff's ownership? So far as the cases go, we may, and the name given to the wrong—Slander of Title—suggests this. On the other hand, it is at least plausible to argue that it falls under the second class of rights mentioned—those to "undiminished financial condition" except upon privileged occasions. For example, an action lies for damage due to false statements that the plaintiff has gone out of business.⁷ This can hardly be thought of as an invasion of the rights of an owner of property as such. (2) The equitable doctrine which permits relief against cloud on title is another illustration of the existence as part of the ownership of property of rights other than rights to be free from physical injury to the tangible object owned. Of course here one obtains specific relief rather than damages, but that does not affect the principle in question.

It will hardly do, then, to dismiss the plaintiff in the principal case in the summary fashion in which the court did. However, it must be admitted that there are cases in the reports which seem to accept as a principle of decision that enunciated in the opinion of the court. A striking example is found in a case in New York,⁸ in which the defendant operated its electric lighting plant in a manner which as against tenants of neighboring premises constituted a nuisance.⁹ In consequence the plaintiff, who owned adjacent property which was leased to tenants, was obliged when the leases ran out to accept a reduced rental, thereby—according to the finding of facts by the trial court—losing in a five year period several thousand dollars.¹⁰ In spite of this the court—Gray, Bartlett and Haight, J. J., dissenting in a vigorous opinion—denied a recovery, even though the defendant maintained the nuisance for the whole of the five-year period. A result of this kind shocks one's sense of justice and seems at first sight inexplicable. It will be found on examination to be due, at least in part, to the

⁶ Burdick, *Torts* (3d ed.) 435.

⁷ *Radcliffe v. Evans* (1892) 2 Q. B. 524, 61 L. J. Q. B. 535.

⁸ *Miller v. Edison Electric Illuminating Co.* (1905) 184 N. Y. 17, 76 N. E. 734. The decision in the earlier case of *Francis v. Schoellkopf* (1873) 53 N. Y. 152 seems to be in conflict with the *Miller* case.

⁹ *Bly v. Edison Electric Illuminating Co.* (1902) 172 N. Y. 1, 64 N. E. 745.

¹⁰ The trial court found that the alleged loss of \$3000 per year for five years, or a total loss of \$15,000, was as to a substantial part due to the existence of the nuisance on the defendant's premises.

ambiguity in legal terminology already discussed. After quoting from Sir George Jessel to the effect that "to entitle a reversioner to maintain an action, *the injury must be of a permanent character*,"¹¹ the court said: "Here *the only injury found by the trial court is to the enjoyment and occupation of the premises. That does not affect the reversioner.*"¹² Here is the nub of the difficulty—obviously the court has in mind merely physical injuries to the tangible object. The argument seems to be: "a nuisance must involve a physical invasion of the owner's physical 'property'; no physical invasion existed here; therefore the defendant has committed no legal wrong." Even if we grant that so far as the law of nuisance is concerned, the acts of the defendants did not result in a nuisance to the plaintiff, we still have to face the problem: were the defendants not guilty of some other kind of legal wrong? As well might one argue in an action for "slander of title" that since there is no "permanent injury" to the physical "property" a reversioner cannot recover for his financial loss due to the slander of his title.

Many other cases might be cited which exhibit the same superficial line of reasoning, but space is wanting in which even to cite them.¹³ In some a correct result is without doubt reached, but by means of a merely superficial discussion of the kind indicated. In the case which is the subject of this note the court was probably correct in refusing to allow the owner to recover the present diminution in the market value of his land, for tomorrow the defendant may abate the threatening condition on his land and the market value of the plaintiff's land would then again rise. On the other hand, it would seem that the plaintiff ought to be entitled to a mandatory injunction for the abatement of the threatening condition.¹⁴ As incidental thereto he clearly ought to recover whatever actual financial loss he has suffered because of the defendant's acts. A discussion of the exact method of computing these damages is not within the scope of the present note, the chief purpose of which is to point out the lack of clear analysis in many current discussions of the topic under consideration.¹⁵

W. W. C.

¹¹ Opinion in *Mott v. Shoolbred* (1871) L. R. 20 Eq. Cas. 22. The italics in this and following quotations are those of the present writer.

¹² The New York court was influenced to reach its decision because it had previously held, in the case cited in note 9, *supra*, that the tenant who took a lease during the existence of the nuisance could recover damages for the same. Apparently the court thought that both tenant and landlord ought not to recover; but surely the tenant ought not to have damages for the wrong of which the landlord complained in the *Miller* case.

