

# UNWORTHY HEIRS: THE APPLICATION OF THE PUBLIC POLICY RULE IN THE ADMINISTRATION OF ESTATES

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## *Introduction*

Prior to 1870, the doctrines of attainder, forfeiture, corruption of blood and escheat which prevailed in England solved the problem created by one person killing another benefiting under his will or otherwise, because given a conviction for murder or some other felony the property of the criminal was taken by the Crown, thus destroying the line of descent.<sup>1</sup> These ancient doctrines of the common law were abolished in 1870 by the Act to Abolish Forfeitures for Treason and Felony.<sup>2</sup>

Since the abolition of these stern doctrines, cases have arisen which have posed the problem of whether the law will allow a slayer or his successors to benefit from his victim's death. A number of types of such cases are discernible:

- 1) Where insurance proceeds are in question;
- 2) Where the slayer is a beneficiary under a will;
- 3) Where the slayer is an heir of his intestate victim;
- 4) Where the slayer and the deceased were joint tenants; and,
- 5) Where the slayer is insane when he killed the victim.

The general rule of public policy that the law forbids a criminal from profiting from his own wrong was first promulgated in *Cleaver*

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<sup>1</sup> *Attainder* has been defined as the "extinction of civil rights and capacities which takes place whenever a person who has committed treason or felony received sentence of death for his crime". Black, *Law Dictionary* (4th ed., 1968), p. 162.

*Forfeiture*: "the loss of lands and goods to the state, as the consequence of crime." Black, *ibid.*, p. 778.

*Corruption of Blood*: "The consequence of attainder, being that the attainted person could neither inherit lands or other hereditaments from his ancestor, nor retain those he already had, nor transmit them by descent to any heir, because his blood was considered in law to be corrupted." Black, *ibid.*, p. 414.

*Escheat*: "descent, in the nature of forfeiture, of lands and tenements within his manor, to a lord, either on failure of issue of the tenant dying seised or on account of the felony of such tenant." Black, *ibid.*, p. 640. In modern times in Canada, escheat operates in favour of the Provinces.

<sup>2</sup> 1870, 33 & 34 Vict., c. 23.

*et al. v. Mutual Reserve Fund Life Association*<sup>3</sup> (the *Maybrick* case):<sup>4</sup>

It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces, rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanor. It may be that there is no authority directly asserting the existence of the principle; but the decision of the House of Lords in *Fauntleroy's Case* [4 Bli. (N.S.) 194; 5 E.R. 70 (1830)] appears to proceed on this principle, and to be a particular illustration of it. This principle of public policy, like all such principles, must be applied without reference to the particular character of the right asserted or the form of its assertion. In *Fauntleroy's Case* it was held to prevent the assignees of a forger from claiming the benefit of a policy on his death at the hands of justice by reason of his forgery. It would equally apply, it appears to me, to the case of a *cestui que trust* asserting a right as such by reason of the murder of the prior tenant for life or of the assured in a policy; and it must be so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to this principle must be read and construed as subject to it.

In the *Cleaver* case a husband had taken out an insurance policy on his life for the benefit of his wife. The policy provided for payment to the wife if living at the husband's death otherwise to the estate of the husband. The husband died leaving a will appointing executors. Subsequently the wife assigned to the plaintiff *Cleaver* her interest in the policy and he was appointed administrator of her property as she was imprisoned for the murder of her husband.

The question of law raised was whether if it were proven that the husband died from poison intentionally administered by his wife, that could afford a defence to the action as against *Cleaver* as assignee of the policy from the wife; as against *Cleaver* as administrator; and as against the executors of the husband's estate.

The Divisional Court gave judgment for the defendant insurer holding that *Cleaver* could not recover in either capacity and that the husband's executors could not recover because they would be compelled, under the Married Women's Property Act, 1882<sup>5</sup> to hold the insurance fund as trustees for the wife.

The Court of Appeal held that the executors could recover on the policy despite the fact that the death of the insured was caused by the felonious act of his wife because as between the executors and the insurer no question of public policy arose but could only serve to bar *Cleaver* should he seek to enforce the trust provided, with regard to insurance proceeds, in the Married Women's Property Act, 1882 which trust, the court held was enforceable by virtue of the wife's

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<sup>3</sup> [1892] 1 Q.B. 147 (C.A.).

<sup>4</sup> *Ibid.*, at pp. 156-157, per Fry L.J.

<sup>5</sup> 45-46 Vict., c. 75.

act, so that there was a resulting trust in favour of the insured's estate.

