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HOMICIDE AND SUCCESSION TO PROPERTY

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TODAY, most jurisdictions bar a killer from succeeding to his victim's property. The traditional rationale for that result is that a criminal should not be allowed to enrich himself by his crime. Assuming that this principle is sound, its application in individual cases often proves troublesome. What would happen, for example, if the crime were of a lesser degree than murder, and the killer had no intent to enrich himself? If the killer is barred, who should take what would have been his share under a will? Or, if the decedent and murderer held property jointly, should the killer forfeit his interest in the property? As this Article will show, these questions and others have posed no little difficulty, and have inspired diverse attempts at resolution.

I. INHERITANCE BY INTESTATE SUCCESSION

If a son, learning that his father intends to disinherit him, murders the father, can the murderer still inherit from his victim? Today the answer in nearly every jurisdiction is certain to be no, but in a majority of states the answer first given by the courts seems to have been yes. That may seem strange, but it is even more strange that there are no reported decisions on this question before the end of the nineteenth century. It is hard to believe that intrafamilial homicides have occurred only within the past seventy-five years. The usual explanation for the lack of reported decisions on the subject is that the old rules providing for forfeiture of a felon's property prevented the murderer from profiting from his crime.[1] That explanation, however, encounters at least two difficulties. In the first place, forfeiture of land could take place only after the felon had been convicted, and conviction could not occur if the alleged murderer committed suicide before trial.[2] In such cases the question whether murder should affect the ordinary course of descent could not have been avoided. Second, many states in this country had abolished forfeiture for crime long before cases began to appear raising the question of the effect of murder on descent. In Illinois, the Constitution of 1818 abolished forfeiture,

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1. A. REPPY & L. TOMPKINS, HISTORY OF WILLS 88 (1928).

2. *See* 4 BLACKSTONE, COMMENTARIES *386.

but not until 1914 was there a reported decision on whether a murderer could inherit from his victim.[3]

Part of the explanation for the paucity of early reported cases may be that in some situations it makes no practical difference whether or not the murderer is allowed to take. Such situations were probably more prevalent in earlier times when the spouse was not an heir. Indeed, the great majority of cases reported in the twentieth century involve a husband who kills his wife, or vice versa. Assuming that the murderer is executed for the crime, or commits suicide, the question whether he was entitled to dower or curtesy is of little practical significance, since those are only life interests which would, in any event, terminate upon the murderer's death.

Still, that does not explain the total absence of reported cases before the end of the last century. Wives were always entitled to an absolute interest in their husband's *personal* property,[4] and even as to real estate, statutes of descent began in the nineteenth century to grant surviving spouses a fee simple share.[5] Thus, if a wife killed her husband, and the couple had no children, the court would have had to decide whether she could inherit, even though dead, because the answer to this question would determine whether the wife's relatives took a share of the husband's property as her successors.

With no reported decisions, we can only guess what the courts actually did in such a case. It is submitted, however, that they allowed the murderer to inherit; and if there are no reported cases, it is because no one questioned that result. Although it is difficult to believe that all courts without discussion reached a result so squarely opposed to the rule which prevails everywhere today, that seems to have been the case. Otherwise—if the courts assumed that the murderer could *not* inherit—the more doubtful cases would have given rise to a host of subsidiary questions which would surely have found their way into the reports. What would have happened, for example, if the wife had sold her interest to a bona fide purchaser, or if she were insane? These and other questions are the subject of numerous modern cases in which courts have tried to work out all the implications of the rule that murder should bar inher-

3. *See* ILL. CONST. art. 8, § 16 (1818); Wall v. Pfandschmidt, 265 Ill. 180, 106 N.E. 785 (1914).

4. *See, e.g.*, Statute of Distributions, 1670, 22 & 23 Car. II, c. 10, § 5.

5. *E.g.*, tit. 16, ch. 4, § 2440, [1873] Iowa Laws, 14th Gen. Assembly 411; ch. 37, § 2, [1876] Minn. Laws 18th Sess. 55.

itance. In the absence of comparable cases in the past, it is reasonable to assume that the rule did not arise until relatively modern times. Perhaps typical of the early approach is an 1875 Tennessee case.[6] There a husband murdered his wife, and since there were no children, he would have been her heir under state law. Although the husband was barred, it was not because of the murder, but only because the marriage was void for miscegenation.[7] Apparently no one even suggested the husband was disqualified because of the murder.

Toward the end of the nineteenth century, the argument that a murderer should not be allowed to inherit began to be made with some frequency. At first a majority of courts in this country rejected it. Typically, the court professed unhappiness at letting the murderer inherit, but said that any change in the law must come from legislation. Thus, the Washington Supreme Court allowed a son who had killed his father to inherit the estate:[8]

> Although the result shocks our conscience (and well it should), we believe that the existing applicable statutes can only be construed to permit appellant to inherit his father's estate. . . . We have no doubt that the legislature will take prompt action so the result we are forced to reach in the instant case may be avoided in the future.[9]

In Washington, the suggested statutory change followed rather promptly.[10] In other states where the courts refused to disturb the statutory course of inheritance in order to bar a murdering heir, legislation to cover the case has also followed, although sometimes only after many years.[11]

It is surprising that so many courts felt bound to apply the statutes of descent and distribution so literally when the result shocked the judges' conscience. They could have treated these cases in the light of the principle stated by Blackstone:

> Where some collateral matter arises out of the general words [of a statute], and happens to be unreasonable, there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore, they are at liberty to expound the statute by equity and only *quoad hoc* disregard it. Thus, if an act

6. Carter v. Montgomery, 2 Tenn. Ch. 216 (1875). *See also* Brook v. Warde, 3 Dyer 310b, 73 Eng. Rep. 702 (K.B. 1572).

7. 2 Tenn. Ch. at 231.

8. *In re* Duncan's Estate, 40 Wash. 2d 850, 246 P.2d 445 (1952).

9. 40 Wash. 2d at 854, 246 P.2d at 447-48.

10. Ch. 141, [1955] Wash. Laws, 613.

11. *E.g.*, Probate Act, § 15a, [1939] Ill. Laws 12, *overruling* Wall v. Pfandschmidt, 265 Ill. 180, 106 N.E. 785 (1914).

> of parliament gives a man power to try all cases that arise within his manor of Dale; yet, if a cause should arise in which he himself is a party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel.[12]

Nearly all the courts which first squarely faced the problem thought it "unreasonable" that a murderer should inherit from the man he killed, and it was surely fair to assume that "this consequence was not foreseen" by the legislature which enacted the statute of descent. It is difficult to see, then, why the majority of courts did not *quoad hoc* disregard the statute. In fact several courts have adopted this reasoning.[13]

A slightly different approach was advocated by Dean Ames in a leading article first published in 1897.[14] In his view, cases holding that the murderer could not inherit were "unsound in principle and unlikely to have any following in the future."[15] He suggested, however, that in order to prevent "the flagrant injustice of an atrocious criminal enriching himself by his crime,"[16] courts of equity should impose a constructive trust on the murderer, who would thus receive legal title but not the beneficial enjoyment of the inherited property.[17] The use of the constructive trust in this situation has been favored by other writers including the authors of the *Restatement of Restitution*[18] and has been followed by many courts.[19]

The proponents of the constructive trust approach claim that it has two basic advantages. The first is that it placates those favoring a literal construction of statutes. A constructive trust "avoids the dubious practice of reading implied exceptions into a statute [because] the court is not making an exception to the provisions of the statutes, but is merely compelling the murderer to surrender the profits of his crime. . . ."[20] That reasoning, however, is somewhat

12. BLACKSTONE, COMMENTARIES *91.

13. *E.g.*, Weaver v. Hollis, 247 Ala. 57, 22 S.2d 525 (1945); Price v. Hitaffer, 164 Md. 505, 165 A. 470 (1933); Garwols v. Bankers' Trust Co., 251 Mich. 420, 232 N.W. 239 (1930).

14. Ames, *Can a Murderer Acquire Title by His Crime and Keep It?*, 36 AM. LAW REG. (n.s.) 225 (1897) [This essay was republished in J. AMES, LECTURES ON LEGAL HISTORY 310 (1913)].

15. *Id.* at 228-29.

16. *Id.* at 229.

17. *Id.*

18. RESTATEMENT OF RESTITUTION § 187 (1937); G. BOGERT, TRUSTS § 478 (2d ed. 1960); 5 A. SCOTT, TRUSTS § 492 (3d ed. 1967).

19. *E.g.*, Dutell v. Dana, 148 Me. 541, 113 A.2d 499 (1952); Parks v. Dumas, 321 S.W.2d 653 (Tex. Civ. App. 1959).

20. G. BOGERT, TRUSTS § 478, at 78 (2d ed. 1960); 5 A. SCOTT, TRUSTS § 492, at 3496 (3d ed. 1967). *See also* RESTATEMENT OF RESTITUTION § 187, comment *a* at 764 (1937).

disingenuous. It may be well to make exceptions to a statute in appropriate cases, and when a court awards property to someone other than the one to whom the statute gives it, can the court really claim to be applying the statute literally? It is not surprising that many courts have rejected the constructive trust approach as being "somewhat fictitious."[21] As Henry Maine suggests, such legal fictions may be "invaluable expedients for overcoming the rigidity of law"[22] at certain stages of legal development, but "they have had their day. . . . It is unworthy of us to effect an admittedly beneficial object by so rude a device."[23]

The second advantage claimed for the constructive trust rationale is that it protects the rights of one who has purchased property in good faith from the murdering heir, since a bona fide purchaser of the legal title is not subject to the constructive trust.[24] But it is doubtful that resort to the constructive trust rationale is necessary in order to reach that result. Many statutes which disqualify a murderer from inheriting also protect persons who have purchased in good faith from him,[25] and even without such a statute courts would probably reach the same result. In France, for example, where the Civil Code bars a murderer from inheriting, it has been held that a parricide conveys good title to a bona fide purchaser of the inheritance.[26] It is true that in Anglo-American law the concept of bona fide purchase was for many years recognized only in equity, and that property bought in good faith from a felon after his crime was committed was forfeited.[27] But in modern times courts have been willing to protect bona fide purchasers without resort to traditional trust doctrines. For instance, one who without notice purchased land from an heir has been allowed to keep it against the claim of a devisee under a later-discovered will.[28] It is likely, therefore, that even in a jurisdiction in which a murderer could not acquire legal title, courts would similarly protect a person whose good faith purchase was from an heir who was later discovered to

21. *In re* Duncan's Estate, 40 Wash. 2d 850, 852, 246 P.2d 445, 447 (1952). *See also* Wall v. Pfandschmidt, 265 Ill. 180, 192-93, 106 N.E. 785, 789 (1914).

22. H. MAINE, ANCIENT LAW 22 (World Classics ed. 1946).

23. *Id.* at 23.

24. G. BOGERT, TRUSTS § 478 (2d ed. 1960); 5 A. SCOTT, TRUSTS § 492 (3d ed. 1967); RESTATEMENT OF RESTITUTION § 187, comment *a* at 764 (1937).

25. *E.g.*, PA. STAT. ANN. tit. 20, § 3453 (1964).

26. Normand v. Duchier, [1856] Recueil Périodique et Critique [D.P.] II. 195 (Cour imperiales, Poítiérs).

27. *See* 4 BLACKSTONE, COMMENTARIES *386.

28. Eckland v. Jankowski, 407 Ill. 263, 95 N.E.2d 343 (1950).

have murdered his ancestor. Cases on this point are extremely rare. Not infrequently, however, the murderer has transferred his rights to someone else, usually the attorneys who defended him at his criminal trial. Many cases have held that, in that context, the assignee, as well as the murderer himself, is barred.[29] But such cases can clearly be distinguished from ones involving a purchaser who has no knowledge of the crime.[30]

Thus, the advantages claimed for the constructive trust rationale are questionable. Furthermore, the approach presents certain problems. In jurisdictions which still maintain a separate court of equity, resort to that tribunal may be necessary in order to reach the correct result. In *Estate of Mahoney*,[31] for example, the Supreme Court of Vermont held that the probate court could not bar a husband who had killed his wife from inheriting her property, because only the court of chancery had jurisdiction to impose a constructive trust. The State of Vermont, then, maintains two courts, one to award the property to the murderer and the other to take it away from him. Over two hundred years ago Blackstone considered it absurd that two courts in the same jurisdiction should apply conflicting rules to the same property.[32] Surely such an absurdity has no justification today; not even the excuse of history can support it since the case of a murdering heir was not one of those traditionally dealt with by the Chancellor. Even in the *Mahoney* case, one concurring judge expressed concern "with the impractical aspects of the constructive trust doctrine."[33] Such jurisdictional complications have arisen in other states as well. New York at one time made resort to equity necessary to defeat a murderer's claim to his inheritance,[34] but later cases have been handled in the Surrogate's Court. One Surrogate, although unsure that he had jurisdiction, nevertheless proceeded to decide the case since "the estate is small, the matter pressing, and the parties cannot well afford any other solution of the question than mine."[35] Undoubtedly many of the estates which involve this question are too small to warrant the expense and delay of proceedings in two courts; indeed, such unnecessary

29. *E.g.*, Wilson v. Bates, 313 Ky. 333, 231 S.W.2d 39 (1950); *In re* Cash, 30 N.Z.L.R. 577 (Sup. Ct. 1911).

30. *Compare* Peeples v. Corbett, 157 S. 510 (Fla. 1934), *with* Hogan v. Martin, 52 S.2d 806 (Fla. 1951).

31. 126 Vt. 31, 220 A.2d 475 (1966).

32. 3 BLACKSTONE, COMMENTARIES *441.

33. 126 Vt. at 37, 220 A.2d at 479.