¹³ Conspicuous examples are: *Simpson v. Savage* (1856) 1 C. B. N. S. 343; *West Leigh Colliery Co., Ltd. v. Tunnicliffe & Hampson, Ltd.* [1908] A. C. 27.

¹⁴ Cases like *Mott v. Shoolbred*, cited in note 11, *supra*, make even this doubtful.

¹⁵ Cf. the suggestions as to the measure of damages (if a recovery were

CONVERSION BY INNOCENT AGENTS

He who would attempt to define adequately in a few words the tort known to our law as a conversion would indeed be a bold man.¹ Probably no definition can be framed unless expressed in such general terms as to be of little use except to one who already knows the authorities. Be this as it may, a recent case serves to emphasize some of the difficulties of the subject. A possessor of negotiable instruments payable to bearer, which had been stolen from the plaintiff, delivered them to the defendants, who were bankers, and authorized their sale. The defendants sold them and paid over the proceeds to their principal—all without notice of the plaintiff's interest. It was held that the defendants' acts did not constitute a conversion. *Pratt v. Higginson* (1918, Mass.) 119 N. E. 662.²

In making its decision the Massachusetts court followed an earlier case in the same jurisdiction³ and apparently was not aware that an opposite conclusion had been reached in at least one other state.⁴ As cases upon the precise point involved are few in number and conflicting, it seems that the problem is in most jurisdictions an open one. Cases dealing with ordinary "tangible personal property"⁵ are of course common enough. The view prevailing in most American jurisdictions undoubtedly is that "a person is guilty of a conversion who sells the property of another, without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title."⁶ In England the question apparently has not been settled by the court of final authority,⁷ but a decision of the Queen's Bench Division accords with

allowed) in the note to the case of *Miller v. Edison Electric Illuminating Co.* in 3 L. R. A. (N. S.) 1061. Massachusetts has an interesting statute dealing with the subject. A construction of this statute will be found in *Smith v. Morse* (1889) 148 Mass. 407, 19 N. E. 393.

¹"I am never very confident as to what is or is not a conversion." Bramwell, L. J., in *National Mercantile Bank v. Rymill* (1881) 44 L. T. (N. S.) 767.

²For complete statement of facts, see RECENT CASE NOTES, *infra*.

³*Spooner v. Holmes* (1869) 102 Mass. 503. In that case the defendant derived no profit from the sale; in the principal case the defendants were paid a commission. The court very properly refused to distinguish the cases on that ground.

⁴*Kimball v. Billings* (1867) 55 Me. 147.

⁵The word "property" here refers, of course, to the physical object owned. A discussion of the ambiguous use of this word will be found in the preceding Comment: *What is an "Injury" to "Real Property"?*

⁶Quoted from the opinion of the court in *Kimball v. Billings*, cited *supra*, note 4. For citation of cases taking the prevailing view, see the note in 50 L. R. A. (N. S.) 52.

⁷*Hollins v. Fowler* (1875) L. R. 7 H. L. 757, naturally comes to mind, but that case does not settle the question, for there the defendants—according to the findings of fact—purchased the goods as principals and then re-sold them.

the prevailing American view.⁸ However, a decision of the Court of Appeal in an earlier case⁹ seems hard to reconcile in principle with that view, and we may agree with the learned editor of the *LAW QUARTERLY REVIEW* that with the English authorities as they were some other judge of the Queen's Bench Division might have decided the *Consolidated Bank* case the other way.¹⁰ In fact there are a few—very few, be it confessed—American cases which hold that the innocent agent¹¹ is not guilty of a conversion, even where the property sold is tangible personalty.¹² The question ultimately comes down to one of public policy, and there is much to be said in favor of the view taken by the minority. We may well agree with the editor of the *LAW QUARTERLY REVIEW* when in the note already quoted from he says: "It is submitted that in cases like the *Consolidated Company v. Curtis* reasons of public policy favour the auctioneer [the innocent agent] rather than the money lender [the true owner]."

Even if we admit that the view of the majority represents sound policy in the case of ordinary chattels, it will not do to hastily assume, as did the court in Maine in the case already cited,¹³ that the same rule ought to apply to negotiable instruments payable to bearer. It is interesting to note that neither the Maine nor the Massachusetts court gave any adequate reason for its decision. As stated, the former merely applied without discussion the rule settled for ordinary chattels and did not notice the possibility of a difference. The latter, while it recognized the distinction, contented itself with saying that the case before it differed from that of ordinary chattels in that "title passed by delivery of the instruments" to the holder in due course. The fact that the purchaser is protected does not, of course, of itself, settle whether the innocent agent is also protected. Perhaps the same considerations of public policy which lead us to give protection to the holder in due course who buys from the thief negotiable paper payable

⁸ *Consolidated Company v. Curtis & Son* [1892] 1 Q. B. 495.