Fry L.J. went on to point out that:<sup>6</sup>

. . . if . . . the possible right of the wife under her husband's will or intestacy forms an objection to the action by the executor, the reply is obvious—that the principle of public policy must be applied as often as any claim is made by the murderess, and will always form an effectual bar to any benefit which she may seek to acquire as the result of her crime . . . the rule of public policy should be applied so as to exclude from benefit the criminal and all claiming under her, but not so as to exclude alternative or independent rights.

There are a number of criticisms which could be made of the rule enunciated in *Cleaver*:

- 1) That it is unjust in that it in effect further punishes a person who has presumably paid his debt to society by means of the criminal law;
- 2) That it is unfair to punish the innocent heirs of the slayer; and,
- 3) That the rule is framed too broadly and should not apply to every type of crime.<sup>7</sup>

However, as we shall see, few courts have questioned the rule laid down in the *Cleaver* case and have applied it to all but the fifth type of case mentioned above.

At this point we might enquire into the reasons for the rule. Alison Reppy has suggested that through the application of the so-called rule of public policy the courts were, in effect "seeking to recapture for the Crown the common law right to take property from a felon, or to prevent a felon from taking property as a result of a criminal act, by substituting the newly discovered rule of public policy for the earlier common law doctrines of attainder, forfeiture and corruption of blood and escheat".<sup>8</sup> But what was the policy behind the old doctrines? To deter revolution and maintain order? If so what is the policy behind the present rule? Is it designed to protect potential victims of crimes by preventing benefits from reaching the criminal? If this is so perhaps the rule should be part of the criminal law. The major reason given by the courts is that it is repellent to them to enforce rights arising from crime which seems to harken back to the policy behind the ancient doctrines that is, to maintain order. The

<sup>6</sup> *Ibid.*, at pp. 158-159.

<sup>7</sup> This seems to be the effect of Fry L.J.'s words; however, as the case was only concerned with the situation where murder was the crime the suggestion that the rule applied to lesser crimes was *obiter*.

<sup>8</sup> The Slayer's Bounty—History of Problem in Anglo-American Law in Anglo-American Legal History Series: I. No. 6 (1942), p. 15.

courts, as we shall see, however have been predictably less concerned with the policy behind the rule and more concerned with its applicability to various cases.

### I. *Character and Proof of the Crime.*

In this section we shall examine cases that raise the question of whether the public policy rule is applicable where the crime is less than murder, and the problem of proving the crime in civil proceedings.

In the Ontario case of *McKinnon v. Lundy*<sup>9</sup> the children of a testatrix sought a declaration that they were the owners of lands devised to their father under her will. It appears that the husband had been indicted for the murder of his wife and was convicted of manslaughter. Ferguson J. accepted as evidence the certificate of his conviction: "It was suggested, and I apprehend rightly, that on the subject of crime, only the indictment and conviction should be looked at, the conviction, like any other judgment, being, while it stands, evidence of uncontrollable verity."<sup>10</sup>

Counsel for the defendant argued that this case could be distinguished from *Cleaver* in that there was a conviction for murder which involved a finding of the existence of malice aforethought whereas here the conviction was only for manslaughter. This argument was rejected by Ferguson J. who interpreted the rule in *Cleaver* as applying to "all cases of crime where the criminal claims a benefit directly resulting from his crime"<sup>11</sup> so that the husband and his assigns could neither take under his wife's will or on the ensuing intestacy.

The Ontario Court of Appeal<sup>12</sup> reversed the lower court, holding that the crime "must be of such a character as to show an intent to bring about the result . . . a party who intentionally kills another cannot profit by that act. But would such a rule apply where a person accidentally kills his most intimate friend, but under circumstances which bring him within the criminal law because he was negligent? I cannot believe such to be the law. . . ."<sup>13</sup>

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<sup>9</sup> (1893), 24 O.R. 132.

<sup>10</sup> *Ibid.*, at p. 143.

<sup>11</sup> *Ibid.*, at p. 145.

<sup>12</sup> (1894), 21 O.A.R. 560.

<sup>13</sup> *Ibid.*, per Burton J.A., at p. 562. This question has yet to be definitely answered.

The Supreme Court of Canada<sup>14</sup> (Taschereau J. dissenting) restored the judgment of Ferguson J., holding that there was no need to distinguish between murder and manslaughter.<sup>15</sup>

The reasoning of the Court [of Appeal] would seem to me rather to apply to a case of justifiable or excusable homicide than to a case of manslaughter. The principle upon which the devisee is held incapable of taking under the will of the person he kills is, that no one can take advantage of his own wrong.