34. Ellerson v. Westcott, 148 N.Y. 149, 42 N.E. 540 (1896).

35. *In re* Wolf, 88 Misc. 433, 463, 150 N.Y.S. 738, 739 (1914).

expense and delay are hard to justify regardless of the parties' ability to pay.

Similar problems in applying the constructive trust may exist even in a jurisdiction in which law and equity have been completely merged, for the historical distinction between them may be preserved for determining the form of trial of questions of fact. Presumably the logic of the constructive trust theory would require denial of any right to trial by jury in such a state, but there is no practical or even historical justification for that result.[36]

Whether the constructive trust or some other rationale is used to exclude a murderer, the fundamental question is why he should be excluded. Anglo-American courts answer this question with the moralism that the murderer should not be allowed to profit by his wrong: "*Nullus commodum capere potest de injuria sua propria.*"[37] Usually this statement is considered self-explanatory, although occasionally courts add that otherwise a temptation to crime would exist.

Hardly ever is the intention of the victim mentioned as a justification for excluding the murderer. It can reasonably be argued, however, that the laws of intestate succession are designed to carry out the probable desires of the decedent, and should therefore be interpreted to fulfill his probable wish to disinherit the one who killed him. But this approach also has its problems. What happens, for instance, if the victim forgives his killer before expiring? That question has provoked a little discussion in texts,[38] but has yet to arise in a case in an Anglo-American jurisdiction. In France, however, a widow once tried to show that her husband had pardoned her after she shot him.[39] The court expressed doubt as to whether such a showing made any difference, and found that, in any event, the proof of forgiveness was insufficient to permit her to inherit.[40]

Another difficulty with the intent rationale is that in most states

36. *Cf.* Legette v. Smith, 226 S.C. 403, 85 S.E.2d 576 (1955).

37. In this form the maxim seems to go back no farther than Coke, who used it to explain why entry for waste did not extinguish a rent charge. COKE ON LITTLETON *148b. But in Roman Law a similar idea was expressed in different words. DIGEST 50.17.134.1. However, the exclusion of "unworthy" heirs in Roman Law was not usually based on this idea.

38. *Cf.* Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715, 728 (1936); Chadwick, *A Testator's Bounty to His Slayer*, 30 L.Q. REV. 211, 213 (1914).

39. Gianola-Clariet v. Gianola, [1938] Recueil Général des Lois et des Arrêts [S. Jur.] II. 109 (Cour d'appel, Douai, July 27, 1937).

40. [1938] S. Jur. II. 111. In Louisiana, an heir who has been pardoned is allowed to inherit. LA. CIV. CODE ANN. art. 975 (West 1952).

a surviving spouse has a claim which cannot be defeated by the decedent's will. Thus, a wife who has killed her husband can argue that it makes no difference that he would have disinherited her because he was not free to do so under the law. Under the traditional American rationale, that argument would not be accepted, because the wife would still be profiting from her wrong—but for the murder she might have predeceased her husband and thereby lost all interest in his estate.[41] A few American courts have held that a spouse's rights were not covered by a statute barring a murderer from inheriting,[42] but no particular reason is suggested in these cases why the spouse's rights should be treated differently from inheritance. Under the civil law, even though a father's power to disinherit his children is severely limited, a child who kills his father will be barred from inheriting.[43] A spouse, however, does not forfeit his interest in community property, since that interest is not dependent on survival and thus there is no profit from the murder.[44]

The intention of the murder victim clearly does have some bearing on the question of who inherits the share of the estate which otherwise would have gone to the murderer. According to one case, if the victim at the time he was killed had been about to execute a new will in favor of a third person, a constructive trust will be enforced for the benefit of that person.[45] This result is questionable, since the murderer could be barred from profiting by his crime without thus opening the door to untrustworthy parol evidence. In any event, such evidence is seldom available, and the courts must therefore determine from the circumstances how the decedent would have wanted his property distributed.

A statute may furnish a guide in this situation. Some statutes, for example, provide that the victim's property shall go to his "other heirs."[46] In many cases this solution is satisfactory, but a problem arises if the murderer was a child of the victim and had children himself: should the children be barred because of their parent's crime? It is not enough to say that even innocent persons should not

41. 5 A. Scott, Trusts § 492.2 (3d ed. 1967); Restatement of Restitution § 187, comment *j* at 770 (1937).

42 *In re* Mertes' Estate, 181 Ind. 478, 105 N.E. 471 (1914); *In re* Kuhn's Estate, 125 Iowa 449, 101 N.W. 151 (1904). The Iowa statute was later amended to cover the spouse's rights. *See* Iowa Code § 633.535 (1964).

43. C. Civ. art. 727 (65e ed. Petits Codes Dalloz 1966).

44. Latham v. Father Divine, 299 N.Y. 22, 85 N.E.2d 168 (1949).

45. 299 N.Y. at 26-28, 85 N.E.2d at 169-70.

46. *E.g.*, Wyo. Stat. § 2-46 (1967); *cf.* Tenn. Code Ann. § 31-109 (1955); Iowa Code Ann. § 633.537 (1964).

be allowed to profit from another's wrong; whoever gets the property will in some sense be profiting from the murder, since but for the murder the victim would have retained the property and might have willed it to someone else. Furthermore, it can be argued that the children do not profit from the crime in any real sense since even without the murder the murderer might have inherited the property and later passed it on to his children. It may be objected, however, that the murderer is barred in order to remove temptation to crime, and a temptation would still exist if the murderer knew that his own children would get the property from which he was excluded. But that argument proves too much. Under such a theory, a court in every case would have to determine what might have tempted the murderer and then act to frustrate realization of that goal—a speculative and fruitless task.

Probably the best solution in such a case is to distribute the property as if the murderer had predeceased his victim. The murderer's children will thus inherit as grandchildren and heirs of the victim. Many statutes provide for that result,[47] and one court has reached it in the face of inconsistent statutory language. In *Bates v. Wilson*,[48] the Kentucky Court of Appeals awarded the murderer's share to his daughter rather than to "the decedent's other heirs-at-law" (the murderer's brother) as prescribed by statute.[49] The court stated: "I cannot believe that it was the intention of the Legislature of Kentucky to deny the right to inherit the estate to an innocent child."[50] But in *Norton's Estate*,[51] a similar statute was held to preclude the murderer's child from taking. That case illustrates the perils of a literalistic approach to statutory construction. Having held that the murderer's son was barred, the court realized there were no "other heirs" available, since the murderer was an only child. The state argued for escheat, but the escheat statute was also literally inapplicable, since the decedent had not died with "no lineal descendants or kindred."[52] The court ultimately upheld the claim of the decedent's sister, although that too was inconsistent with the statute of descent.[53]

47. *E.g.*, ILL. REV. STAT. ch. 3, § 15a (1967). A similar provision appears in the statutory solution first proposed by Professor Wade in 1936, which has been adopted in several states. *See, e.g.*, ch. 141, [1955] Wash. Laws 613.

48. 313 Ky. 572, 232 S.W.2d 837 (1950).

49. 313 Ky. at 574, 232 S.W.2d at 838.

50. 313 Ky. at 574, 232 S.W.2d at 838.

51. 175 Ore. 115, 151 P.2d 719 (1944).

52. Ch. 39, [1913] Ore. Laws 72 [ORE. COMP. LAWS ANN. § 16-101(6) (1940)].

53. Norton's Estate, 177 Ore. 342, 162 P.2d 379 (1945). Although the exclusion of

A possible injustice in distributing property as if the murderer had predeceased the victim is that this result prevents any afterborn children of the murderer from sharing in their grandfather's estate. Of course a convicted murderer is not likely to have more children, but in at least one case a daughter did in fact bear a child a few months after killing her father.[54] By an equitable construction of a statute allowing posthumous children to inherit, that child was permitted to share in his grandfather's estate.[55]

Another problem is whether a murderer can later inherit from the person to whom his share of the victim's property was awarded. French writers have said that he can,[56] and there seems to be nothing to the contrary in any American cases or statutes.[57] On the other hand, French writers have also suggested that a child who kills his father can later inherit from his father's father by representation,[58] whereas the only American court to consider the problem reached the opposite result.[59] The view of the French writers can be justified on the theory that inheritance by the murderer is in either case subject to the will of a third person, so that the likelihood of profit is too remote to afford a temptation to crime. That argument is considerably weakened, however, when the third person in question is incapable of making a will.

A further complication under this approach concerns the disposition of the murderer's estate. If the murderer and his victim are heirs apparent of each other, such as husband and wife, and if the murderer is deemed to predecease the victim, it is questionable whether the victim inherits from the murderer's estate even though in fact he died first. Ordinarily, he does not;[60] a murderer does not frequently have the incentive to kill in order to prevent his victim from acquiring the murderer's own property, since usually he can dispose of such property as he pleases without resorting to murder.

the murderer's children in such statutes appears to be due to a legislative oversight, the Napoleonic Code in France clearly excludes them. C. Civ. art. 1730 (65e ed. Petits Codes Dalloz 1966). *See* Venayre v. Bardet, [1854] D.P. II. 157 (Cours imperiales, Bordeaux, Dec. 1, 1853).

54. Estate of Wolyneic v. Moe, 94 N.J. Super. 43, 226 A.2d 743 (1967).

55. 94 N.J. Super. at 46, 226 A.2d at 744.

56. M. PLANIOL & G. RIPERT, DROIT CIVIL FRANÇAIS § 50 (2d ed. 1956). *See also* DIGEST 34.9.7.

57. *See* Pierce v. Pierce, 309 Ky. 77, 216 S.W.2d 408 (1948).

58. *See* note 56 *supra*.

59. Parks v. Dumas, 321 S.W.2d 653 (Tex. Civ. App. 1959).

60. If he were allowed to inherit, such a departure from the ordinary rules of inheritance with respect to the murderer's property might run counter to constitutional prohibitions on forfeiture for crime. *See* U.S. CONST. art. I, §§ 9, 10; U.S. CONST. amend. V.

However, if the victim is the murderer's spouse, he or she may have had an indefeasable interest, such as dower, in the murderer's property. In these cases, to remain consistent with the apparent purpose of preventing a murderer from achieving the temptation-causing profit, it might be necessary that the victim inherit, for the motive of the murder may have been to prevent such inheritance. In a New York case, a murdered wife's executor successfully asserted rights against her husband's estate under an antenuptial agreement given in lieu of dower.[61] But in *Debus v. Cook*,[62] a case from Indiana, a murdered wife's administrator lost a claim of dower in the husband's land because "in the case at bar the property in question belonged to the alleged murderer."[63]

Assuming that the murderer's property is to be treated differently from the victim's, what happens to prior gifts between the two? Can a husband who kills his wife reclaim assets which he had formerly given her? It would seem that he would not be permitted to do so, for once the gift is made, the property becomes the donee's.[64] But in *Kelley v. State*,[65] a husband who had killed his wife was allowed to inherit her estate since it was "considerably less than what he has expended for her during their marriage,"[66] and thus "the property that she had at the time of her death was in substance his."[67] A similar problem arises in the converse situation in which the murderer had previously received gifts from the victim. Presumably most American courts would treat such property as the murderer's own, and would not hold that his possession of it was affected by his crime. In France, however, the Civil Code establishes an action to annul gifts for "ingratitude," which includes the donee's killing the donor.[68]

II. Wills

Cases in which the murderer is a beneficiary under the victim's will, but is not an heir, are less common. All the reported cases agree that in that situation the murderer cannot take. The chief problem in will cases is determining who does take the murderer's

61. Logan v. Whitley, 129 App. Div. 666, 114 N.Y.S. 225 (1908).

62. 198 Ind. 675, 154 N.E. 484 (1926).

63. 198 Ind. at 67, 154 N.E. at 484.

64. *See* Connor v. Holbert, 49 Tenn. App. 319, 354 S.W.2d 809 (1961).

65. 105 N.H. 240, 196 A.2d 68 (1963).

66. 105 N.H. at 243, 196 A.2d at 71.

67. 105 N.H. at 243, 196 A.2d at 71.

68. C. Civ. art. 955 (65e ed., Petits Codes Dalloz 1966). *See also* La. Civil Code Ann. art. 1560 (West 1952).

share. Here again the victim's intent should control, if it can be ascertained, and the will itself may furnish some basis for determining that intent. While testators do not usually provide in their wills for this precise situation, they often name an alternate beneficiary who is to take in the event that they are predeceased by a legatee. In such a case, the property might be awarded to the alternate beneficiary on the basis of the supposition, applied in inheritance cases, that the murderer died before the victim. Although this result has been reached by some courts[69] it is subject to two objections. First, the murderer did not in fact predecease the testator and so the substitutional gift is literally inapplicable. In England this has been considered an insuperable difficulty.[70] But the objection appears unduly literal; courts are usually more prone to give a nonliteral construction to a will than to a statute. Numerous cases, for example, have held that a remainder which by the terms of a will is to vest on the death of a life tenant can vest earlier upon a disclaimer by the life tenant while he is alive.[71] A more substantial objection can be made when the alternate taker named in the will is a relative of the murderer but not of the testator. Thus, in *Wilson's Will*,[72] the Wisconsin Supreme Court favored awarding the property to the designated alternate beneficiary as more in keeping with the expressed intent of the testator than was a distribution to his heirs, but the situation was "complicated by the fact that the named alternate legatees are the adult children of the murderer husband by a prior marriage."[73] The case was remanded to the trial court to take further testimony as to how the wishes of the testator would best be carried out. It is unclear whether the court intended to open the door to oral testimony, ordinarily barred by the Statute of Wills, in order to resolve this difficult issue. In most cases extrinsic evidence of any sort is unlikely to throw much light on the testator's intent.