⁹ *National Bank v. Rymill* (1881, C. A.) 44 L. T. (N. S.) 767. This important case is apparently not elsewhere reported. It seems clearly opposed in its views of what constitutes a conversion to the earlier case of *Stephens v. Elwall* (1815 K. B.) 4 M. & S. 259, but doubtless is distinguishable from *Consolidated Company v. Curtis & Son*, cited in the preceding note.

¹⁰ (1892) 8 L. QUART. REV. 114 and 183.

¹¹ The term "innocent agent" has been used in this Comment to denote an agent who sells chattels or negotiable paper entrusted to him by a principal without notice, actual or constructive, of the claims of the true owner.

¹² *A. J. Roach & Co. v. Turk and Hawkins* (1872, Tenn.) 9 Heisk. 704; *J. T. Fargason Co. v. Ball* (1913) 128 Tenn. 137, 159 S. W. 221. Apparently the Tennessee court applies the rule of non-liability to innocent agents generally. In Kentucky it is limited, apparently, to agents who are under a duty to serve the public without discrimination. *Abernathy v. Wheeler* (1890) 13 Ky. L. Rep. 713, 17 S. W. 858.

¹³ *Supra*, note 3.

to bearer, will also lead us to exempt the innocent selling agent from liability; but that can be determined only by examining into those considerations of policy—a thing which the Massachusetts court failed to do. Note the problem: By the law governing negotiable instruments, in order that commercial paper may perform its functions, a thief is given a legal *power* but no legal *privilege*¹⁴ to confer an indefeasible ownership of the instruments upon a holder in due course. By virtue of this power the thief can confer upon his agent—the innocent banker of the principal case—a power to do the same. Does the innocent agent acquire a legal privilege as well as a power? Or is he under a duty to refrain from selling, even innocently, the instruments, so that if he does he will be liable to the true owner in damages? The statement of the Massachusetts court as to the protection given the holder in due course clearly involves the existence of the power, but obviously it tells us nothing as to the privilege. We may, however, conclude that negotiable paper payable to bearer will not be dealt with as freely as we wish it to be unless we extend protection to the innocent agent as well as to the holder in due course; if so, we shall protect the former as well as the latter—and this probably is what the Massachusetts court had in mind.

If we adopt the Massachusetts view, we have the following interesting but perhaps justifiable consequences. Where the acts of the innocent agent result in divesting the owner of personal property of all claim to the property sold, there is no conversion by agent or purchaser, and the former owner is left with an action against one person only, *viz.*, the dishonest principal; where, as in the case of ordinary chattels, the innocent agent's acts leave the person whose property has been misappropriated with full title to his property, there is a conversion by the agent and the owner has his option to proceed against either: (1) the misappropriating principal; or (2) the innocent agent; or indeed (3) the purchaser. It may also be noted that the latter rule would apply to a promissory note which is not negotiable,¹⁵ as well as to other non-negotiable instruments.¹⁶ Apparently the former rule would apply to the sale by an innocent agent of

¹⁴ *Power* and *privilege* are here used in a technical sense, the former to signify that the person concerned by his acts *can* accomplish certain results; the latter to denote *absence of duty* on the part of the privileged person to refrain from accomplishing those results. Not being privileged to transfer title the thief is liable to the true owner if he exercises his power to do so.

¹⁵ For example, to a purported sale and transfer by an innocent agent of a written promise to pay to bearer, which contains conditions so that the instrument is not negotiable.

¹⁶ *Bercich v. Marye* (1874) 9 Nev. 312, in which a broker who innocently, as agent, sold stolen non-negotiable certificates of stock was held liable to the owner for conversion, although the latter had indorsed them in blank before the theft occurred. Cf. *Koch v. Branch* (1869) 44 Mo. 542.

an ordinary chattel under such circumstances that title passed to a *bona fide* purchaser for value.¹⁷

One cannot help believing that a reconsideration of the policy involved in this whole line of cases ought to be undertaken. When we recall the relatively slight protection given to ownership of chattels in some of the continental systems—title may in many cases be passed by one in possession without other title¹⁸—ought we not at least to ask ourselves whether we need to give owners of chattels actions not only against the misappropriating principal and the *bona fide* purchaser but also against an innocent agent? The latter assumes no dominion over the property for himself and often derives no profit. If one sympathizes with the view that the prevailing rule as to the innocent agent's liability in the case of ordinary chattels is of doubtful public policy, he will welcome the decision in the principal case as a refusal to extend the prevailing American doctrine beyond its present limits. In the somewhat analogous case of an innocent agent selling trust property for a trustee who is selling in breach of trust the law seems to be that the agent is not liable to the *cestui*.¹⁹

