THE EFFECT OF HOMICIDE ON PROPERTY RIGHTS

By M. F. C. SCOTT*

'It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person.' Thus, in *Cleaver* v. *Mutual Reserve Fund Life Assn.*,[1] Fry L.J. stated the principle which prevented a murderer from acquiring property by the death of his victim. As a general principle it was perhaps too widely stated. Even a thief acquires possession of the goods he steals, and will be protected in his possession against the encroachments of a person with no title at all; and one who obtains goods by false pretences has a title even as against the original owner until the latter repudiates the contract. The principle is one which operates only within a restricted field, that of rights accruing to a person from a homicide.

Cleaver's Case arose out of the murder by poisoning of James Maybrick by his wife Florence Maybrick. Shortly before his death James Maybrick had taken out a policy of insurance on his life in her favour. Under the Married Women's Property Act 1882, s. 11 (Eng.), he was a trustee of the policy for his wife. The Act further provided that moneys payable under the policy should not, 'so long as any object of the trust remains unperformed, form part of the estate of the insured'. The claim was against the insurance company by the personal representatives of the deceased on the one hand, and by the administrator of the convict's estate, claiming as such and as express assignee of the policy, on the other. It was scarcely surprising that the claim of the administrator should have failed, and indeed this aspect of the case was not argued before the Court of Appeal. The claim of the personal representatives, however, was upheld. Since the trust in favour of the wife had failed, the policy went to form part of the deceased's estate. There was no principle of public policy which prevented the next-of-kin of the deceased from recovering upon the contract.

What is surprising, however, is that the court could trace no earlier authority directly in point. The nearest that could be found was the decision in *Fauntleroy's Case*[2] in 1830. In that case Henry Fauntleroy insured his own life and later became bankrupt, and the benefit of the policy became vested in the assignees in bankruptcy. About the same

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1 [1892] 1 Q.B. 147, 156.

2 *Amicable Society* v. *Boland* (1830) 4 Bli. N.S. 194.

time he was arrested and convicted of forgery, for which he was sentenced to death and subsequently executed. The Lord Chancellor, Lord Lyndhurst, disposed of the assignees' claim briefly. Had the insurance policy provided expressly against the possibility of the commission and subsequent conviction of felony, and of the execution of the capital sentence, it would clearly have been contrary to public policy. 'Can we', he said, 'in considering this policy, give to it the effect of that insertion, which if expressed in terms would have rendered the policy, as far as that condition went at least, altogether void?'[3]

It has been suggested[4] that the reason for this paucity of earlier authority lies in the effect of felony on the property rights of the felon up till the Forfeiture Act 1870 (Eng.).

At an early stage the Crown was apparently prepared to assert a right to the forfeiture of all the property, both real and personal, of a person attainted of treason or felony. After the Grand Charter of 1297 the Crown's right to the lands of a person attainted of felony was restricted to the *'ann, jour et wast'*— the right to occupy the lands and to commit waste thereon for a year and a day. The Crown's absolute right to the lands in cases of treason, and to the goods and chattels in cases of either treason or felony, was unaffected. Subordinate to these rights in the Crown was the right of the mesne lord to an escheat of the land of his tenant *'propter delictum tenentis.'* Further, by the conviction the blood of the traitor or felon came to be attainted. He ceased to be capable of inheriting himself, and he also ceased to be a channel through which any inheritance could be claimed by another. Finally, a person under sentence for felony could maintain no action in the courts.

What was the effect of these disabilities? Since the whole of the felon's property was either forfeit or escheat, it would appear there was no question of the felon retaining a personal benefit from his crime or transmitting it to another. Yet, though this is in large measure true, and goes far to account for the absence of authority on the question we are considering, it is not a wholly adequate explanation.