A closely related question exists when the will is silent but an antilapse statute in the jurisdiction provides for a substitutional gift to the issue of a legatee who predeceases the testator. In *McGhee v. Banks*,[74] such a statute, which would have given property to the

69. Whitfield v. Flaherty, 39 Cal. Rptr. 857, 228 Cal. App. 2d 753 (1964); Welch v. Welch, 252 A.2d 131 (Del. Ch. 1969).

70. Estate of Robertson, 107 Sol. J. 318 (1963). *See also In re* Dellow's Will Trust, [1964] 1 All E.R. 771 (Ch.); *In re* Byers, 208 Misc. 916, 144 N.Y.S.2d 68 (1955).

71. *E.g.*, Estate of Reynolds, 38 Wis. 2d 155, 158 N.W.2d 328 (1968). *See also* Semmes v. Gary Natl. Bank, 242 N.E.2d 517 (Ind. App. 1968).

72. 5 Wis. 2d 178, 92 N.W.2d 282 (1958).

73. 5 Wis. 2d at 187, 92 N.W.2d at 287.

74. 115 Ga. App. 155, 154 S.E.2d 37 (1967).

murdering husband's child by another marriage, was held inapplicable, and the wife's property was instead given to her next of kin. A statute first proposed in 1936 by Professor John W. Wade, and since then adopted in several states, provides that the antilapse statute does not apply to a legacy to a murderer.[75] In some instances this provision can lead to a questionable result. For example, if a testator's will left his estate "to his children" and one of his children killed him, the murderer's own children would receive nothing, because, without application of the antilapse statute, the estate would go to the other class members. But since the children of a murdering heir are not usually precluded from taking his intestate share, it is hard to justify a different result in the case of a murdering legatee.

Another problem arises if the murdered testator's property passes to charities after the murder, as a result of the solution reached by state law. Does such property qualify for the federal estate tax charitable deduction? That question was raised, but not answered, in *Welch v. Welch*.[76] The charities in that case argued against application of a constructive trust theory because they thought that it would prejudice the claim for a deduction. But it seems doubtful that the state law rationale should govern the tax result, since bequests in trust for charity also qualify for the deduction. A similar question can arise as to what effect there is on the marital deduction when the benefits passing to a surviving spouse are increased or diminished by reason of a murder. Perhaps the best solution in these cases is to treat the murderer as if he had disclaimed his interest, and to apply the Internal Revenue Code's express provisions dealing with disclaimers.[77]

Sometimes the question concerns the devolution of property under the will of someone other than the victim. In *Blanks v. Jiggets*,[78] a son murdered his father who had a life estate and a general power of appointment under the mother's will. That will also provided that in default of appointment, the property would pass to the life tenant's issue. The court allowed the son to take the property, and held inapplicable a statute which barred the murderer from taking from his victim's estate. In *Emerson's Estate*,[79] a similar statute was held inapplicable to the situation in which a son, who had a remainder under his father's will contingent on surviving his

75. Wade, *supra* note 38, at 727.

76. 252 A.2d 131 (Del. Ch. 1969).

77. *See* INT. REV. CODE of 1954, §§ 2055(a), 2056(d).

78. 192 Va. 337, 64 S.E.2d 809 (1951).

79. 191 Iowa 900, 183 N.W. 327 (1921).

mother, ensured the occurrence of that condition by killing his mother. Both cases, however, are inconsistent with the maxim that the murderer should not profit from his wrong, since but for the crime the murderer might have lost his interest, either because of an exercise of the power of appointment in the first case, or because of a failure to survive his mother in the second. In these cases, unlike instances of inheritance from a third person, the original testator was obviously unable to disinherit the murderer after the crime occurred. Under Professor Wade's proposed statute the murderer in both situations would have been barred.[80]

In the case of a will it seems clear that the devolution of the murderer's own property should not be affected. Thus, when a mother killed her son, who was the sole beneficiary under her will, the court rejected a claim by the son's administrator against the mother's estate:[81] "It seems never to have been held that a wrongdoer forfeits his own property by reason of his wrongful act that deprives another of a mere expectancy."[82]

III. Insurance

Judging from the reported cases, the single most important asset involved in intrafamilial homicide is life insurance. Persons who are killed by a spouse or a child are much more likely to have insurance on their lives than to have made a will. From the beginning, the courts, without exception, have held that a beneficiary who murders the insured cannot collect the proceeds of a policy on his life, even if there is no statute on the subject in the state, or even if there is a statute which covers murder by an heir or legatee but does not refer to murder by an insurance beneficiary.[83] In fact, many courts which have held that, in the absence of a statute, a murderer must be allowed to inherit, have nonetheless held that a murderer cannot collect insurance proceeds. Even in the late nineteenth and early twentieth centuries, the heyday of "freedom of contract" and judicial review of legislation, courts showed more respect for the *lex scripta* of a statute than they did for insurance policies.[84]

80. Wade, *supra* note 38, at 738-40. *See also* 5 A. Scott, Trusts § 493.1; Restatement of Restitution § 188, comment *c* at 774 (1937). The same authorities recommend that if the killer has a vested remainder, the property be withheld from him for the life-expectancy of the life tenant. There are no cases on this point.

81. Meyer v. Ritterbush, 276 App. Div. 972, 94 N.Y.S.2d 620 (1950).

82. 276 App. Div. at 972, 94 N.Y.S.2d at 621.

83. *E.g.*, Carter v. Carter, 88 S.2d 153 (Fla. 1956); Gholson v. Smith, 210 Miss. 28, 48 S.2d 603 (1950).

84. *Compare* Illinois Banker's Life Assn. v. Collins, 341 Ill. 548, 173 N.E. 465 (1930), *with* Wall v. Pfandschmidt, 265 Ill. 180, 106 N.E. 785 (1914).

In a democracy the courts are understandably reluctant to refuse to carry out to the letter the commands of a popularly elected legislature, whereas belief in freedom of contract has never been so strong as to require enforcement of agreements thought to be inconsistent with "public policy." It is probably fair to assume that the draftsman of a private instrument, such as a contract, is less likely than the draftsman of a statute to foresee and make intelligent provision for all contingencies. Nevertheless, the contrast is not so clear as to justify any rigid distinction in judicial treatment of the two, especially since authors of statutes may be prone to err almost as much as draftsmen of contracts.

The distinction drawn by some courts between the devolution of insurance proceeds and that of the victim's other assets has created difficulty when the murderer was an heir of the insurer as well as a beneficiary of his insurance. Usually insurance proceeds which are denied to the beneficiary are paid to the insured's heirs. Does this mean, then, that the money which is denied to the murderer as beneficiary is given to the same person as heir? Indeed, some courts have so held.[85] Other courts have resolved the dilemma by excluding the murderer from the distribution of the insurance proceeds, but not from distribution of the other assets of the victim's estate.[86] Still others have held that in this situation the company can retain the proceeds.[87] None of these solutions is satisfactory. The only sensible result is to treat insurance like any other asset in the estate, and to change that treatment only to the extent that the differences involved are relevant.

One difference between insurance and other assets that may justify a differential treatment of insurance proceeds is that the insurance company may claim that it need not pay anyone. Although this claim is usually rejected and in fact has rarely been made in recent cases, it has been allowed when fraud can be shown. The policy is voidable for fraud if the beneficiary was instrumental in procuring it, and if he intended at the time to kill the insured. This defense to payment has often been successfully asserted by insurers.[88] However, it is hard to prove to a jury. In one case, for example, even though the beneficiary was "very active" in procuring the policy

85. Equitable Life Assurance Socy. v. Weightman, 61 Okla. 106, 160 P. 629 (1916); Murchison v. Murchison, 203 S.W. 423 (Tex. Civ. App. 1918).

86. Illinois Banker's Life Assn. v. Collins, 341 Ill. 548, 173 N.E. 465 (1930).

87. Johnston v. Metropolitan Life Ins. Co., 85 W. Va. 70, 100 S.E. 865 (1919); Wickline v. Phoenix Mut. Life Ins. Co., 106 W. Va. 424, 145 S.E. 743 (1928).

88. Colyer's Admr. v. New York Life Ins. Co., 300 Ky. 189, 188 S.W.2d 313 (1945); Henderson v. Life Ins. Co., 176 S.C. 100, 179 S.E. 680 (1935); Columbian Mut. Life Ins. Co. v. Martin, 175 Tenn. 517, 136 S.W.2d 52 (1940).

and shot the insured a month after the policy was issued, a verdict rejecting the company's claim of fraud was sustained.[89]

Under these circumstances it is not surprising that some companies have obviated the need to prove fraud by inserting provisions in their policies that the proceeds will not be paid if the beneficiary kills the insured. Thus far such provisions have fared well in the courts. Not only has their validity been sustained in the face of challenge, but they have even been construed in favor of the insurer in doubtful cases, such as a murder by an insane beneficiary.[90] On the other hand, such provisions are rarely relied on in recent cases, and usually the company does not dispute its liability. Perhaps companies today feel that a provision precluding liability in this situation may be unenforceable because of state statutes limiting their defenses to claims under life insurance policies. In *Universal Life Insurance Company v. Grant*,[91] for instance, a provision that no benefit was payable for a death resulting from acts in violation of law by either the insured or the beneficiary was held invalid under a Texas statute. But that case involved an illegal act of the insured rather than of a beneficiary, and so is arguably distinguishable. English courts have held that if the insured dies as a result of his own misconduct, such as when he is executed for a crime, the policy is void;[92] and that view has had some following in the United States.[93] But a majority of courts in this country hold that, unless the policy provides otherwise, the proceeds are collectible even though the insured brought about his own death through a criminal act.[94] The restraint on crime allegedly created by the contrary rule has been termed too speculative to be worth consideration. This appears to be true. It is very doubtful, to say the least, that anyone contemplating armed robbery, for example, would be encouraged by the thought that he might die and thus cause insurance on his

89. Metropolitan Life Ins. Co. v. Banion, 106 F.2d 561 (10th Cir. 1939). *See also* Hewitt v. Equitable Life Assurance Socy., 8 F.2d 706 (9th Cir. 1925); Standard Life Assurance Co. v. Trudeau, 9 Que. B.R. 499 (1900).

90. Greer v. Supreme Tribe, 195 Mo. App. 336, 190 S.W. 72 (1916). *See also* Women of Woodcraft v. Rausch, 24 Colo. App. 304, 134 P. 141 (1913).

91. 117 S.W.2d 813 (Tex. Civ. App. 1928). *See also* Prudential Ins. Co. v. Goldstein, 43 F. Supp. 765 (E.D.N.Y. 1943).

92. Amicable Socy. v. Bolland, 4 Bligh (n.r.) 194, 5 Eng. Rep. 70 (H.L. 1830).

93. Burt v. Union Central Life Ins. Co., 187 U.S. 362 (1902); Molloy v. John Hancock Mut. Life Ins. Co., 327 Mass. 181, 97 N.E.2d 422 (1951).

94. Prudential Ins. Co. v. Petril, 43 F. Supp. 768 (E.D. Pa. 1942); Taylor v. John Hancock Mut. Life Ins. Co., 11 Ill. 2d 227, 142 N.E.2d 5 (1957); Bird v. John Hancock Mut. Life Ins. Co., 320 S.W.2d 955 (Mo. App. 1959). However, a policy provision barring recovery in this situation would probably be enforced in most states. *E.g.*, Novak v. Equitable Life Assurance Socy., 101 Ill. App. 2d 392, 243 N.E.2d 269 (1968).

life to become payable to his family. On the other hand, experience shows that insurance is sometimes procured by a beneficiary who expects to kill the insured.

Persons whose lives are insured, however, sometimes do commit *suicide* in order to have the proceeds payable to the beneficiary. Here, too, the English view, followed in a few American cases, is that public policy forbids payment of the proceeds when the insured kills himself.[95] But in most American states today, not only is suicide no defense if the policy does not so provide,[96] but many statutes expressly limit the company's power to exclude by contract liability for suicide. Typically such statutes state that although liability may be excluded within two years of issuance of the policy, it may not be excluded for suicide occurring thereafter.[97] It is unclear, however, why American law, unlike English, distinguishes between murder and suicide. Of course, in the suicide cases, the person committing the wrongful act will receive no personal benefit from the insurance because he is dead;[98] but that is true in murder cases as well, if, as often happens, the murderer is dead and a claim is asserted by his assignee or personal representative. That the murderer will receive no personal benefit is never considered significant. Presumably then, the real difference between murder and suicide is that public feeling against murder is far stronger; in fact, in many states suicide is not a crime at all.[99]

Although murder and suicide are different, the solution reached in many states to the suicide problem suggests a sensible resolution of the question whether an insurance company should be allowed to provide for the exclusion of liability for a death caused by a beneficiary's murder of the insured. Such a provision, if restricted to a murder occurring within a limited period of time, seems to be a reasonable safeguard against fraud and the difficulties of proof it entails. After the period has elapsed, however, the public interest in barring any inducement to crime is sufficiently protected by the general rules barring the murderer or persons claiming through him from taking the proceeds, and insurance companies should not be

95. Beresford v. Royal Ins. Co., [1938] A.C. 586; Ritter v. Mutual Life Ins. Co., 169 U.S. 139 (1898).

96. *E.g.*, Gulfco Finance Co. v. Guillory's Estate, 134 S.2d 121 (La. App. 1961).

97. VA. CODE ANN. § 38.1-437 (1950); UTAH CODE ANN. § 31-22-15 (1953).

98. On this basis, suicide can be distinguished from an attempt to collect disability benefits for a self-inflicted injury. *See* Potts v. Barrett Div., 48 N.J. Super. 554, 138 A.2d 574 (1958). *But see* Prudential Ins. Co. v. Rice, 222 Ind. 231, 52 N.E.2d 624 (1944).

99. *E.g.*, State v. Campbell, 217 Iowa 848, 251 N.W. 717 (1933); Prudential Ins. Co. v. Gray Mfg. Co., 328 F.2d 428 (2d Cir. 1964).

permitted to retain those proceeds. Of course, from an actuarial standpoint, murder is a less important insurance risk than suicide, and that may explain why companies today rarely try to exclude murder from coverage.