Referring to the *Cleaver* decision Strong C.J. said:<sup>16</sup>

That was itself a case of murder but the Lord Justices lay no stress on the crime being a premeditated one, and indeed Lord Justice Fry uses language which indicates, as the ground of his decision, a principle which would include all wrongful acts, not merely felonies but misdemeanours. . . .

In England, a similar result was reached in *In the Estate of Hall*<sup>17</sup> where a legatee who had been convicted of the manslaughter of the testator was dismissed from an action for probate of the will:

I see no reason for restricting the rule to cases of murder. . . . It is against public policy that a person committing a crime should directly benefit. . . .<sup>18</sup>

While Anglo-Canadian courts have not made a distinction between murder and manslaughter in applying the rule, some American courts have held that if the crime is less than murder the killer is not disqualified.

In *Estate of Mahoney*,<sup>19</sup> where the victim's widow had been convicted of manslaughter, the court held that application of the rule depended on whether the crime was voluntary or involuntary manslaughter and in *Legette v. Smith*<sup>20</sup> a husband unintentionally killed his wife while attempting to kill the wife's paramour and was allowed to take on his wife's intestacy.

Sometimes this result is thought to be dictated by the statutes precluding inheritance by the killer. Thus in *Re Kirby's Estate*<sup>21</sup> where the statute provided that a person convicted of the "murder" of the decedent should not be entitled to succeed, the court permitted

<sup>14</sup> *Lundy v. Lundy* (1895), 24 S.C.R. 650.

<sup>15</sup> *Ibid.*, per Strong C.J., at p. 652.

<sup>16</sup> *Ibid.* These words provide a good example of how widely the courts have applied the rule in *Cleaver*. Taschereau J. in his dissent at p. 653 argued that as there was no evidence one way or the other if the wife had lived long enough to change her will and did not "she must have persevered in her intention to bequeath her estate to her husband, though she knew his crime . . . it cannot be denied . . . that a will by any one in favour of the person who killed him is good, if made in the interval between the wound and the death".

<sup>17</sup> [1914] P. 1 (C.A.).

<sup>18</sup> *Ibid.*, per Swinfen Eady L.J., at p. 8.

<sup>19</sup> (1966), 220 A. 2d 475 (Vt).

<sup>20</sup> (1955), 85 S.E. 2d 576 (S.C.).

<sup>21</sup> (1912), 121 P. 370 (Cal.).

the heir convicted of manslaughter to inherit. However, other courts operating under common-law principles without any controlling statute have concluded that an intentional killing is a bar.<sup>22</sup>

As we have seen Anglo-Canadian authorities have held that manslaughter is sufficient to bar an heir without making any distinction between voluntary and involuntary manslaughter. Although there is dicta<sup>23</sup> to the effect that justifiable or excusable homicide would not be a bar, it remains to be seen whether criminal negligence or any lesser crimes will be made exceptions to the rule in Anglo-Canadian courts.<sup>24</sup>

In cases where a criminal court has registered a conviction a question has been raised as to whether a civil court should receive and act on the conviction without a retrial of the criminal issue. As we have seen all three courts in the *McKinnon v. Lundy* case accepted the certificate of conviction without question.

In the *Estate of Crippen*<sup>25</sup> where the husband had been convicted of murdering his wife who died intestate, the executrix and universal legatee under the husband's will was barred from a grant of administration of the wife's estate. There the court held that where a convicted felon or his personal representative bring any civil proceeding to establish or to enforce rights which result to the felon or to the convicted testator from his own crime the conviction is admissible in evidence as proof of the conviction and a *prima facie* proof of the commission of the crime.

The *Crippen* case was followed *In Re Noble Estate*<sup>26</sup> which held that a certified copy of the conviction was admissible as proving both the conviction and as *prima facie* proof of the commission of the murder of the intestate.

The *Crippen* case was overruled by *Hollington v. Hewthorn*.<sup>27</sup> The latter case did not involve the public policy problem involved in *Crippen* but held that a criminal conviction was inadmissible in civil proceedings. Thus, in the Ontario case of *Re Charlton*<sup>28</sup> where a

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<sup>22</sup> *Chase v. Jennifer* (1959), 150 A. 2d 251 (Md); *In Re Estate of Mahoney supra*, footnote 19.

<sup>23</sup> See *Lundy v. Lundy, supra*, footnote 14.