W. W. C.

RESCISSION FOR INNOCENT MISREPRESENTATION

In the Comment bearing the above title in a previous number of the JOURNAL¹ it was pointed out that American courts were developing the law relating to innocent misrepresentation along lines differing somewhat from those established in the English cases. This is empha-

¹⁷ For example, a sale in market overt; or by the agent of a factor under some of the statutes giving factors entrusted with the possession of goods for sale a power to invest a *bona fide* purchaser for value with full title. The question might also arise where the agent transfers or attempts to transfer by means of a warehouse receipt, never dealing with the physical goods. In some cases title might pass; in others not. Would the liability of the agent to pay damages depend upon that? Here must be noted the suggestion that the innocent selling agent is never liable for conversion where he deals not with the physical goods but merely with warehouse receipts or the like. See *Leuthold v Fairchild* (1886) 35 Minn. 99, 27 N. W. 503, 28 N. W. 218.

¹⁸ French Civil Code, sec. 2280; German Civil Code, secs. 929-936; Schuster, *Principles of the German Civil Law*, 390-399.

¹⁹ See *Brinsden v. Williams* [1894] 3 Ch. 185; Godefroi, *Trusts* (4th ed.) 230. Of course there are differences between a thief of negotiable paper payable to bearer and a rascally trustee, but each possesses a power, recognized as valid by both equity and law, to defeat the claim of the owner or *cestui*, respectively, by a transfer to a *bona fide* purchaser for value. Each is under a duty in equity—the thief's duty is legal as well—to refrain from exercising that power. We may well ask, therefore, whether agents who act in good faith ought to be held to incur different liabilities in the two cases.

¹ (1918) 27 YALE LAW JOURNAL, 929.

sized by a recent decision in Massachusetts, holding that an innocent misrepresentation of fact which induces a person to enter into a bilateral agreement for the purchase of corporate stocks and bonds, may be set up by the misrepresentee² as a common law defense to an action brought by the misrepresenter for damages for breach of contract.³ *Bates v. Cashman* (1918, Mass.) 119 N. E. 664.

In making its decision the Massachusetts court seems unaware of the fact that decisions settling the precise question raised are exceedingly scarce, not merely in its own jurisdiction but elsewhere. The court relied entirely upon Massachusetts cases, none of which are squarely in point, all being in fact tort actions for deceit. The leading English case—one which has apparently never been overruled—held that an innocent misrepresentation is not of itself a defense to an action at law, but with a *dictum* that it may be such if it leads to "error in substantialibus."⁴ It is possible—one can hardly say probable—that an English court would to-day decide otherwise, now that the same judges administer both law and equity. Seemingly the question has not arisen since the Judicature Acts were passed.⁵ However this may be, reference to the cases discussed in the Comment cited above will show that the decision in the principal case is to be welcomed as in accord with both fairness and the general trend of American legal development upon the subject of misrepresentation. Such a result was certainly to be expected in Massachusetts, where, as the cases cited in the opinion in the principal case show, the court has gone far toward permitting tort actions for deceit to be based upon innocent misrepresentations.

Even if it be thought by many that sound policy does not justify holding an innocent misrepresenter liable in tort for losses incurred by the misrepresentee in reliance upon the misrepresentation, nevertheless it seems clear that one ought not, as a general rule, to be entitled to recover damages for the breach of a bargain which he obtained by means of a misrepresentation,⁶ whether the latter was made fraudulently or innocently. If the representation be fraudulent, it ought always to entitle the misrepresentee to refuse to carry out the bargain. If, on the other hand, it be innocent, it seems that while as a rule it

² *Misrepresenter* and *misrepresentee*, while not in common use, are convenient words which need no explanation. They are used in Bower, *Actionable Misrepresentation*, which is the best English treatise upon the subject.

³ For complete statement of facts, see RECENT CASE NOTES, *infra*.

⁴ *Kennedy v. Panama, etc., Mail Co.* (1867) L. R. 2 Q. B. 580.

⁵ See Bower, *op. cit.*, 231.