An insurance company may also be excused from paying the proceeds if the beneficiary who murders the insured is the owner of the policy. The *Restatement of Restitution* states that "if the policy is taken out by the beneficiary, and he later murders the insured, even though the beneficiary had no intent to kill when the policy was issued, the insurer is not liable . . . [since] there is no reason why the estate of the insured should be entitled to the proceeds."[100] The same principle seems to apply if the policy is originally taken out by the insured and later assigned, as a gift or for value, to the murderer. Professor Wade's proposed statute, however, distinguishes the two cases, although his reasons are unclear. Apparently the statute's basis is that if the insured originally owned the policy, even though he later transferred all rights in it to the murderer, the proceeds become payable to the insured's estate.[101] But since other assets which have been given or sold to the murderer do not revert to the transferor's estate by virtue of the crime, there seems to be no reason for treating insurance differently.

The cases on this point are in conflict. In *New York Mutual Life Insurance Company v. Armstrong*,[102] a judgment for the administratrix of the victim, who was insured under a policy which had been assigned, was reversed. The Court stated that after the policy was assigned to the murderer, "his representatives alone would have a valid claim under it . . . . Proof, therefore, that he caused the death of the assured by felonious means must necessarily have defeated a recovery . . . ."[103] In *West Coast Life Insurance Company v. Crawford*,[104] however, in which a father took out insurance on the lives of his children and later murdered them, it was held that unless fraud could be proved, the proceeds would be payable to the children's estates.

If it is determined on any ground that the insurance company is excused from paying the death benefits, further complications

100. RESTATEMENT OF RESTITUTION § 189, comment *e* at 777 (1937). *See also* 5 A. SCOTT, TRUSTS § 494.2 (3d ed. 1967); W. VANCE, INSURANCE § 117, at 722 (3d ed. 1951).

101. Wade, *supra* note 38, at 741.

102. 117 U.S. 591 (1886).

103. 117 U.S. at 598. *See also* Jack v. Mutual Reserve Fund Life Assn., 113 F. 49 (5th Cir. 1902).

104. 58 Cal. App. 2d 771, 138 P.2d 384 (1943). *See also* New York Life Ins. Co. v. Davis, 96 Va. 737, 32 S.E. 475 (1899).

arise. It seems reasonable that, in such a situation, the premiums paid should be returned or else that the cash surrender value should be awarded to the policy owner, even though he is the murderer, since the murderer should not forfeit his own property. Authority on this point, however, is slight.[105]

If the insurer is not excused from paying the proceeds, they are ordinarily held payable to the personal representative of the insured for distribution to his heirs, which, today at least, would not include the murderer. In many states insurance proceeds are exempt from creditors' claims and inheritance taxes only when they are paid to a named beneficiary. It is questionable whether such proceeds lose their special status when they are paid to the insured's personal representative after the designated beneficiary has murdered the insured. What meager authority exists on this point is divided.[106]

In many cases the policy names an alternate beneficiary to take if the primary beneficiary predeceases the insured. That raises a question similar to the one considered earlier in connection with substitutional gifts in a will. Some courts have ordered the proceeds paid to the alternate beneficiary in this situation—a result approved by the writers.[107] But what happens if the alternate beneficiary is a relative of the murderer but not of the insured? In *Turner v. Prudential Insurance Company*,[108] the court held that when a wife murdered her husband, the insurance proceeds should be paid to her children by a prior marriage, who were named as contingent beneficiaries, rather than to the husband's children who were born after his wife's children had been designated to take. Although the court purported thereby to carry out the insured's probable intent, its conclusion is highly questionable. A curious case involving this problem arose in California. In that case, a husband murdered his wife who was insured under two policies in which he was named the primary beneficiary. In one policy, a friend of the wife was designated as an alternate beneficiary, and the California court

105. Professor Wade disagrees (Wade, *supra* note 38, at 748), and the RESTATEMENT OF RESTITUTION takes no position (§ 189, comment *e* at 777). In some cases, however, the insurer has either returned the premiums [Prince of Wales v. Palmer, 25 Beav. 605, 53 Eng. Rep. 768 (Ch. 1858)], or paid a smaller benefit under the terms of the policy [Mackiowak v. Polish Union, 236 App. Div. 44, 258 N.Y.S. 134 (1932); National Aid Life Assn. v. May, 201 Okla. 450, 207 P.2d 292 (1949)].

106. *Compare* Cooper v. Krisch, 179 Ark. 952, 18 S.W.2d 909 (1929), *with* Succession of Butler, 147 S.2d 684 (La. App. 1962), *cert. denied*, 244 La. 117, 150 S.2d 584 (1963). *See also* Farmers & Merchants Bank v. Helton, 278 S.W.2d 352 (Tex. Civ. App. 1955).

107. 5 A. SCOTT, TRUSTS § 494.1 (3d ed. 1967); Wade, *supra* note 38, at 741.

108. 60 N.J. Super. 175, 158 A.2d 441 (1960). *See also* Neff v. Massachusetts Mut. Life Ins. Co., 158 Ohio St. 45, 107 N.E.2d 100 (1952).

awarded the proceeds to her.[109] The other policy stated that the husband's mother would be the beneficiary if the husband failed to survive the insured. A federal court held that the proceeds of this policy were payable to the wife's estate, since the condition of payment to the husband's mother was not literally fulfilled.[110] Although the literalistic reasoning used by the federal court is questionable, the conclusion reached probably fulfilled the insured's intent under the circumstances.

Another difficulty in the insurance situation concerns the disposition of successive interests. If the policy gives the murderer only an income interest in the proceeds, which are payable on his death to a secondary beneficiary, will the latter's enjoyment be accelerated by virtue of the murderer's disqualification? The only case on this point held that the secondary beneficiary must wait until the murderer dies.[111] Such adherence to the literal language of an instrument does not seem to give effect to the maker's wishes in the light of unanticipated events.

Sometimes an *insured* kills the beneficiary whom he has designated. Ordinarily a beneficiary's rights are lost if he fails to survive the insured. That the failure to survive was caused by murder should make no difference, just as a bequest lapses even though testator killed the legatee.[112] Devolution of the murderer's own property does not have to be altered in order to remove any incentive to murder, since the murderer could usually have achieved the same result by an innocent act, such as naming a new beneficiary of the policy or altering his will. That reasoning has been recognized in several cases.[113] The statute proposed by Professor Wade, however, provides that insurance proceeds in this situation shall be paid to the murdered beneficiary's estate at the murderer's death unless an

109. Beck v. West Coast Life Ins. Co., 38 Cal. 2d 643, 241 P.2d 544 (1952).

110. Beck v. Downey, 191 F.2d 150 (9th Cir. 1951). The United States Supreme Court reversed and remanded for reconsideration in the light of the California decision, *Beck v. West Coast Life Ins. Co.* Downey v. Beck, 343 U.S. 912 (1952). On remand, the 9th Circuit again reached the same result holding that California law was not controlling. Beck v. Downey, 198 F.2d 626, *cert. denied*, 344 U.S. 875 (1952).

111. Neff v. Massachusetts Mut. Life Ins. Co., 158 Ohio St. 45, 54, 107 N.E.2d 100, 104 (1952). The same problem would arise if a life tenant named in a will murdered the testator. In some situations, acceleration of the remainder would probably not carry out the testator's intent. *See* 5 A. SCOTT, TRUSTS § 492.5 (3d ed. 1967); RESTATEMENT OF RESTITUTION § 187, comment *k* at 770 (1937).

112. *See* text accompanying notes 81–82 *supra*.

113. Aetna Life Ins. Co. v. Mitchell, 180 F. Supp. 674 (M.D. Pa. 1960); Belt v. Baser, 238 Ark. 644, 383 S.W.2d 657 (1964); Union Central Life Ins. Co. v. Elizabeth Trust Co., 119 N.J. Eq. 505, 183 A. 181 (1936). Of course, if the slain beneficiary's right in the policy is vested, the proceeds will go to the beneficiary's estate. Parker v. Potter, 200 N.C. 348, 157 S.E. 68 (1931).

alternate beneficiary is named or "unless the slayer, by naming a new beneficiary or assigning the policy, performs an act which would have deprived the decedent of his interest in the policy if he had been living."[114] It is difficult to see the reason for that result. Consistency with Professor Wade's suggestion here seems to require that when a testator kills a legatee or when a man kills a presumptive heir, the victim's estate will share in the distribution of the murderer's property unless the murderer makes a will expressly disinheriting his victim. Such a rule would contribute neither to the discouragement of crime nor to the fulfillment of the probable intention of property owners.

The source of the premium payments may also be relevant in insurance cases. If the murderer has paid the premiums, can he get them back or recover a proportionate share of the proceeds? There are decisions in community property states holding that he can. In *Prudential Insurance Company v. Harrison*,[115] for instance, the court allowed a husband who killed his wife to recover one half the proceeds of a policy on her life on the ground that they were community property since the premiums had been paid with community funds. In a later case, however, the same court held that a murdering spouse's interest was limited to one half the surrender value of the policy.[116] But in many cases arising in community property states, this problem seems to have been overlooked. In other jurisdictions, premiums paid by a nonowner would probably be regarded as a gift to the policy owner and could not be recovered.

The question of who gets the insurance proceeds in an intrafamilial murder can be quite complex. Understandably, insurance companies have often resorted to interpleader actions to resolve conflicting claims. Several state statutes protect insurers who have made payments in good faith to the wrong party[117] and a court might well reach the same result even in the absence of such a statute.[118] The concept of good faith, however, does not include every honest mistake. In *McDuffie v. Aetna Life Insurance Company*,[119] the company paid the proceeds to the beneficiary—the

114. Wade, *supra* note 38, at 741.

115. 106 F. Supp. 419 (S.D. Cal. 1952).

116. Manufacturers' Life Ins. Co. v. Moore, 116 F. Supp. 171 (S.D. Cal. 1953); *cf.* Succession of Butler, 147 S.2d 684 (La. App. 1962), *cert. denied*, 244 La. 117, 150 S.2d 584 (1963).

117. *E.g.*, MINN. STAT. § 525.87 (1957); OKLA. STAT. tit. 84, § 231 (Supp. 1967); Wade, *supra* note 38, at 749.

118. *But cf.* Life & Casualty Ins. Co. v. Webb, 112 Ga. App. 344, 145 S.E.2d 63 (1965).

119. 160 F. Supp. 541 (E.D. Mich. 1957), *affd.*, 273 F.2d 609 (6th Cir. 1960).

insured's wife—after she was tried for killing her husband and acquitted. Later the insured's mother sued for payment and collected; the court held that the acquittal of the wife was not res judicata and did not warrant the company's payment to her.

IV. Joint Tenancy

In many intrafamilial murders, the murderer and his victim own land or personal property jointly. In such cases, several courts have allowed the murderer to succeed to the property, holding that statutes barring inheritance by a murderer were inapplicable because of the peculiar nature of succession by a joint tenant.[120] Those decisions have been criticized by writers, who have pointed out that the murderer is thereby permitted to profit by his crime because he has assured his survival of the victim—the fact upon which his succession depends.[121] More recent cases tend to recognize this fact and to deprive the murderer of his right to survivorship. All authorities agree, however, that the murderer should be allowed to keep whatever right he may have during his lifetime to the income from the property, since that interest is not acquired because of the crime.[122] There is also virtually complete agreement that the relative life expectancies of the murderer and the victim should not be considered, and that any doubt as to who would have survived but for the crime should be resolved against the killer. It is thus irrelevant that the murderer was younger than the victim and under accepted mortality tables would probably have outlived him anyway.[123]

A substantial difference of opinion does exist as to how the property is to be divided. Many courts have awarded everything but the murderer's life interest to the victim's estate,[124] while others have

120. Welsh v. James, 408 Ill. 18, 95 N.E.2d 872 (1951); *In re* Estate of Foster, 182 Kan. 315, 320 P.2d 855 (1958); Oleff v. Hodapp, 129 Ohio St. 432, 195 N.E. 838 (1935); Wenker v. Landon, 161 Ore. 265, 88 P.2d 971 (1939).

121. Ames, *supra* note 14, at 237; G. Bogert, Trusts § 478 (2d ed. 1960); 5 A. Scott, Trusts § 493.2 (3d ed. 1967); Restatement of Restitution § 188 (1937).

122. Restatement of Restitution § 188, comment *b* at 773 (1937); Wade, *supra* note 38, at 728-32; *In re* Hawkins Estate, 213 N.Y.S.2d 188 (1961); Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188 (1927).

123. Ames, *supra* note 14, at 237; Restatement of Restitution § 188, comment *a* at 773 (1937); Nieman v. Hurff, 11 N.J. 55, 93 A.2d 345 (1952). *But see* Sherman v. Weber, 113 N.J. Eq. 451, 167 A. 517 (1933).