(1) The attainder, in the case of lands, related back to the commission of the offence.[5] During the intervening period the felon had full capacity to take property by purchase[6]; indeed, it was to the Crown's advantage that he should have this capacity. Hence though the murderer could not succeed as heir to his victim's estate, he could take under

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3 *Ibid.* at 212. Another curious *lacuna* in the law on this subject is the absence of any decision since *Fauntleroy's Case* which directly confirms it. Of the many persons executed during the present century some at least must have been insured. Either the companies were content to pay despite the judgment, or no murderer's next-of-kin have yet challenged a principle which is surely unduly harsh. Suicide is one thing, for the person concerned intends to lose his life; felony is another, for few felons have any such intention. And, as counsel argues in the case (*ibid.* at 210), how far is this policy to be taken? Is it not, for example, contrary to public policy for the insured to hasten his demise by drink and debauchery?

4 *E.g.*, by Joyce J. in *In re Houghton* [1915] 2 Ch. 173, 176, and by Chadwick, 'A Testator's Bounty to his Slayer', (1914) 30 L.Q.R. 211, 214.

5 Co. Litt. 391, a; 13 Viner, Abr. 451.

6 13 Viner, Abr. 453, citing Br. Abr. Forfeiture de Terres, pl. 80.

his victim's will, and although the property would afterwards be subject to forfeiture and escheat, this would prove small consolation to the family of the murdered man.

(2) In this intervening period he could even enjoy the benefit of property so acquired. There was no forfeiture of the mesne profits of the land; nor was there any doctrine of relation back in the case of chattels, which the felon was entitled to sell for the maintenance of himself and his family.[7]

(3) *Cestui que use* before the Statute of Uses, and afterwards, when the trust had evolved, *cestui que trust*, had an interest which was subject neither to forfeiture (except in cases of treason) nor escheat.[8] The beneficiary who murdered his co-beneficiary to obtain his share, or the future beneficiary who murdered one with a life interest, was not liable to forfeit the interest acquired by the murder.

(4) In the last case, though the murderer's heir could claim no estate, because of the corruption of the blood, there seems to be nothing to have prevented a devisee or assignee for value from claiming.

(5) Similarly, though the felon as *cestui que trust* was incapacitated from suing to enforce the trust, the devisee or assignee was under no such disability.

The truth appears to be that in the early law the courts were solely concerned with the conflicting property rights of the Crown on the one hand and the felon and his family on the other. Thus they were prepared to save to the wife property acquired by the husband in right of his wife[9]; and they were prepared to allow that the Statute *De Donis* prevented the heir-in-tail from forfeiting his inheritance.[10] But no consideration appears to have been given at all to the property rights of the victim—an omission which need scarcely surprise us, when we remember that attainder was a consequence of criminal proceedings, and bear in mind the very scant attention given to these rights in criminal proceedings even at the present day.

Fauntleroy's Case and *Cleaver's Case*, the two cases which are the start of our modern law upon this subject, are both decided basically as cases of contract. The principles of public policy form a well-recognised branch of the law of contract, and it was no great innovation to subsume the facts of these cases under that head. Cases of succession to the victim's estate under his will or on an intestacy are clearly in a different category. The civil law knew well enough how to deal with the situation.

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7 4 Com. Dig. 405; 2 Co. Inst. 48; 3 Bac. Abr. 739.

8 See Holdsworth: *History of English Law* (4th ed. 1935) iii, 71-2; 3 Co. Inst. 19. In *King's Attorney* v. *Sands* (1670) 2 Freem. Ch. 129, Hardres 405, 488, it was assumed by Lord Hale that the interest of *cestui que trust* descended to his only brother, who had killed him. Since, however, there was no-one in that instance to enforce the trust, it was to be held by the trustee beneficially.

9 13 Viner, Abr. 447; *Venables* v. *Harris* (1586) 2 Le. 126.

10 33 H. 8 c. 20 made an estate tail liable to forfeiture for high treason.