⁶ Throughout the discussion it is assumed that the misrepresentation is of a kind such that if it were fraudulently made there would be no doubt of its constituting a defense at law. Into the distinctions—real or supposed—between misrepresentations of fact and law, or of fact and opinion, the present Comment does not enter.

ought to constitute a defense, there are certain situations which should, perhaps, be distinguished. It is well settled, in the jurisdictions which grant specific performance to vendors, that a vendor who has innocently misrepresented the subject-matter of a contract to sell may still have specific performance in some cases, *viz.*, those in which, if the agreement is carried out, the thing received by the misrepresentee will differ from that bargained for only in an unessential way for which adequate compensation can be made by a corresponding abatement in price.⁷ In jurisdictions where this is the law, it would seem that for a law court to hold that an innocent misrepresentation is a defense under all circumstances would result in common law giving the misrepresentation greater effect than it has in equity. Ought not courts of law in such jurisdictions to hold that while the innocent misrepresentation is usually a defense to an action for breach of contract, it will not be so if the situation is such that the misrepresentee, if compelled specifically to perform, would receive something differing from that bargained for only in an unessential way? If so, of course the law court would, consistently with the rule in equity, provide for a corresponding reduction in the amount of damages awarded to the misrepresentor. It would seem, moreover, that a similar rule ought to be adopted by law courts even in jurisdictions which deny specific performance to vendors, for it is difficult to see the justice of refusing the benefit of the bargain to an innocent misrepresentor when the other party will, if he performs, receive substantially the thing bargained for at a reduction in price corresponding to the deficiency.⁸ If it be urged that this is to introduce "equitable" considerations into law courts, it may be said in reply that the idea that innocent misrepresentations are of legal importance originated in equity, and that if law courts are to attach legal consequences to them it ought to be done only after considering what justice and fairness require.

In the principal case the facts seem to show that the misrepresentation was of such a character that the misrepresentee would if held to the bargain not get substantially what he bargained for, or, at least, that even if he did, it would be difficult to determine an abatement in the purchase price which would be fair to both parties. In either event, therefore, the decision is not in conflict with the rule above suggested. The court, however, did not decide the case upon these considerations but upon the ground that an innocent misrepresentation of a material

⁷ *Cf.* (1918) 27 YALE LAW JOURNAL, 931, note 14.

⁸ This would be accomplished—if the vendee accepted the article—by permitting him to recoup for the deficiency when sued for the purchase price. If the agreement were to pay cash at the time of delivery of the article sold, there would of course be the difficulty that, assuming the law does not require payment of the full purchase price, the parties may not be able to agree as to what constitutes a fair abatement in the same. This difficulty is believed not to be a serious one.

fact⁹ is always, if the misrepresentee choses to assert it, a defense to an action for breach of contract.

In the opinion in the principal case the court said that the defendant was "entitled to rescind" the "contract which he has been induced to enter into in reliance upon false though innocent misrepresentations." Where, as in the case before the court, the agreement is purely executory upon both sides, this statement seems hardly accurate, in so far as it suggests that the misrepresentee is already under a contractual *duty*. The misrepresentee need do nothing before or after suit is brought to "rescind" the "contract"; all he has to do is to plead the misrepresentation as a defense.¹⁰ It is therefore somewhat difficult to see how he can be regarded as under an existing *duty*. To be sure, he has by virtue of the transaction in question acquired a *privilege* and a *power* to "ratify" or "affirm," *i. e.*, by manifesting his intention to hold the other party to the bargain, he may and can create a *duty* on his own part and thereby invest the misrepresenter with a correlative *right*. This *privilege* and *power* are not subject to destruction by the misrepresenter—in technical language, are protected by an *immunity*. On the other hand, it seems accurate to say that the misrepresenter by entering into the agreement has subjected himself to a contractual *duty*, which, however, will cease to exist if the misrepresentee terminates it in any of the recognized modes. An agreement of the kind in question does therefore create a complex aggregate of legal relations, although one differing considerably in detail from those which would have resulted if there had been no misrepresentation. It is consequently perfectly accurate to speak of "rescission" even where the agreement induced by misrepresentation is purely executory on both sides, provided we mean by that term merely putting an end to an existing complex aggregate of legal relations.¹¹

W. W. C.

THE HEIR'S COMPULSORY PORTION AND THE CONFLICT OF LAWS

Except for occasional homestead provisions, the unrestricted freedom to dispose of property by will exists in the United States, Great Britain, Canada, and in some of the South American states. In the other countries the power of the testator in this regard is restricted in the

⁹ No attempt has been made to define "material fact"; it is assumed that the learned reader is already familiar with the meaning of that phrase in the law of misrepresentation.

¹⁰ *Thurston v. Blanchard* (1839, Mass.) 22 Pick. 18.