124. Hargrove v. Taylor, 236 Ore. 451, 389 P.2d 36 (1964); Estate of King, 261 Wis. 266, 52 N.W.2d 885 (1952).

divided the property equally between the murderer and the victim's estate.[125] Although the former solution is favored by the *Restatement* and the texts, the latter has much to recommend it. In an ordinary joint tenancy the murderer could have cut off the victim's right of survivorship by a severance. In other situations in which a murder accomplishes a result which could have been achieved by an innocent act, the murderer cannot be said to have profited from his crime and is consequently entitled to his share of the property after the murder.[126] The same should be true here. Professor Scott rejects this reasoning in the case of joint tenancy, and accepts it for the situation in which the owner of an insurance policy kills the beneficiary,[127] but it is difficult to see any distinction between the two cases. Professor Wade's proposed statute allows the murderer to obtain a severance or partition after the crime is committed, but otherwise the property is all to go to the victim's estate upon the murderer's death.[128] That is consistent with the result he recommends in insurance cases; but it is hard to reconcile with the general rule that the victim's estate does not share in the murderer's property under his will or on intestacy, even if the murderer takes no action to disinherit the victim.[129]

Land held jointly by a husband and wife—tenancy by the entirety—differs from ordinary joint tenancy in that neither spouse can cut off the other's right of survivorship by severance. The provision in Professor Wade's statute for a possible severance by the murderer is inapplicable to tenancy by the entirety.[130] Nevertheless, in many states, a spouse can in fact destroy the right of survivorship by obtaining a divorce. Some courts which have divided land equally between the murderer and the victim's estate have relied on the analogy to a divorce, for a divorce transforms a tenancy by the entirety into a tenancy in common.[131] Of course, the murderer, in

125. Ashwood v. Patterson, 49 S.2d 848 (Fla. 1951); Bradley v. Fox, 7 Ill. 2d 106, 129 N.E.2d 699 (1955); National City Bank v. Bledsoe, 237 Ind. 130, 144 N.E.2d 710 (1957). Of course, murder would be irrelevant if the murderer and victim held as tenants in common, since there the order of deaths does not matter. Bierbrauer v. Moran, 244 App. Div. 87, 279 N.Y.S. 176 (1935).

126. *See* text following note 60 *supra* and accompanying notes 81, 113 *supra*.

127. 5 A. Scott, Trusts §§ 493.2, 494.4 (3d ed. 1967).

128. Wade, *supra* note 38, at 732.

129. *See* text accompanying and following note 114 *supra*.

130. Wade, *supra* note 38, at 728.

131. National City Bank v. Bledsoe, 237 Ind. 130, 144 N.E.2d 710 (1957); Bedwit v. Herr, 339 Mich. 265, 63 N.W.2d 841 (1954); Barnett v. Couey, 224 Mo. App. 913, 27 S.W.2d 757 (1930).

order to obtain a divorce, would have to show grounds for it, but, as a practical matter, that is usually not a substantial hurdle today for a determined spouse.

Joint bank accounts pose a special problem. The terms of a joint deposit agreement typically provide that either party can withdraw all the funds. In this situation, courts could hold that, since even without the murder the murderer could have lawfully acquired the whole account, he should be permitted to keep it as "his own" property, not acquired by his crime. On the other hand, they might assume that, but for the crime, the victim would have withdrawn all the funds and that therefore those funds should be assigned to his estate. It is unclear which is the better solution since, in these circumstances, the accepted dichotomy between the victim's property and the murderer's is hard to apply. Professor Wade favors the second solution on the theory that any doubts about what would have happened but for the crime should be resolved against the murderer. But, as he points out, even though the bank may pay funds to either party, the recipient may still be liable to the other depositor.[132] Thus, it has been held that when one person has deposited his own funds in a joint account with another, the other must return to the depositor funds he withdrew from the account.[133]

Perhaps the courts should look to the original source of jointly held property in deciding to whom it would pass in the event of a murder. Thus, if a husband kills his wife, he would be able to claim that a house held in joint tenancy which was purchased with his money, or a joint bank account created by deposits of his own funds, was really his and should not be forfeited any more than any other of his property. In one case, after a husband killed his wife, stock which they held in joint tenancy was divided between them on the basis of their respective contributions.[134] Generally, however, courts do not consider the source of jointly held property relevant, and most opinions do not indicate whose funds were used to acquire the property. Professor Wade's suggested statute allows for the enforcement of "any trust arising because a greater proportion of the property has been contributed by one party than by the other."[135] But in most cases this proviso will have no effect, since if a husband purchases land which is taken in the names of both husband and wife, a gift to her will frequently be presumed; and if it

132. Wade, *supra* note 38, at 734.

133. Koziol v. Harris, 82 Ill. App. 2d 472, 226 N.E.2d 387 (1967).

134. Abbey v. Lord, 168 Cal. App. 2d 499, 336 P.2d 226 (1959).

135. Wade, *supra* note 38, at 732.

is, no trust in his favor will arise.[136] If the creation of a joint tenancy is in fact regarded as a gift by the person supplying the funds, succession to the property in the event of a murder should not be affected by the source of the funds, since, as we have seen, a murderer cannot reclaim property which he has previously given to the victim. It may be questioned, however, whether the common understanding of joint tenancy is in accord with the notion that an immediate gift has been made to the noncontributing joint tenant. Indeed, for purposes of the federal estate and gift tax, when a husband buys a house which is deeded to him and his wife jointly, no transfer is deemed to take place until he dies.[137] Certainly in some cases the parties themselves also regard the property as "his" until his death.

On the other hand, it would be a difficult task for courts in every case to determine (1) whose funds were used to acquire the property in question—although this must be done frequently in the estate tax setting—and (2) whether or not an immediate gift to the noncontributing party was intended. These practical problems may justify a simple resolution, such as an equal division of the property.

Other forms of property, not mentioned in the foregoing discussion, have rarely been treated in the reported cases and are not expressly covered by statutes. It is probably fair to assume that if a beneficiary of a revocable living trust murders the settlor, or if the designated beneficiary of a death benefit under an employee retirement plan kills the employee, the rules established with respect to wills and insurance will point the way to a proper solution.[138] Another special problem has arisen in suits against a murderer for wrongful death. In *Dishon's Administrator v. Dishon's Administrator*,[139] a husband killed his wife, and her administrator sued his estate. The action was dismissed on the ground that by statute any recovery for wrongful death would go to the husband and that therefore the suit was pointless. More recently, however, a similar suit was upheld by the Oregon Supreme Court,[140] which relied on a statute barring a murderer's succession

136. Hiatt v. Hiatt, 168 S.W.2d 1087 (Mo. 1943).

137. INT. REV. CODE of 1954, §§ 2040, 2515. Section 2515(c) provides that a donor may treat such a gift as completed when it is made, but the exercise of this election will have no effect on § 2040—the entire value will nonetheless be included in the husband's estate for estate tax purposes.

138. *See* 32 OPS. ATTY. GEN. ORE. 251 (1965); Greifer's Estate, 333 Pa. 278, 5 A.2d 118 (1939); Keels v. Atlantic Coast Line Ry., 159 S.C. 520, 157 S.E. 834 (1931).

139. 187 Ky. 497, 219 S.W. 794 (1920). *See also* Davenport v. Patrick, 227 N.C. 686, 44 S.E.2d 203 (1947).

140. Apitz v. Dames, 205 Ore. 242, 287 P.2d 585 (1955).

as heir, legatee, or insurance beneficiary: "It is true that this statute does not, in express words bar recovery by a murderer under the Death Statute, but it does by clearest language establish the public policy of the state in harmony with the common law rule that a criminal shall not profit by his own crime."[141] The court held that this policy justified recovery by the beneficiaries who were designated by the statute to take in the absence of a widower. Perhaps further litigation on this question can be expected as the doctrine of immunity for intrafamilial torts is abandoned in other jurisdictions.

V. Motive, Lesser Degrees of Homicide, and Other Offenses

The criminal who murders in order to profit from his crime has already been discussed. But in most cases, the killer is not motivated by the thought of profit and in many instances, a lesser offense than murder is involved. Thus, it is important to examine whether such circumstances would affect the result.

With respect to motive, some courts which have allowed a killer to inherit have referred to the absence of a profit motive in the crime, but their decisions have been reached primarily on other grounds.[142] Georgia and Virginia at one time had statutes which barred succession only by those who killed in order to obtain the victim's property,[143] but these statutes were later amended to eliminate any reference to motive.[144] In other jurisdictions, the courts are virtually unanimous in holding that a murderer's motives are immaterial. Occasionally, the circumstances have evoked expressions of sympathy for the criminal. Thus, in a case in which a wife had killed her invalid husband, the court, having held the killing to be a felony, was moved to remark:

> I must in justice add this. Here was a woman who quite clearly enacted this tragedy not out of hatred of her husband—she and her husband had apparently been happily married for many years. She was deeply concerned for him particularly in the event of his surviving her. Doubtless she was exhausted by the work of continually looking after such a helpless man . . . . This is clearly a case of compassion rather than for condemnation.[145]

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141. 205 Ore. at 275, 287 P.2d at 600.

142. *E.g.*, Anstine v. Hawkins, 92 Idaho 561, 447 P.2d 677 (1968); Gollnick v. Mengel, 112 Minn. 349, 128 N.W. 292 (1910).

143. *See* Life Cas. Ins. Co. v. Webb, 112 Ga. App. 344, 145 S.E.2d 63 (1965); Ward v. Ward, 174 Va. 331, 6 S.E.2d 664 (1940).

144. *See* Ga. Code Ann. §§ 56-2506, 113-909 (1960); Va. Code Ann. § 64.1-18 (1968).

145. *In re* Dellow's Will Trusts, [1964] 1 All E.R. 771, 775 (Ch.).

But compassion did not suffice and the widow was not allowed to take as her husband's legatee and heir.

Many courts have held, however, that, if the crime is less than murder, the killer is not disqualified. Sometimes this result is thought to be dictated by a statute which refers only to "murder" as a bar to inheritance. In a California case,[146] for instance, the court permitted an heir convicted of manslaughter to inherit under such a statute:

> Whether this accords with natural right and justice is a question upon which we cannot enter. The right of inheritance in this state does not depend upon the ideas of court and counsel as to justice and natural right. The entire matter is in the control of the Legislature, and depends wholly upon the provisions of the statute . . . .[147]

An insurance beneficiary, on the other hand, after he was convicted of manslaughter, was held to be barred under California law from collecting the proceeds.[148] Although there is no apparent reason for distinguishing insurance from other assets for this purpose, courts here, as in other situations, have felt freer to apply to insurance what they conceive to be "natural right and justice" uninhibited by the language of any statute.

It is not clear, however, that "natural right and justice" do in fact require that unpremeditated homicide be a bar to succession. The *Restatement of Restitution* states that the constructive trust principles set forth therein "are not applicable where the slayer was guilty only of manslaughter."[149] But more recent cases and statutes have tended to equate voluntary manslaughter with murder for this purpose. The California statute, for example, was amended in 1955 to cover voluntary manslaughter, and the statute proposed by Professor Wade encompasses "any person who wilfully and unlawfully takes" another's life.[150] Courts operating under common-law principles, without any controlling statute, have also concluded that an intentional killing, albeit unpremeditated, is a bar.[151]

146. Estate of Kirby, 162 Cal. 91, 121 P. 370 (1912).

147. 162 Cal. at 94, 121 P. at 371. *See also* Strickland v. Wysowatcky, 128 Colo. 221, 250 P.2d 199 (1952); Moore v. Prudential Ins. Co., 342 Pa. 570, 21 A.2d 42 (1941).

148. Manufacturers' Life Ins. Co. v. Moore, 116 F. Supp. 171 (S.D. Cal. 1953); Prudential Ins. Co. v. Harrison, 106 F. Supp. 419 (S.D. Cal. 1952).

149. RESTATEMENT OF RESTITUTION § 187, comment *e* at 766 (1937).

150. Ch. 1110, [1955] Cal. Stats. 2108; Wade, *supra* note 38, at 721-22.

151. Chase v. Jenifer, 219 Md. 564, 150 A.2d 251 (1959); Metropolitan Life Ins. Co. v. McDavid, 39 F. Supp. 228 (E.D. Mich. 1941); *In re* Estate of Mahoney, 126 Vt. 31, 220 A.2d 475 (1966). *But cf.* Estate of Hall, [1914] P. 1. (C.A.). That result has been reached even in the face of a statute that referred only to "murder." Wilson v. Board of Trustees, 108 Ill. App. 2d 210, 246 N.E.2d 701 (1969).

Different problems arise if the killing was wrongful but not intentional, such as one caused by negligence. Most courts have held that this type of homicide does not disqualify the slayer.[152] That result was reached even in a case in which the claimant had been convicted of a felony, despite a statute which barred anyone who "feloniously" took the life of another.[153] Similarly, French courts have, in such circumstances, avoided a literal application of the Napoleonic Code, which bars inheritance by one who is convicted of killing the deceased, and have held that this bar applies only to intentional homicide.[154] On the other hand, other articles of the same Code allow inter vivos or testamentary gifts to be annulled on account of "grievous wrongs" done to the donor by the donee, and this language has been held to include an assault without intent to kill which led to the donor's death.[155] Apparently the basis for the distinction is that the probable intent of a donor or a testator should be given more weight than that of a deceased whose property is inherited. Presumably a donor or testator would feel sufficient resentment for a serious injury, even though not intentional homicide, to want to cancel the gift.

The question of the decedent's intent is a debatable one, but it has been rarely discussed by Anglo-American courts. Instead, as has been seen, these courts place primary emphasis upon preventing the criminal from profiting by his wrong.[156] It might appear that the Anglo-American decisions which permit a negligent killer to inherit are inconsistent with that traditional analysis, for it could be argued that even a negligent killer profits from a wrong which has assured his survival of the decedent. But it is somewhat fictitious for the courts to speak in terms of wresting "profit" from the wrongdoer, since in any of these cases, the existence of profit from the crime may be highly questionable. For example, when the killer has an actuarial probability of surviving the decedent anyway, the causal nexus between the crime and the

152. Commercial Travelers Mut. Assn. v. Witte, 406 S.W.2d 145 (Ky. 1966); Beene v. Gibralter Life Ins. Co., 116 Ind. App. 290, 63 N.E.2d 299 (1945); Schreiner v. High Court, 35 Ill. App. 576 (1890).

153. Hatcher v. Aetna Life Ins. Co., 105 F. Supp. 808 (D. Ore. 1952); Rosenberger v. Northwestern Mut. Life Ins. Co., 176 F. Supp. 379 (D. Kan. 1959). *But cf.* Hamblin v. Marchant, 103 Kan. 508, 175 P. 678 (1918).