In either case a person might lose the benefit of the succession by becoming *'indignus'* or unworthy of it. Murder was not the only possible cause of this; an attempted murder, or even a neglect to come to the assistance of the deceased when he was in danger of death, was sufficient, for the doctrine was based upon the presumed intention of the testator who, had he known all the facts and had the necessary opportunity, would have revoked his will, or would not have consented to the effect of intestacy. This doctrine passed into our own ecclesiastical law, but never formed part of the common law.[11]

The English courts, however, with no apparent hesitation, were content to extend the concept of public policy from its contractual sphere to the context of succession on death. In *In re Hall*[12] the principle was extended to the case of a person claiming as legatee under a will. In two Australian cases, *In re Tucker*[13] and *In re Sangal*[14], and in the English case of *In re Sigsworth*[15] it was extended to claims arising upon an intestacy. Sir Samuel Evans P., in *In re Crippen*,[16] in a passage cited with approval by Cozens-Hardy M.R. in *In re Hall*,[17] repeated the *dictum* of Fry L.J. in an even more emphatic form:

> It is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence.[18]

At the same time the courts have also extended the principle from cases of murder to cases of manslaughter—*In re Hall*.[19] We are not told in the report of the case the facts which constituted manslaughter, but it may be assumed that it was a sufficiently grave case, for counsel for the person convicted sought to support his case by instancing the harshness of the rule were it to be applied to manslaughter by reckless driving. One can indeed imagine cases of great hardship. The wife who drives her husband and kills him by her dangerous driving comes to be punished, not only by widowhood, but by the loss even of any right to succeed to her husband's property. There is a very real difference between this sort of case and the case of a Maybrick or a Crippen. Nevertheless, such appears to be the law until it is altered.

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11 For the civil law see Lex 7 S. 4 D. *de bonis damnatorum* (48, 20); D. 34, 9 *de his quae ut indignis auferuntur*; Chadwick, 'A Testator's Bounty to his Slayer', (1914) 30 L.Q.R. 211 (which compares some of the modern Civil Codes); F. B. Williams, 'Can a Murderer Acquire a Title by his Crime?', (1894) 8 Harv. L.R. 170-171. For the ecclesiastical law see Swinburne, *Wills and Testaments* (2nd edn., 1803), part 7, sec. 22.

12 [1914] P. 1.

13 (1921) 21 S.R. (N.S.W.) 175.

14 (1921) V.L.R. 355.

15 [1935] 1 Ch. 89, following the opinion expressed by Farwell J. in *In re Pitts* [1931] 1 Ch. 546, 550.

16 [1911] P. 108.

17 [1914] P. 1, 6.

18 [1911] P. 108, 112.

19 [1914] P. 1.

Ever since the speeches of their Lordships in *Chicken* v. *Ham*[20] we have learnt to mistrust judicial pronouncements which begin by declaring that the law is clear. The courts have not been prepared in every case to dismiss the plaintiff's claim as peremptorily as in *In re Hall*. In *In re Houghton*[21] a son had been found guilty of his father's murder but insane. Joyce J. decided that he was entitled to a share on his father's intestacy. Of course, since he had been found insane he was not in effect guilty of any crime,[21a] and it is upon this ground that the decision stands. But the learned judge first addressed himself to the general principle involved. He cited with approval the American case of *Re Carpenter's Estate*,[22] in which the judge was reported as saying:

> It is argued, however, that it would be contrary to public policy to allow a parricide to inherit his father's estate. Where is the authority for such a contention? How can such a proposition be maintained, when there is a positive statute directing a precisely opposite conclusion? In other words, when the imperative language of a statute prescribes that, upon the death of a person, his estate shall vest in his children, in the absence of a will, how can any doctrine, or principle, or other thing called public policy, take away the estate of a child, and give it to some other person?[23]

This reasoning has not commended itself to the courts in later cases, and doubtless any judgment given in this sense would be an outrage to ordinary concepts of morality. Nevertheless the objection to permitting public policy to fulfil this role is a very real one, and needs to be answered.[24] The concept of public policy does very well in the contractual context of *Cleaver's Case*; it cannot be carried over into a field where statute law plays a part without some thought as to the logical justification for doing so. Two lines of reasoning have been used to provide this justification.