¹¹ If the agreement is not purely executory on both sides, but has been partially or wholly performed, we shall of course find the legal relations resulting to be different in many respects from those attaching to the executory agreement. Cf. (1918) 27 YALE LAW JOURNAL, 929, note 1.

interest of the members of his immediate family. The portion of his estate so withdrawn from free testamentary disposition is commonly known as the heir's compulsory or legal portion.¹ There are wide differences with respect to the persons who are entitled to a compulsory portion, with respect to the amount to which they are entitled, and the conditions under which they can claim their share in the estate.² These differences in the law of the various countries are a fruitful source of litigation from the standpoint of the conflict of laws.

The Civil Court of Nice³ was recently called upon to decide the rights of an Italian subject in property left in France by his wife, who had willed all of her property to her mother. The husband claimed a life estate in one-third of the wife's property in accordance with the Italian law governing the compulsory portion of husband and wife. As the question was raised before a French court the judge was bound in the first place to consult the French rules of the conflict of laws. In consulting these rules the judge would find that different groups of the operative facts, which collectively confer power upon the testator to make a valid testamentary disposition, are controlled by different rules. One group, which concern the testator's personal qualities and are commonly designated by the term "capacity," he would find controlled by the *lex patriae*,⁴ the law of the country to which the decedent belonged by nationality. Another group, relating to the form in which

¹ Sometimes, for example in Spain, the estate is divided into three parts. One part is left to the free disposition of the testator. Another part is withdrawn from his control altogether. The third part may be disposed of by will, but must be applied as a "betterment" to his legitimate children and descendants. Art. 808, Civil Code.

² Compare France, Arts. 913 ff., Civil Code; Germany, Arts. 2303, Civil Code; Italy, Arts. 805, 807, Civil Code; Spain, Arts. 806-810, Civil Code; Switzerland, Arts. 470-474, Civil Code.

³ Trib. Civ. Nice, July 9, 1917, Clunet 1917, 1792.

⁴ App. Paris, Aug. 10, 1872, Clunet 1874, 128; Aug. 7, 1883, Clunet 1884, 192; 4 Weiss, *Traité de droit international privé*, 639.

Except in England and the United States, the capacity to make a will is governed generally speaking by the testator's personal law, irrespective of the fact whether the will disposes of movable or immovable property. The term "personal" law means, now the law of the country of which the testator was a subject (*lex patriae*), now the law of his domicile. The continental countries have accepted, with few exceptions, the *lex patriae*. Germany, Art. 7, Intr. Law, Civ. Code; Italy, Art. 6, Prel. Disp., Civ. Code. In South America the states are divided. Brazil has adopted the law of nationality, Art. 8, Civ. Code. Argentina has retained the law of domicile, Arts. 6, 7, Civ. Code.

The Anglo-American rule which determines the testator's capacity to dispose of immovable property according to the law of the *situs* accepts the view of the Dutch school. P. Voet, *De Statutis*, s. 9, c. 1, n. 9; s. 4, c. 2, n. 6; s. 4, c. 3, n. 12; J. Voet, *Ad Pandectas*, bk. 1, tit. 4, pt. 2, n. 8. This view has not found a permanent lodgment elsewhere, not even in Holland itself. Asser & Rivier, *Éléments de droit international privé*, 139.

the testator's will must be expressed, he would find to be subject to the law of the place of execution.⁵ He would be told to apply these rules without reference to the nature of the property as movable or immovable. He would find a third group of operative facts, having reference to a variety of other interests, to which the "personal law" of the decedent is applied if the property is movable, and the law of the *situs*, if it is immovable.

The continental courts and writers label the third group of operative facts as "substantive" provisions. There is disagreement among them on the question whether the rules relating to the heir's compulsory portion should be deemed to fall within group one or within group three, whether they belong to "capacity" or to the "substantive" law of succession. Usually it is said that they belong to the "law of succession," as distinguished from "capacity."⁶ If it be assumed that Italy would regard the heir's compulsory portion as relating to the "capacity" of the testator, the question in the French court would be: Which law is to decide for this court whether the problem relates to "capacity" or to the "substantive" law of succession? This would be a *preliminary question* in the eyes of some of the continental writers, which must be determined before the *forum* can tell which of its rules of the conflict of laws to apply—those on capacity or those on the substantive matters of succession. Bartin,⁷ now Professor of Law at the University of Paris, was the first to call attention to the general problem. He advanced the "theory of qualifications," according to which a preliminary question like the above is to be determined with reference to the law of the *forum*.

A true analysis of the question requires that the rules governing the heir's compulsory portion be placed in a group apart from the "capacity" group or the "formalities" group. All of these rules restrict the heir's *power* of disposition, but they do so from different points of view and for different purposes. Hence a difference in the rules of the conflict of laws.