154. C. Civ. art. 727 (65e ed. Petits Code Dalloz 1966); Martoglio v. Royère, [1950] Recueil Dalloz [D. Jur.] 222 (Tribunal civil, Aix).

155. C. Civ. arts. 955, 1046 (65e ed. Petits Codes Dalloz 1966); Desmet v. Desmet, [1937] Recueil Hebdomadaire de Jurisprudence [D.H. Jur.] I. 384 (Cour d'appel, Paris).

156. *See* text accompanying note 1 *supra.*

profit is unclear. Courts, however, avoid this problem of weighing actuarial probabilities by adopting a conclusive presumption of profit.[157] But in light of the problematic nature of the alleged profit, it simply seems unfair to apply the conclusive presumption against anyone guilty of only a minor wrong. Thus, profit is presumed, but the presumption applies only to those guilty of major wrongs.

It is hard to say at what point an offense becomes so heinous that a court is justified in presuming the offender did profit from his crime. One might expect that courts in making this difficult choice would have resorted to distinctions already established in the criminal law, such as those between murder and manslaughter or between felony and misdemeanor. But courts have usually rejected these ready-made bench marks in favor of others newly created for the occasion.[158]

Of course, a killer who is guilty of no criminal offense at all should not be disqualified. Thus a beneficiary who kills the insured in self-defense or by accident can collect the policy proceeds. That is true even if the terms of the policy bar recovery in every situation in which the beneficiary causes the death of the insured.[159]

There is an additional complication if the killer lacks the mental capacity necessary for mens rea. One court has held that a fifteen-year old who killed his father could not inherit, even though, because of his age, he was adjudicated a juvenile delinquent rather than convicted of murder.[160] On the other hand, if the killer is insane he is not disqualified.[161] Some cases indicate that the test of insanity for this purpose is the same as the one used by criminal law.[162] But one court has held that a more liberal test is to be applied here: a man may be insane and therefore capable of succeeding to the property of the victim even if he is sane under the *M'Naghten* rule followed in criminal cases.[163] On

157. *See* text accompanying note 123 *supra.*

158. *E.g.*, Estate of Mahoney, 126 Vt. 31, 220 A.2d 475 (1966); Hatcher v. Aetna Life Ins. Co., 105 F. Supp. 808 (D. Ore. 1952).

159. Sovereign Camp v. Everett, 58 Ga. App. 642, 199 S.E. 660 (1938). *See also* Hutcherson v. Sovereign Camp, 112 Tex. 551, 251 S.W. 491 (1923). *But cf.* National Aid Life Assn. v. May, 201 Okla. 450, 207 P.2d 292 (1949).

160. Sengillo's Estate, 206 Misc. 751, 134 N.Y.S.2d 800 (1954).

161. *In re* Pitts, [1931] 1 Ch. 546; Blair v. Travelers Ins. Co., 30 Ill. App. 2d 191, 174 N.E.2d 209 (1961); RESTATEMENT OF RESTITUTION § 187, comment *b* at 765 (1937). *But see* Women of Woodcraft v. Rausch, 24 Colo. App. 304, 134 P. 141 (1913). This is true in France even as to a legatee under a will. 5 DALLOZ, SUPPLÉMENT AU RÉPERTOIRE § 1065 (1890).

162. *See, e.g.*, Estate of Bobula, 19 N.Y.2d 818, 227 N.E.2d 49, 28 N.Y.S.2d 152 (1967).

163. Anderson v. Grasberg, 247 Minn. 538, 78 N.W.2d 450 (1956).

the other hand, the converse has also been held: a killer who had been acquitted on grounds of temporary insanity was nevertheless barred from taking benefits under an insurance policy.[164] The court stated that even though he "should not be subjected to punishment by imprisonment . . . the same reasoning would not apply in a civil suit in which he seeks benefits which would accrue to him only upon the death of the person for whose death he himself was responsible."[165]

In the civil law, disqualification of an heir as "unworthy" to inherit can arise even from offenses which do not cause the wrongdoer to profit. Under Roman law an heir could be "unworthy" even though he had committed no moral wrong at all. If a testator attempted informally to revoke a will, or if he left property to a son later found not to be his, the heir was unworthy to take.[166] In such cases, of course, the concept of barring a criminal from profiting from his crime is inapplicable. Rather, the rationale is to carry out the decedent's probable intent. This broad concept of unworthiness was considerably restricted by the Napoleonic Code which lists only a few specific grounds of disqualification.[167] These grounds include, in addition to murder, such wrongs as attempted murder and bringing a false capital accusation against the deceased. In addition, an inter vivos or testamentary gift may be annulled for "grievous wrongs" committed by the donee. Since such wrongs do not necessarily result in any profit to the wrongdoer, they are not encompassed by the basic premise under which Anglo-American courts operate in this area.

Despite this fundamental difference in basic approach, the results reached in most cases under the two systems are not substantially different. The grounds other than murder for declaring an heir "unworthy" are rarely invoked in France.[168] Cases of annulling a gift or a will for wrongs other than homicide are more common, but French courts have given these provisions a rather restrictive interpretation. For example, an unsuccessful attack on the decedent's will, sometimes held to render the contestant "unworthy" under Roman law,[169] has not been so treated by French

164. United States v. Kwasniewski, 91 F. Supp. 847 (E.D. Mich. 1950).

165. 91 F. Supp. at 853.

166. CODE 6.35.3; DIGEST 34.9.12, 49.14.46.

167. C. CIV. art. 727 (65e ed. Petits Codes Dalloz 1966). *See* 4 M. PLANIOL & G. RIPERT, DROIT CIVIL FRANÇAIS § 45 (2d ed. 1956).

168. 4 M. PLANIOL & G. RIPERT, DROIT CIVIL FRANÇAIS § 48 (2d ed. 1956).

169. DIGEST 49.14.29.1, 5.2.8.14. *But see* DIGEST 34.9.24.

courts.[170] Other claims that a bequest should be annulled for "ingratitude" by the donee have also been rejected either because the offense was not serious enough or because the testator showed his forgiveness by failing to change his will.[171] On the other hand, some American states have statutes which bar wrongdoers from succeeding to property even if their misconduct is not causally related to the succession. Nearly all such statutes deal with marital misconduct, such as desertion, adultery, nonsupport, bigamy, or some combination of these factors. American law on this matter, however, unlike the civil law, is largely unrelated to the law dealing with homicide; the statutes and the cases concerning one rarely refer to the other. This has led to some strange contrasts. In *Owens v. Owens*[172] a widow who was an accessory to her husband's murder was allowed to take dower on the ground that "the only statutory provision which, for criminal misbehavior, bars an action prosecuted for the recovery of dower, is when she 'shall commit adultery, and shall not be living with her husband at his death.' "[173] Are we to suppose, then, that the legislature considered a violation of the Seventh Commandment more heinous than an infraction of the Sixth?[174] That is unlikely; the more probable explanation of the discrepancy is that it was a legislative oversight. The problem of the adulterous wife came to the attention of legislatures earlier,[175] partly because adultery was more common than murder, and partly because there was greater need for relief in the case of adultery, since a murdering wife would often be executed and thus unable to claim dower anyway.

With respect to marital misconduct itself, American statutes make some rather peculiar distinctions. Whether the disqualification is based on fulfilling the decedent's probable intent, or on discouraging undesirable conduct, one would suppose that there is little reason to distinguish among succession by way of dower, succession as surviving joint tenant, or succession as heir. Yet such distinctions are made in the statutes, and in this area courts have

170. De Lachenal v. Fontaine-Tranchant, [1863] D.P. I. 82 (Cour de Cassation, July 30, 1861); 5 M. PLANIOL & G. RIPERT, DROIT CIVIL FRANÇAIS § 723 (2d ed. 1957). *See also* Succession of McDonald, 154 La. 1, 97 S. 262 (1923).

171. Sauce v. Sauce, [1930] D.H. Jur. I. 353 (Cour d'appel, Besançon); Charmillon v. Magniard, [1876] D.P. V. 396 (Cass. civ. 1re, Lyon, Jan. 14, 1870).

172. 100 N.C. 240, 6 S.E. 794 (1888).

173. 100 N.C. at 241, 6 S.E. at 794.

174. *Exodus* 20:13, 14. The same dichotomy once existed in other states as well. *Compare* Wall v. Pfandschmidt, 265 Ill. 180, 106 N.E. 785 (1914), *with* Stock v. Mitchell, 252 Ill. 530, 96 N.E. 1076 (1911).

175. *See* Statute of Westminster II, 1285, 13 Edw. 1, c. 34.

been even more reluctant to correct these anomalies than in the case of homicide. In *Schmeizl v. Schmeizl*,[176] for example, a wife who had deserted her husband and lived with another man for fifteen years was allowed to claim a share of her husband's estate. According to the court, the statute did not bar her "of her distributive share in her husband's personal estate," because the statute applied only to dower, and "a court is not at liberty to surmise a legislative intention contrary to the letter of the statute."[177] But a few years earlier the same court had rejected such a literalistic approach by denying a husband, who had killed his wife, the right to share in her estate, even though there was no statutory basis for excluding him.[178]

Nevertheless, the two cases are in fact distinguishable. Of course, with respect to the decedent's intent, it is quite possible that he would have wished to disinherit the wrongdoer in both situations. But in the case of murder he has no chance to do so, whereas he can take action to bar a deserting spouse from sharing in his estate, and his failure to do this creates a doubt as to his true intention. Furthermore, from a moral point of view, murder is more heinous than adultery. More important, however, is the absence of a causal connection between the crime and the benefit claimed by the adulterous spouse. If she is allowed to share in her husband's estate it will not be the result of her adultery, whereas in the case of murder, but for the crime, the killer might have predeceased the victim and therefore received nothing. A causal connection, under principles well-established in the common law, justifies the imposition of a penalty which may be disproportionate to the gravity of the offense in any scale of moral values. Following that reasoning, the common law does not consider it unjust to charge a tortfeasor who was only slightly negligent with heavy damages which were caused by his wrong, even though the same wrong, had it resulted in no harm, would have warranted only a light sanction or none at all. Likewise, the effect of depriving a killer of his right to inherit varies according to the size of the victim's estate. The most depraved killer suffers nothing under this rule if his victim is penniless. This is no different from a case in which one is guilty of extreme recklessness which happens to cause no harm. In the case of marital misconduct, however, there is no

176. 186 Md. 371, 46 A.2d 619 (1946).

177. 186 Md. at 374, 375, 46 A.2d at 621.

178. Price v. Hitaffer, 164 Md. 505, 165 A. 470 (1933).

comparable causal basis for imposing a penalty the size of which is unrelated to the enormity of the wrong.

Thus, the Anglo-American approach, to the extent that it can be contrasted with that of the civil law, has merit. Nevertheless, there are some decisions under the Napoleonic Code which seem sound in light of the decedent's probable intent. One court, for example, held that an employee who had stolen from a dying testatrix was barred from receiving a bequest under her will.[179] Such a case is not encompassed by the principle that a wrongdoer shall not profit from his wrong, nor is it covered by any American statute, nor, one suspects, would any American court annul the bequest on the ground of the decedent's probable wishes in this situation.

VI. Proof of the Crime

Assuming that an heir or a beneficiary is charged with a crime of sufficient gravity to disqualify him, that crime still must be proved. It is problematic how the outcome of any criminal proceedings against him will affect his right to succession. This problem has arisen in four types of cases.

In the first type, the alleged criminal has not been convicted and never will be because he is dead. This happens rather frequently, usually because the killer commits suicide shortly after the crime. It is questionable whether the absence of a conviction should make any difference if the murder can be established in a civil proceeding. The fact that a key witness—the suspect himself—is dead and cannot defend himself in person against the charge presents a problem, especially since forfeiture of a felon's property historically occurred only upon conviction. But these considerations are not particularly persuasive. In other areas of the law, the death of an alleged tortfeasor or debtor does not, under modern law, preclude proof of their past actions in a civil proceeding.[180] Courts operating under common-law principles have concluded, usually without even discussing the point, that the absence of a criminal conviction of the alleged murderer is irrelevant.[181]

On the other hand, many states have enacted statutes which bar

179. Gavel v. Gaillard, [1867] D.P. III. 31 (Tribunal civil, Lyon, Dec. 27, 1866). *See also* Digest 39.8.2.3, 39.5.29.2.

180. Such proof may be inhibited by statutory prohibitions against testimony by interested witnesses. The question whether the Dead Man's Statute would bar proof of murder by an interested witness has not arisen in any reported case.

181. Restatement of Restitution § 187, comment *f* at 766 (1937); Whitney v. Lott, 134 N.J. Eq. 586, 36 A.2d 888 (1944). *In re* Sigsworth, [1935] 1 Ch. 89; *In re* Johnson [1950] 2 D.L.R. 69 (Man. K.B. 1949).

one who is "convicted" of murder, and under those statutes courts have almost always held that the murder can be proved only by a criminal trial. Often such statutes refer only to certain modes of succession, and as a result courts have applied different rules to different types of property. In *Smith v. Greenberg*,[182] a husband who had killed his wife and daughter and then committed suicide was not allowed to take as beneficiary of insurance on their lives, but was permitted to inherit from them under a statute barring inheritance by anyone "convicted of murder." In France a similar dichotomy exists. An heir is unworthy under the Code only if he is convicted of murder, whereas conviction is unnecessary to bar a legatee from claiming under a will.[183] That distinction, which is not found in Roman law,[184] is predicated, as in American cases, simply upon a literal interpretation of the statutory language. One may doubt, however, that the legislators really intended to make such irrational distinctions. It is more likely that the reference to conviction in these statutes arose simply from failure to consider situations in which conviction was impossible, although in one instance the legislative history of a statute indicated that the case of a murderer who committed suicide was consciously omitted by the draftsmen.[185]

Not all courts have felt compelled to construe such statutes literally. In *Smith v. Todd*,[186] in which an insurance beneficiary had killed the insured and committed suicide, the murderer's administrator was denied the proceeds, even though the statute covered insurance and referred to one "convicted" of killing. The court concluded that "it was the legislative intent, not to abrogate or delimit the common-law rule barring a beneficiary who murders the insured from taking under the policy, but to add to and extend that rule" by making any conviction conclusive as to the fact of the crime.[187] On the other hand, a similar argument was rejected in *Bird v. Plunkett*,[188] a case involving succession by will, on the ground that no common-law bar against murderers existed.