The point made in *Re Carpenter's Estate* was put to an Australian court in *In re Barrowcliff*.[25] The statutory element, it was argued, was not lacking even in *Cleaver's Case*, for there the court had in effect over-ruled the express words of the Married Women's Property Act 1882 (Eng.), which laid down clearly that a trust was to exist for the wife. The learned judge answered the argument as follows:

> A statute in general terms is not construed as repealing the common law relating to a special and particular matter, unless an intention to that effect appears, and in *Cleaver's Case* the rule of the common law, and the policy which

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20 *Misleading Cases*, reported by A. P. Herbert (2nd edn. 1927) 109, see especially at 115.

21 [1915] 2 Ch. 173.

21a See *In re Pitts* [1931] 1 Ch. 546.

22 (1895) 170 P. 203.

23 Cited [1915] 2 Ch. 173, 177.

24 The interesting judgment of Harvey J., in *Re Tucker* (1921) 21 S.R. (N.S.W.) 175, deserves to be read in this context. While the learned judge felt himself bound to follow earlier English authority, he expressed himself as follows (*ibid.* at 181): The whole doctrine seems to me to be in a very unsatisfactory condition; it is an extraordinary instance of Judge-made law invoking the doctrine of public policy in order to prevent what is felt in a particular case to be an outrage.'

25 (1927) S.A.S.R. 147.

it expresses, were sufficiently cogent to justify the conclusion that the general words of the Statute were never intended to comprehend a case which the legislature could never have contemplated or anticipated.[26]

A much better justification, however, is to be found in the view put forward by Ames[27] after an exhaustive review of the American authorities, which were, even at the date he wrote, already fairly numerous. He preferred the analogy of the constructive trust which sometimes arises in case of fraud. A person fraudulently induces another to convey property to him. The legal estate passes by operation of law, but he will not be permitted to enjoy his ill-gotten gains, and equity will make him a trustee for the defrauded person. X, who is prospectively entitled to succeed upon the intestacy of Y, induces Y not to make a will by promising that he will hold the property for Z. On Y's death intestate the property will indeed pass to X, by virtue of the appropriate statute, but he will be compelled to hold on a constructive trust for Z. Instances can be multiplied. The whole doctrine of secret trusts rests, indeed, upon the rule which prevents a person availing himself of either the Statute of Frauds or the Statute of Wills where it would be fraudulent for him to do so. In a like manner, where a person succeeds in having the estate of another vested in him by murdering that other, equity ought not to permit him to hold it for his own benefit.[27a]

Perhaps the reason the English courts have not adopted this much more coherent account of the matter is that the English cases have all been decided since the Land Transfer Act 1897 (Eng.), so that they were never called upon to decide the respective destinations of the legal and the equitable estates; the most the murderer could acquire in any case was an equitable estate. But the principle remains the same. There can be a trust of an equitable estate. Though the legislature has directed that an equitable estate is to go to certain persons, there can be a further equity which prevents one of them from enjoying that equitable estate beneficially, and compels him to surrender it upon other trusts, and meanwhile to hold it upon those other trusts.

The question of the destination of the legal estate can still arise, however, even at the present day, as is demonstrated by the Australian cases of *In re Barrowcliff*[28] and the very recent case of *In re Thorp*.[29] In each case the facts were that one of two legal joint tenants murdered

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26 *Id.* at 150. In *Cleaver's Case* Fry L.J. had been content to say ([1892] 1 Q.B. 147, 158): 'The trust thus created by statute, and the language of the statute creating it, must in my opinion be both subject to the principle of public policy which I have stated, *viz.*, the trust is one which cannot be enforced by a murderess of her husband, and the language of the statute must be read as if it contained an exception of such a case.'