The court of Nice assumed that the question of the heir's compulsory

⁵ Cass. March 9, 1853, D. 1853, I, 217; App. Aix, July 11, 1881, S. 1883, 2, 249; App. Paris, Dec. 2, 1898, D. 1899, 2, 177; App. Orléans, Feb. 24, 1904, 31 Clunet, 680.

⁶ Trib. Civ. Seine, June 14, 1901, Clunet, 1902, 144. Surville & Arthuys, *Cours élémentaire de droit international privé*, 6th ed., 461; Valéry, *Manuel de droit international privé*, 461. *Contra*: 2 Vareilles-Sommières, *La synthèse du droit international privé*, n. 1170.

The Court of Cassation in a decision of Aug. 30, 1820, held that the provisions applicable to the legal reserve affected the "capacity" of the testator; but this view has been abandoned. See H. Donnedieu de Vabres, *Succession ab intestat en droit international privé*, 701.

⁷ Bartin, *Études de droit international privé*, 1 (reprinted from Clunet, 1897, 225, 466, 720).

portion belonged to group three. In so doing it followed the view generally accepted in France. So far as immovables are concerned this would lead to the application of the French law. Article 3 of the French Civil Code provides that "immovables, even those owned by foreigners, are governed by French law." This rule has been consistently applied to the subject-matter under consideration.⁸ As the French law grants to the surviving husband or wife no compulsory portion, the plaintiff's claim to immovables was ill-founded.

With respect to the movable property left in France the court of Nice held that, inasmuch as the parties had only a domicil *de facto* in France, the husband's right to a compulsory portion were governed by the law of Italy, the country of the wife's origin.⁹ All French courts would hold likewise that if the decedent had acquired a "legal" domicil in France the French law would have applied. By a "legal" domicil, in contradistinction to a *de facto* domicil, is meant in France an authorized domicil within the meaning of Article 13 of the Civil Code, which provides that "an alien who has been authorized by decree to establish his domicil in France shall have the enjoyment of all civil rights." Such a domicil constitutes a preliminary step to naturalization and is not possessed by any foreigner who does not intend to acquire the French nationality. A *de facto* domicil, on the other hand, according to Article 102 of the French Civil Code, is the place of a person's "principal establishment." Its chief importance consists in the fact that such a domicil confers jurisdiction upon the French courts with reference to the administration of the person's property upon death and the like.¹⁰

When a foreigner has not acquired an authorized domicil in France the French courts are inclined to say that the law of his domicil of origin or of his country of origin controls. They appear to mean the national law of the decedent,¹¹ by which they understand in the case of an American citizen the law of the state in which he was last domiciled before he took up his residence in France. If the nationality of the decedent cannot be ascertained, the law of the *forum* is applied.¹²

⁸ Cass. Jan. 26, 1892, Clunet 1893, 489; Trib. Civ. Corbeil, Aug. 4, 1897, Clunet 1898, 568; Trib. Civ. Seine, Apr. 26, 1907, Clunet 1907, 1132; Trib. Civ. Toulon, Apr. 26, 1909, Clunet 1912, 550; Trib. Civ. La Châtre, July 5, 1910, Clunet 1911, 588 and note.

⁹ Cass. Jan. 12, 1869, D. 69, 1, 294; Cass. May 8, 1894, D. 94, 1, 355; App. Paris, July 9, 1902, Clunet 1903, 181; Aug. 1, 1905, D. 1906, 2, 169; Dec. 23, 1909, Revue de droit international privé, 1910, 454; Grenoble, July 3, 1907, Revue de droit international privé, 1908, 813.

¹⁰ App. Paris, March 20, 1896, Clunet 1896, 402; July 9, 1902, Clunet 1903, 181.

¹¹ Cass. May 8, 1894, D. 94, 1, 355; Cass. March 8, 1909, D. 1909, 1, 305; App. Aix, March 27, 1890, D. 91, 2, 13; App. Grenoble, July 3, 1907, Revue de droit international privé, 1908, 813.

¹² Pau, May 14, 1907, Clunet 1907, 1109.