182. 121 Colo. 417, 218 P.2d 514 (1950). *Compare* Horn v. Cole, 203 Ark. 361, 156 S.W.2d 787 (1941), *with* Barnes v. Cooper, 204 Ark. 118, 161 S.W.2d 8 (1942).

183. *Compare* Maguaire-Roussell v. Fanchon, [1897] D.P. II. 184 (Tribunal civil, Montreuil-sur-Mer), *with* Martin v. Sautel, [1952] D. Jur. 345 (Cour d'appel, Lyon, June 11, 1951).

184. *See* DIGEST 49.14.9.

185. Bird v. Plunkett, 139 Conn. 491, 503-04, 95 A.2d 71, 76 (1953).

186. 155 S.C. 323, 152 S.E. 506 (1930). *See also* Cowan v. Pleasant, 263 S.W.2d 494 (Ky. 1953); Metropolitan Life Ins. Co. v. Hill, 115 W. Va. 515, 177 S.E. 188 (1934).

187. 155 S.C. at 337, 152 S.E. at 511.

188. 139 Conn. 491, 95 A.2d 71 (1953).

In a second class of cases, the alleged killer is alive and might be convicted but has not yet been brought to trial. Several courts, operating under common-law standards, have held that it is irrelevant that the appropriate public officials have not seen fit to prosecute the suspect,[189] but other courts, following a "conviction" statute, have held that that statute precludes proof of the crime in a civil proceeding.[190] It seems reasonable, when criminal charges are pending, even in a jurisdiction which requires a conviction, at least to defer distribution of the assets to the accused until the criminal proceedings are concluded, unless they have been postponed indefinitely because the accused is incompetent to stand trial. Courts, however, have refused to take this course.[191]

In a third type of case, the accused has been tried and either acquitted or convicted of a lesser offense, not serious enough to bar his right to succession. Some courts have held an acquittal conclusive on the ground that the controlling statute required a conviction.[192] But even when there is no such statute, it could be argued that courts should refrain from relitigating a question which has been determined in the criminal proceedings. Courts, however, have generally admitted evidence that the accused, though acquitted, was in fact guilty, and indeed some have held that the prior acquittal is no evidence at all.[193] That result can be justified on the grounds that proof beyond a reasonable doubt is not necessary to establish the existence of a crime in a civil proceeding, and an acquittal may mean merely failure to meet the higher standard of proof required in criminal proceedings. Moreover, since the persons entitled to take if the accused is barred are not parties to the criminal case, they should not be bound by the result of proceedings in which they did not participate.

Finally, there are cases in which the killer has been convicted of murder. Presumably such a conviction should be conclusive

189. In the Estate of G., [1946] P. 183; Southern Life & Health Ins. Co. v. Mack, 17 S.2d 370 (La. App. 1944) (insurance).

190. Sharp v. Sharp, 228 La. 89, 81 S.2d 820 (1955) (inheritance); Estate of Agoure, 165 Cal. 427, 132 P. 587 (1913).

191. Oberst v. Mooney, 135 Kan. 433, 10 P.2d 846 (1932); Winters Natl. Bank v. Shields, 29 Ohio L. Abs. 193 (Prob. 1939). *But cf.* 44 OPS. ATTY. GEN. W. VA. 385 (1952).

192. McMichael v. Proctor, 243 N.C. 479, 91 S.E.2d 231 (1956); Bird v. Plunkett, 139 Conn. 491, 95 A.2d 71 (1953); Martoglio v. Royère, [1950] D. Jur. 222 (Tribunal civil, Aix). *But see* Gianola-Clairet v. Gianola, [1938] S. Jur. II. 109 (Cour d'appel, Douai, July 27, 1937).

193. Burns v. United States, 200 F.2d 106 (4th Cir. 1952); Horn v. Cole, 203 Ark. 361, 156 S.W.2d 787 (1941); Webb v. McDaniel, 218 Ga. 366, 127 S.E.2d 900 (1962). However, CAL. PROBATE CODE § 258 (West, 1956) makes an acquittal conclusive.

under a statute which provides that one convicted of murder shall not inherit.[194] But can a court reach the same conclusion in the absence of statutory authority? Writing in 1930, E. M. Grossman commented that "it would undoubtedly be convenient, as a practical matter if the record of a criminal trial"[195] were conclusive, so that further litigation could be avoided. "But," he said, "the practical advantages of such a rule do not justify the assumption of its existence if established legal principles lead to a different result."[196] In most of the earlier cases, "established legal principles" received more attention than the "practical" advantages.[197] But not all of the "established legal principles" require the conclusion that a criminal conviction be ignored. For example, if the conviction is made conclusive, the different standards of proof in criminal and civil proceedings create no problem; proof of guilt beyond a reasonable doubt in the criminal case is more than sufficient to satisfy the preponderance-of-the-evidence test in the civil. Furthermore, the convicted criminal cannot complain that he was barred from succession by a judgment in which he was unrepresented.

The principal obstacle to making the conviction conclusive is that the persons who would succeed to the decedent's property, if the murderer is disqualified without a civil trial, would be taking advantage of criminal proceedings to which they were not parties.[198] For that reason, many cases have held that conviction of an alleged killer is not even admissible as evidence in a later civil proceeding.[199] Of course, if the conviction is based on a plea of guilty, the plea can, under established principles, be received in evidence as an admission by the accused.[200] The statute proposed by Professor Wade provides that any conviction shall be evidence in the civil action,[201] and some courts, in the absence of any statute, have held a conviction to be

194. *See* Laprade v. Laprade, [1881] D.P. III. 85 (Tribunal civil, Marmande, June 25, 1879). *But see* Goodwin v. Continental Cas. Co., 175 Okla. 469, 53 P.2d 241 (1935). The statutes of Indiana and California expressly provide that a conviction shall be conclusive. IND. ANN. STAT. § 6-212; CAL. PROBATE CODE § 258 (West 1956).

195. Grossman, *Liability and Rights of the Insurer When the Death of the Insured Is Caused by the Beneficiary or by an Assignee*, 10 B.U. L. REV. 281, 297 (1930).

196. *Id.* at 297.

197. *See* cases cited at note 199 *infra*.

198. 5 A. SCOTT, TRUSTS § 492.4 (3d ed. 1967).

199. *See, e.g.*, Lillie v. Modern Woodmen, 89 Neb. 1, 130 N.W. 1004 (1911); Goodwin v. Continental Cas. Co., 175 Okla. 469, 53 P.2d 241 (1935); Metropolitan Life Ins. Co. v. Hand, 25 Ga. App. 90, 102 S.E. 647 (1920).

200. Davis v. Aetna Life Ins. Co., 279 F.2d 304 (9th Cir. 1960). A guilty plea has been admitted even when the criminal was not a party to the civil suit. McClain v. All States Life Ins. Co., 82 Ohio App. 354, 80 N.E.2d 815 (1948).

201. Wade, *supra* note 38, at 750. *See also* GA. CODE ANN. § 56-2506 (1960).

prima facie proof of guilt.[202] An objection may be made to this view on logical grounds. A conviction, if not conclusive as res judicata, is only an opinion by the finder of fact in the criminal trial, who, having no personal knowledge, could not be a witness, and even if he could, his opinion would be inadmissible under the hearsay rule unless he appeared in court in the civil case. Nevertheless, there is both practical convenience and reasonable justice in the view that the conviction is evidence. It dispenses with the trouble and expense of proving the crime again in the civil suit, and it still affords the accused an opportunity to show that he was unjustly convicted.

A growing number of courts have held that even without a statute so providing, the conviction is conclusive in proceedings to determine the succession to property.[203] This result has been reached even under a statute which provided that the conviction should be "evidence."[204] These cases, too, seem to be sound. The several legislatures which have provided that the conviction shall be conclusive have not considered it an insuperable difficulty that the persons taking in place of the murderer were not parties to the criminal trial. Should not a court also be able to determine that the practical advantages of avoiding relitigation of an issue outweigh "established legal principles" concerning privity?

There are other problems, however, with treating a conviction as conclusive. Since many courts have departed from the traditional distinctions of the criminal law in these cases,[205] the conviction may not actually have determined the issue that is deemed relevant to the civil proceeding. If the killer was convicted of manslaughter, for instance, a court may be unable to tell whether the conviction was for voluntary manslaughter, which is usually a disqualification, or for involuntary manslaughter, which is usually not.[206] If a plea of insanity was rejected in the criminal trial, and the test for insanity is different in determining the right to inherit, the conviction cannot be treated as res judicata. Thus relitigation can be avoided only to the extent that the substantive standards of criminal law govern succession to property.

202. Sovereign Co. v. Gunn, 227 Ala. 400, 150 S. 491 (1933); Estate of Crippen, [1911] P. 108.

203. Austin v. United States, 125 F.2d 816 (7th Cir. 1942); *In re* Estate of Laspy, 409 S.W.2d 725 (Mo. App. 1966); Travelers Ins. Co. v. Thompson, 163 N.W.2d 289 (Minn. 1968).

204. Kravitz Estate, 418 Pa. 319, 211 A.2d 443 (1965).

205. *See* text accompanying notes 156, 160-64 *supra.*

206. *See* Minasian v. Aetna Life Ins. Co., 295 Mass. 1, 3 N.E.2d 17 (1936); Rosenberger v. Northwestern Mut. Life Ins. Co., 176 F. Supp. 379 (D. Kan. 1959), 182 F. Supp. 633 (D. Kan. 1960) (supplemental order).

Another objection to making a conviction conclusive, or even evidence, is that this would give the persons who would take the killer's share of the estate an incentive to testify against him at the criminal trial, whereas ordinarily an accused does not have to face testimony by witnesses who have a pecuniary interest in his conviction. Perhaps, however, this problem is not substantially different from that of interested witnesses in civil cases, and can be handled by having the fact-finder weigh the witness's credibility in the light of his interest.[207]

VII. Choice of Law

Another important aspect of the problem at hand concerns what law governs the various issues which may arise upon an unlawful killing. This question is very rarely discussed in the cases. Presumably the ordinary choice of law rules for succession usually control. What law governs, however, if the crime is committed in a state other than the decedent's domicile? In *Beck v. Downey*[208] the decedent and the murderer were both residents of California, but the crime occurred in Colorado. The issue in the case was who should take the insurance proceeds, since the murderer could not. The court referred to Colorado law; but since the probable intent of the deceased should control this determination, it would seem to have been better to have referred to the law of his domicile on that point. If Colorado law had permitted the murderer to receive the proceeds, however, it is arguable that its law should have governed the question, since California should not impose a penalty that is not imposed by the law of the state where the wrong was committed. But even here, since the disqualification of a murderer can also be predicated on the decedent's probable intent, California law could reasonably have been applied. In the converse situation, if California's law, but not Colorado's, had allowed the criminal to take, it might be argued that the latter should control on the ground that, regardless of the decedent's intent, Colorado's policy of barring any profit from crime should apply to crimes committed there. But it is doubtful that Colorado's interest in inflicting that penalty for a crime committed against a California resident is sufficient to override the law of California.[209]

A related problem is whether one state should treat another's

207. *Cf.* State v. White, 178 La. 98, 150 S. 843 (1933).

208. 191 F.2d 150 (9th Cir. 1951).

209. *Cf.* Ingersoll v. Klein, 106 Ill. App. 2d 330, 245 N.E.2d 288 (1969).

conviction as conclusive as to the alleged murderer's guilt. One case has held that a foreign conviction is not conclusive.[210] That result seems correct if there is any substantial difference between the relevant criminal law of the two jurisdictions, since a criminal conviction can be relevant in civil proceedings involving succession only insofar as the standards of the criminal law are controlling in the latter.

In *Beck v. Downey* the court also referred to the law of Indiana, where the insurance policy in question was issued and where the benefits were payable, and to the law of Iowa, where the policy was applied for and delivered.[211] The relevance of the law of these two states seems doubtful. Questions as to the liability of the insurer should perhaps be governed by the law of the state of execution or performance of the contract. But as to whom proceeds that are admittedly due should be paid—an issue in which the insurance company has no interest—there is no reason to look anywhere other than to the law of the decedent's domicile since that law controls the devolution of his other personal property.

Several cases have involved claims against the United States for savings bonds, insurance, social security benefits, and the like. Obviously federal law controls many questions concerning such claims. But courts have usually applied state-law disqualifications of potential successors who are guilty of misconduct. For example, in a case in which a husband and wife were co-owners of United States savings bonds, the court held, on the basis of New York law, that the husband was barred from claiming those bonds after he had killed his wife.[212] The court there suggested that the result would be the same under federal law, but in other cases more unusual state-law disqualifications have been applied to federal claims. In *Kandelin v. Social Security Board*,[213] a wife who had deserted her husband was not allowed to claim social security benefits because under New York law she was not entitled to share in her husband's estate and thus could not be considered his "widow" under the federal statute.

Choice of law questions may also arise because of a change in the law of the jurisdiction. Ordinarily, courts look to the statute in

210. Harrison v. Moncravie, 264 F. 776 (8th Cir. 1920), *appeal dismissed*, 225 U.S. 562 (1921).

211. 191 F.2d 150, 152 (9th Cir. 1951). *See also* Aetna Life Ins. Co. v. Mitchell, 180 F. Supp. 674 (N.D. Pa. 1960).