27 Ames, *Lectures in Legal History,* (1913), 311-322. Ames' views are accepted by *Scott on Trusts,* (1st edn. 1939), para. 493.2.

27a *Riggs* v. *Palmer* (1889) 115 N.Y. 506 brings out the similarity in a striking fashion. There a boy of sixteen killed his grandfather to prevent him revoking a will in which he was principal devisee. Nevertheless it was held that neither an equitable nor a legal estate passed to the boy.

28 (1927) S.A.S.R. 147.

29 (1962) N.S.W.R. 889.

the other. In the first case Napier J. held that the legal right of survivorship could not operate in the murderer's favour. It was true that there was no precedent for such a case, but 'This act is a repudiation of the terms upon which they hold. It determines the mutuality of the rights of survivorship, and, although there is no authority to that effect, I see no reason why it should not be considered to effect a severance'.[30] The reasoning is, with respect, a little unsatisfactory. Joint owners do not hold 'upon terms'. It may be that they owe each other mutual duties with regard to the possession and enjoyment of the land, but they certainly do not, as joint tenants, owe each other any more personal duties. It should be added that the learned judge rejected a contention that the murderer by his act forfeited all his interest in the property in question.

In *In re Thorp*,[31] however, Jacobs J. refused to follow this decision. The facts were that a husband and wife were registered joint owners of land under the Torrens system. The husband murdered the wife and then committed suicide. The registrar refused to register any transmission to the personal representatives until there had been an adjudication as to their entitlement. The court preferred the 'constructive trust' doctrine, but approached it in a rather novel manner. Outlining the history of the subject, his Honour pointed out that there could never have been an escheat or forfeiture for the felony of murder in a case such as this, for there had been no conviction. There could, however, be escheat and forfeiture for the felony *de se*, by presentment in Eyre or in the King's Bench. He went on:[32]

> It seems to me that there is no place in this historical situation for the view that on a murder of one joint tenant by the other there should be a severance of the joint tenancy. The effect of such a principle would be to reduce the rights of the Crown by way of forfeiture and of the lord of the fee by way of escheat. If such a right could be asserted I should expect to find some reference to it in earlier cases and the old books of authority. The effect would be that if one joint tenant murdered the other then all that the Crown would take would be a forfeiture of a one-half interest in the lands and all that the lord of the fee would take by escheat would be an escheat of that one-half interest.

For that reason his Honour held that the legal right of survivorship still took effect, so that the registrar would register the title of the murderer's personal representative, but place a caveat on the title[33] and require a further adjudication should there be conflicting claims to the equitable estate. As it happened no such claims were likely to arise, since the children of the marriage were the next-of-kin.

It is doubtless correct that the act of murder itself never effected a severance of the joint tenancy without an attainder, for only the attainder

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30 *Id.*, at 151. A similar view appears to have been taken in the Canadian case of *Re Pupkowski* (1957) 6 D.L.R. 427. One joint tenant killed another and a charge of murder was laid. It was held that the Registrar was entitled, while the charge was pending, to refuse to register a transmission of survivorship, in that the survivor had not established a good safeholding and marketable title within s. 164 of the Land Registry Act 1948 (Brit. Col.).

31 (1962) N.S.W. R. 889.

32 *Id.*, at 893.

33 Real Property Act 1900-1956, s. 12 (f) (N.S.W.).

could affect the felon's property rights. It is interesting to note, however, that where a felon was attainted it appears that any joint tenancy in which he shared was indeed severed, the attainder, and hence the severance, relating back to the date of the commission of the offence. This was the decision in *Harris* v. *Wardle*,[34] on the attainder of Lord Castlehaven. The land escheated, therefore, only as to a moiety. It was the opinion of Brampston J. (Berkley J. *contra*) that this was so even if one joint tenant died during the lifetime of the tenant attainted, but after the attainder.