The rule that the national law of the decedent controls the disposition of movable property upon death and the rights of the heirs to a compulsory portion therein is established only with respect to foreigners who have acquired an authorized domicile in France. In the exceptional case where such a domicile exists the law of the "legal" domicile, that is French law, governs.¹³ Where the decedent is a foreigner who has acquired neither a legal nor a *de facto* domicile in France, the courts there have as a rule no jurisdiction to distribute his movable property in France. The question whether the national law of the decedent or the law of his domicile at the time of his death will govern under these circumstances cannot therefore ordinarily arise. As regards French subjects dying domiciled abroad the law of the *de facto* domicile governs the distribution and not the national law of the decedent.¹⁴

The above rules governing the right of the heir to a compulsory portion require a qualification in two directions. The first qualification is due to the recognition on the part of the French courts of the *renvoi* theory in the law of succession. This doctrine was first recognized by the Court of Cassation in the Forgo case¹⁵ in 1878 and was reaffirmed by the same court in 1910.¹⁶ According to the established law, therefore, if the national law of a foreigner who has acquired only a *de facto* domicile in France sanctions the *lex domicilii*, the reference back to the French law will be accepted. The French courts will distribute the personal estate of the decedent in France under these circumstances in accordance with French law. The same rule holds true as regards immovable property which a French subject may own in Italy. On principle the French courts would determine the rights of the heirs to a compulsory portion in such property in accordance with the law of the *situs*. However, as the Italian code provides expressly that the national law of the decedent shall control the devolution of his property upon death, the French courts would apply the same rule and determine the rights of such heirs to a compulsory portion in accordance with French law.¹⁷

The second qualification results from the law of July 14, 1819, which provides as follows:

¹³ Cass. May 5, 1875, D. 75, 1, 343; Pau, May 14, 1907, Clunet 1907, 1109; Trib. Civ. La Châtre, July 5, 1910, Clunet 1911, 588.

¹⁴ Cass. June 21, 1861, D. 65, 1, 418; Cass. Apr. 27, 1868, D. 1868, 1, 302; Trib. Civ. Seine, June 25, 1880, Clunet 1881, 163; App. Pau, June 22, 1885, Clunet 1887, 479.

¹⁵ Cass. Feb. 22, 1882, D. 82, 1, 301.

¹⁶ March 1, 1910, Clunet 1910, 888; Revue de droit international privé, 1910, 870.

¹⁷ App. Aix, July 19, 1906, Clunet 1907, 152.

"Where a succession is to be divided between foreign and French co-heirs, the latter shall receive by way of preference such a share of the property in France as shall be equivalent to the value of the property situated abroad from which they have been excluded, for any reason whatever, on account of some local law or custom."

This provision in favor of French heirs modifies the ordinary rules of the conflict of laws governing movable property upon death.¹⁸ The law of 1819 applies though the decedent is a foreigner whose personal estate is governed in the law of succession by his national law. The only conditions for the application of the law are that there is property in France and that a French heir or legatee is prejudiced by the foreign legislation. Such a prejudice may result from the fact that one of the heirs possessed according to the foreign law a right to a compulsory portion which the French law does not recognize or from a testamentary disposition which is valid according to the foreign law but not according to French law. By virtue of the above law the French heir is given by way of preference the difference between what he actually got and what he would have got as heir under French law in all of the property left by the decedent.¹⁹

E. G. L.

¹⁸ See Baudry-Lacantinerie & Wahl, *r Successions*, nos. 196 ff.

¹⁹ There are three principal systems governing the devolution of property upon death. One distinguishes between movable and immovable property (England, United States, Austria, Belgium, France, Holland, Rumania, Sweden). Of these Austria and Sweden distribute the movable property according to the *lex patriae*, instead of the *lex domicilii*. The second system applies the law of the *situs* to both kinds of property (Illinois, Chile). The third system, influenced by the Roman doctrine of universal succession, regards the succession as a continuation of the decedent's personalty and determines devolution of the property, therefore, in accordance with the decedent's personal law. Some of the countries belonging to this group apply the *lex patriae* (Italy, Spain); others, the *lex domicilii* (Norway, Argentina). In addition to the above systems there are various mixed systems (Brazil, Germany). See in regard to *Austria*: Decision of Supreme Court of Austria, Nov. 4, 1897, Clunet 1900, 649 and note by Professor Wahl. *Belgium*: App. Ghent, March 14, 1907, Revue de droit international privé, 1909, 968. *Holland*: Asser & Rivier, 135. *Rumania*: Art. 2, Civ. Code; Cass. Feb. 20, 1901, Clunet, 1902, 916. *Sweden*: Synnestvedt, *Le droit international privé de la Scandinavie*, 272. *Illinois*: Rev. Stat. 1911, ch. 39, sec. 1. *Chile*: Art. 16, Civ. Code. *Italy*: Art. 8, Civ. Code. *Spain*: Art. 10, Civ. Code. *Norway*: Synnestvedt, 269. *Argentina*: Art. 3317, Civ. Code. *Brazil*: Art. 14, Civ. Code. *Germany*: Secs. 24-26, Intr. Law, Civ. Code.