212. Matter of Bobula, 25 App. Div. 2d 241, 269 N.Y.S.2d 599 (1966), *revd. on other grounds*, 19 N.Y.2d 818, 227 N.E.2d 49, 28 N.Y.S.2d 152 (1967).

213. 136 F.2d 327 (2d Cir. 1943). *See also* Lytle v. Southern Ry., 152 S.C. 161, 149 S.E. 692 (1929); Brinson v. Brinson, 334 F.2d 155 (4th Cir. 1964).

effect on the date of the decedent's death. Pennsylvania courts, however, have held that, when land is acquired by a couple as tenants by the entirety, and then a statute is passed which destroys a murderer's interest in his victim's property,[214] the statute has no effect on the devolution if the husband subsequently kills his wife.[215] That result seems unsound. The constitutional and other objections to retroactive application of statutes are based upon reluctance to frustrate the reasonable expectations of parties who acted in reliance on prior law. It is unreasonable to suppose that the husband took title to his land in the expectation that if he killed his wife he would succeed to all of it. Thus, it is hardly unfair to deny fulfillment to any such expectation. A sounder approach was taken by the West Virginia Supreme Court, which held that a statute passed after a marriage had occurred could still be applied to bar a deserting wife from dower and inheritance.[216]

VIII. General Approach of the Law

There remains for consideration, apart from the results reached in any particular case, the general approach of the law in dealing with the problem of homicide and succession to property. In many questions of succession, any resolution by statute or by judicial decision is necessarily second best; the most satisfactory result can be attained only if an informed lawyer brings the issue to his client's attention, presents the relevant considerations as to the various alternatives, and expresses the client's choice by suitable provisions in the governing instrument. In this area, however, one can hardly expect lawyers to discover and express a testator's intentions as to what should happen if a member of his family kills him. Thus, the answer to the problem can usually be reached only by decisions of official agencies—either courts or legislatures.

Perhaps the fairest result would be obtained in these cases if the courts decided each one on the basis of its particular circumstances. Such a system exists in France with regard to annullment of testamentary and inter vivos gifts on account of the donee's "ingratitude," since the rather vague provisions for the Civil Code leave much discretion to judges in deciding individual cases.[217] A similar approach was taken by a court in this country in one case:[218]

214. Pa. Stat. tit. 20, § 3441-56 (1964).

215. Wycoff v. Clark, 77 Pa. D. & C. 249 (1951); Smith Estate, 3 Pa. D. & C.2d 757 (1955).

216. Thornburg v. Thornburg, 18 W. Va. 522 (1881).

217. 5 M. Planiol & G. Ripert, Droit Civil Français § 723 (2d ed. 1957).

218. *In re* Wolf, 88 Misc. 433, 150 N.Y.S. 738 (1914).

> George Fuchs, while in the course of commission of another crime, killed his wife, intending not to kill her, but to kill her paramour, who had despoiled the slayer of his goods and robbed him of his wife. It would be a curious course of equity if, when these particulars in regard to the killing of the wife are conceded to be true and laid before a judge having equity powers, he could or would ignore them. Equity is the very refinement of adjustments of circumstances which the law ignores. . . . Equity must be susceptible of being administered with relation to actual facts. If it is dependent on presumptions, equity possesses no superiority to law.[219]

That opinion, however, stands alone. Even the writers who have advocated and the courts which have adopted the constructive trust approach[220] do not defend their theory as one permitting special treatment of each case on an individual basis. Instead, in every state we have rules and exceptions of general applicability, whether created by courts or by statute. Many of these rules, on balance, are probably sound, but they are not inevitable. For example, courts generally hold that unintentional homicide is not a disqualification,[221] and that the actual life expectancies of the killer and victim are irrelevant.[222] Perhaps in place of such rules the culpability of the killer and the probable result but for the crime could be treated simply as factors, to be considered along with others, in reaching a just result for the particular case. Under this approach, if one kills a joint tenant who would probably have otherwise survived him, and if he is found guilty of criminal recklessness, he could be disqualified from succeeding. In addition, as has been indicated, different rules apply to the devolution of the murderer's property than to that of the victim's.[223] But very often in a family situation, the court's determination of what "belonged to" the husband and what "belonged to" the wife is necessarily arbitrary in the light of the parties' understanding.[224] Thus instead of mechanically applying rules on the basis of such a determination, courts might consider the source of the property as one of the relevant factors in reaching an ultimate conclusion.

Of course, when a man dies intestate, not from homicide, courts do not distribute his property on the basis of what seems just and

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219. 88 Misc. at 440-41, 150 N.Y.S. at 742.

220. *See* notes 14-20 *supra* and accompanying text.

221. *See* note 152 *supra* and accompanying text.

222. *See* text accompanying note 123 *supra*.

223. *See* text accompanying notes 60-63, 81, 113 *supra*.

224. For another example of the application of a very technical rule, see text accompanying notes 242-43 *infra*.

equitable in the particular situation.[225] It would take far too much judicial time to investigate all the circumstances relevant to a fair distribution of every decedent's estate. Furthermore, what seems fair to one judge might not seem so to another. Achieving uniformity in decisions would require review by appellate tribunals and would thus create an additional burden on judicial resources. On the other hand, succession to property after a homicide is a special case, and is infrequent enough that individualized treatment would not unduly burden the courts. Furthermore, in this situation, unlike an ordinary intestacy, the decedent himself cannot make any special disposition of his property warranted by unique circumstances. Analogies for a case-by-case determination can be found both in the way the courts divide property in the event of a divorce,[226] and in some wrongful death statutes which authorize courts to allocate the recovery equitably among the members of the decedent's family.[227]

Assuming, however, that general rules must be followed in the disposition of all cases, the question remains whether the courts or the legislatures should promulgate those rules. Most courts in this country have assumed that any rules on the subject must come from the legislature. That attitude is probably related to the desire for general rules as opposed to individualized treatment. But the question of how generalized the rules should be is separable from the question of what body should promulgate them. Courts have shown that judicially created rules barring inheritance by a murderer can be broad enough to be easily applied in future cases. On the other hand, statutes, such as the French Civil Code,[228] can be shown to be so elastic as to delegate much discretion to judges in particular cases.

Certain advantages may be claimed for legislation. Since statutes are typically prospective in operation, and since they are, at least in theory, more accessible sources of law, they may give better notice of what the law is. But this factor is of doubtful relevance in the situation at hand. If a murderer is stripped of the fruits of his crime, in addition to undergoing the sanctions prescribed by the criminal law, it is unlikely that he can justifiably claim that he had relied on the existing statute of descent and distribution when he perpetrated his crime, and that therefore he was unfairly surprised. Another advantage of legislation, once stated by a court which re-

225. *E.g.*, ILL. REV. STAT. ch. 3, § 11 (1967).

226. *See, e.g.*, Fortinos v. Fortinos, 168 N.W.2d 698 (Neb. 1969).

227. *E.g.*, ILL. REV. STAT. ch. 70, § 2 (1967).

228. *See* note 217 *supra* and accompanying text.

fused to bar a wife who killed her husband from inheriting his property,[229] is that "the legislature has the resources for the research, study and proper formulation of public policy" in this area.[230] But even assuming that legislatures do in fact have better resources for research on this subject, it is unclear what sort of research would be helpful. Should it be a study of how many people kill for profit; of whether the incidence of such killings is affected by the law, or of some other factor? What would the answers to such questions prove? Furthermore, even if relevant information could be obtained by research, it is questionable whether the legislature would or should devote its limited resources to these questions rather than to other more pressing matters of public concern.

Perhaps legislatures are more qualified than courts on another ground. Assuming the desirability of general rules, some of them must perforce be arbitrary, such as a rule determining how heinous a crime must be before the criminal is to be deprived of his right to inherit. As one commentator has said, "it is futile to attempt to arrive at a 'true rule' by pure logic . . . . [I]t is entirely a matter of opinion just how far public policy requires the rule to be extended."[231] Similarly, there is no logically deducible "true rule" as to how many witnesses should be required for a will or as to what fraction of an intestate's estate should pass to his spouse. Such decisions are customarily left to the legislature, since, in a democracy, a body more directly responsible to popular control than is a court should make such nonrational judgments.

Although that argument has merit in theory, actual experience in those states whose courts have relegated the rule-making to the legislature has usually been unfortunate. Many judicial decisions that "there should be a rule barring inheritance by a murderer but it must come by statute" have been followed by a long failure to act in the legislature.[232] Furthermore, statutes inspired by such decisions are often quite inadequate. The history of North Carolina law affords one example. In the first reported case to arise, *Owens v. Owens*,[233] a wife who was convicted as an accessory to her husband's murder was nevertheless allowed to take dower. In response to that decision, the legislature during the following year passed a statute which provided that a wife who "shall be convicted

229. Anstine v. Hawkins, 92 Idaho 561, 447 P.2d 677 (1968).

230. 92 Idaho at 563, 447 P.2d at 679.

231. Grossman, *supra* note 195 at 290.

232. *See* note 11 *supra*.

233. 100 N.C. 240, 6 S.E. 794 (1888).

of the murder of her husband, or being accessory before the fact to the murder of her husband" forfeited her dower and her statutory allowance to a year's support.[234] The statute covered the rather unusual case of accessory to murder,[235] only because the *Owens* case had involved that situation. On the other hand, as should be apparent, the North Carolina statute left many cases unprovided for. What would be the result, for example, if a child killed his parents, if a wife were convicted of manslaughter, or if a joint tenant were found guilty of murder? These cases subsequently arose in the state, but, in contrast to the literal approach of *Owens*, the statutory limitations were ignored by courts.[236] In 1961 North Carolina adopted the very comprehensive statute proposed by Professor Wade, which covered many cases which have never yet arisen in North Carolina or elsewhere.[237] Certainly that statute is superior to the earlier enactments; yet some of its provisions can be criticized, and even if the validity of these criticisms is debatable, it is doubtful that the position adopted by the statute represents the considered choice of the chosen representatives of the people of North Carolina. The choices to be made, then, even as to mere "matters of opinion," relate to matters on which the general public has no opinion, and can perhaps better be made by courts on the basis of the facts and arguments in a particular case.

The question of the proper allocation of function between the courts and the legislature cannot be decided by either alone. If the courts have announced that the solution must come by statute, the legislature is forced to take some action if there is to be any sensible solution at all. Conversely, when the legislature passes a statute on a subject, the courts are not free to ignore it on the ground that they can do the job better themselves. But legislatures can by appropriate provisions indicate that their enactments are not to be treated as the only source of law. Professor Wade's proposal, for example, provides that the Act "shall be construed broadly in order to effect the policy of this state that no person shall be allowed to profit by his wrong."[238] That provision will enable courts to handle unforeseen

234. Ch. 499, §§ 1-2 [1889] N.C. Laws 477.

235. In France, for example, the Civil Code does not mention accomplices and they have therefore been allowed to inherit. Barre v. Peping, [1950] D. Jur. 781 (Tribunal civil, Epernay).

236. *See* Garner v. Phillips, 229 N.C. 160, 47 S.E.2d 845 (1948); Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188 (1927).

237. N.C. GEN. STAT. § 31A-3 to -12 (1966).

238. Wade, *supra* note 38, at 750.

cases.[230] Even under statutes without such a provision, courts should not feel compelled to draw the negative inferences which they have often derived from statutory language. For example, if a statute dealing with a wife who is convicted of murder bars her only from taking dower, a court should still be able to hold that she is also disqualified from taking under her husband's will. Indeed, it is difficult to see on what possible grounds the draftsmen of the statute could have intended a different result in the two cases. A judicial decision barring the wife from taking under the will could be explained on several grounds: (1) that she can take, but only as a constructive trustee; (2) that she could not take at common law, which the statute left unchanged; and (3) that the policy of the statute should be equitably applied in analogous situations which are not expressly covered. The choice of rationale is not very important so long as the correct result is reached. But there are harder cases. What happens, for instance, if the wife was not convicted because she committed suicide, or if she was convicted only of manslaughter? Here, it is not absurd to make the negative inference that the legislature intended her to take under those circumstances. But if a negative inference is drawn from the statutory language in this situation, how can it be avoided with respect to other forms of property which the statute does not mention? Many courts, as this Article has indicated, have sought a solution by applying different rules to different forms of property in this context.[240] Such distinctions based not on relevant differences, but on the scope of particular statutory language, seem questionable.

IX. Conclusion

There is a curious change in tone from the older discussions of this subject to the more recent ones. For Ames, writing shortly after the first cases arose, the central issue was whether the law should be "open to the reproach of permitting the flagrant injustice of an atrocious criminal enriching himself by his crime."[241] Later cases, however, have raised more difficult issues, and there has been a tendency to treat those issues in technical terms. Thus Professor Scott suggests that "where land is devised to a person for life with remainder to his heirs, and he murders the testator, the question whether the heirs of the murderer are precluded from taking and

239. *Id.* at 751.

240. *See* text accompanying notes 183-85 *supra.*

241. Ames, *supra* note 14, at 229.

keeping the interest devised to them depends upon whether the word 'heirs' is to be treated as a word of limitation or a word of purchase"[242] and that, in turn, may depend on whether or not the Rule in Shelley's Case is in force.[243]

Such a technical approach could be unduly difficult to apply, and it might seem simpler to decide each case on the basis of its peculiar circumstances. But if that individualized treatment poses too great a strain on judicial resources, then even a technical approach, based on a logical application of general principles, is preferable to solutions based on the vagaries of a badly drafted statute.

242. 5 A. SCOTT, TRUSTS § 492.5, at 3514 (3d ed. 1967).

243. *Id.*