Whatever reasoning is used to support the result, however, elegance and convenience make it desirable that the legal estate should devolve in the ordinary manner, and that any special rights occasioned by the murder should affect the equitable estate only. What is not so clear is what ought in justice (for with the exception of *In re Barrowcliff* there is no precedent) to be done with the equitable estate. The murderer ought to have no rights in the moiety of his victim, that is certain. But had the victim not been murdered he stood a chance of surviving the murderer and so gaining the whole estate for himself and his successors. The possibilities are so various, however, that perhaps the best that can be done is to do rough justice by severing the equitable estate, and leave it at that.

The courts have yet to encounter the problem which would arise if the remainderman under a settlement were to murder the life tenant. Thereby the remainderman's interest in the estate would be accelerated, and on principle he or his successor ought not to be able to reap this advantage from the crime. Ames' suggestion[35] is that since restitution cannot be made to the life tenant, it ought to be made to his heir (at the present day his next-of-kin) and that the amount of restitution (presumably to be charged on the property) must be determined by estimating actuarially how many years a person of the life tenant's age would probably have lived. At first sight this seems a far cry from the simple resulting or constructive trust, though, after all, our courts of equity have always been prepared to enter into calculations just as complicated and conjectural in, *e.g.*, apportioning reversionary property between tenant for life and remainderman. Perhaps, as our judges are so fond of saying, it is sufficient to say that there will be time enough to consider such a problem if and when it arises.

Suicide does not affect the devolution of the deceased's property at the present day.[36] As is well known, however, it does, or did, affect liability on an insurance policy on the suicide's life. It was decided by the House of Lords in *Beresford v. Royal Insurance Co.*[37] that even if such a policy is framed so as to provide expressly for payment of the sum

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34 Mich. 11 Car. B.R.; 14 Viner Abr. 477.

35 Ames, *op. cit supra*, n. 27, at 321.

36 *I.e.* since the Forfeiture Act 1870 (Eng.).

37 [1937] 2 K.B. 197; affd. [1938] A.C. 586.

assured in the event of felonious suicide, the policy of the law makes the contract unenforceable. It appears to have been generally assumed that the recent Suicide Act 1961 (Eng.), under which suicide ceases to be a criminal offence in Great Britain, has modified this rule; indeed a learned writer in the *Modern Law Review* goes so far as to say that the Act has 'over-ruled' the decision in *Beresford's Case*.[38] It may be doubted whether this is so. Where a person deliberately shoots himself two or three minutes before a policy which he cannot afford to renew is due to expire, with the expressed intention of allowing his estate to benefit, it seems unlikely that any court even to-day would be prepared to enforce the policy. As Lord Atkin put it: 'On ordinary principles of insurance law an assured cannot by his own deliberate act cause the event upon which the insurance money is payable'.[39] Further, while suicide has ceased to be a crime, it is not apparent why it should cease to be contrary to public policy.

It remains to consider the question what evidence of homicide is necessary. That evidence of the conviction of the murderer is sufficient has not been doubted in any of the judgments, and counsel's argument to the contrary was expressly rejected in *Crippen's Case*.[40] On the other hand the verdict of a coroner's inquest is apparently not sufficient. It is true that it was assumed to be so in *In re Pitts*,[41] but this decision was not followed in *In re Sigsworth*.[42] In that case a coroner's verdict had found that a son had murdered his mother and then committed suicide. The possible claimants to the estate were a paternal uncle and aunt and a maternal uncle and aunt of the son. Clauson J. declined to decide whether the murder had in fact taken place until sufficient evidence apart from the result of the inquest was before him. It will be recalled that in *Beresford's Case* evidence was taken of the suicide before a jury at first instance.

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38 B. W. M. Downey, 'Suicide Act' (1962) 25 M.L.R. 60, 61.
39 [1938] AC. 586, 595.
40 [1911] P. 108.
41 [1931] 1 Ch. 546.
42 [1935] 1 Ch. 89.