<sup>24</sup> In the United States, courts have held that where the killing was wrongful but not intentional such as one caused by negligence, the slayer is not disqualified: *Commercial Travelers v. Witte* (1966), 406 S.W. 2d 145 (Ky); *Beene v. Gibraltar* (1945), 63 N.E. 2d 299 (Ind.).

<sup>25</sup> [1911] P. 108.

<sup>26</sup> [1927] 1 W.W.R. 938 (Sask. Dist. Ct.).

<sup>27</sup> [1943] 2 All E.R. 35.

<sup>28</sup> [1969] 1 O.R. 706 (C.A.) and see E.R. Alexander (1969), 19 U. of T.L.J. 368.

husband who had been convicted of the manslaughter of his wife sought a share of his wife's intestacy it was held that his conviction at the criminal trial was inadmissible and that while his plea of guilty in the criminal proceedings was admissible in subsequent civil proceedings involving his wife's estate it was not conclusive but established merely a presumption of criminal responsibility which could be rebutted. It appears that at the criminal trial the defence of non-insane automatism was raised but was abandoned for a plea of guilty of manslaughter when the trial judge made known his intention to direct a verdict of not guilty by reason of insanity. The Ontario Court of Appeal reversed the lower courts holding that the guilty plea conclusively disentitled the husband from a share of his wife's estate and ordered a new trial on the issue of the husband's criminal responsibility:

. . . a plea of guilty like any admission and notwithstanding its solemnity, is capable of explanation . . . the question of whether or not Oliver Robin Charlton feloniously killed his wife is a question of fact not necessarily concluded by his plea of guilty of manslaughter in her death.<sup>29</sup>

The decision in *Re Charlton* raises many problems not the least of which is the question raised by the situation where there has been an acquittal in criminal proceedings. If a conviction is no longer admissible presumably an acquittal would be equally inadmissible in subsequent civil proceedings determining an heir's right to succeed. Could a person acquitted of a crime be tried again in civil proceedings for the same offence with perhaps a different result? *Re Charlton* seems to suggest this is possible at least with regard to a conviction.

This novel situation arose in *Re Emele*<sup>30</sup> a Saskatchewan case of which no mention was made in the *Charlton* case. There an executor sought the direction of the court where the wife, a will beneficiary, had been acquitted of murdering the testator. While it was contended that notwithstanding her acquittal there had to be a determination of the issue of whether or not she in fact murdered her husband, MacDonald J. felt that it "would be extremely bold for me to find the widow guilty of murder or manslaughter on affidavit evidence after the jury had acquitted her . . ." <sup>31</sup> and held on the authority of the *Lundy* and *Crippen* cases that just as evidence of the conviction is admissible "evidence of her acquittal on the criminal charge is admissible in these proceedings and should be acted upon". <sup>32</sup> The *Charlton* decision makes this case's authority dubious. However it is

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<sup>29</sup> *Ibid.*, per Jessup J.A., at p. 709.

<sup>30</sup> [1941] 4 D.L.R. 197 (Sask. K.B.).

<sup>31</sup> *Ibid.*, at p. 199.

<sup>32</sup> *Ibid.*, at p. 200.

interesting to note that in *Re Emele* counsel went so far as to argue that even if the wife was not guilty of murder or manslaughter she could be held guilty of pointing a gun at her husband. Nevertheless, it was held that even if the court determined that fact of her guilt "she would not on the hypothesis that her pointing the gun at him did not cause his death, be sharing in the estate by her own criminal act"<sup>33</sup> and thus concluded that the widow was not precluded from taking under the will of her husband.<sup>34</sup>

In the United States similar problems of proof and admissibility of a conviction have been encountered. The law there ranges from the *Re Charlton* position to the opposite extreme and to a great extent is influenced by the statutes which have been enacted to bar a slayer.

In states which have enacted statutes which bar one who is convicted of murder the courts have held that the murder can be proven only by a criminal trial. Thus in *Smith v. Greenberg*<sup>35</sup> where a husband had killed his wife and daughter and committed suicide, his heirs were permitted to inherit under a statute barring inheritance by anyone convicted of murder. However not all courts have construed the statutes literally. In *Smith v. Todd*<sup>36</sup> where an insurance beneficiary had killed the insured and committed suicide, the killer's personal representative was denied the proceeds even though the statute 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 murdered the insured from taking under the policy, but to add to and extend the rule" by making a conviction conclusive as to the fact of the crime.<sup>37</sup>

In both California and Indiana the statutes expressly provide that where the slayer is convicted of murder the conviction shall be conclusive.<sup>38</sup> However other jurisdictions have held that the

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<sup>33</sup> *Ibid.*

<sup>34</sup> The rule in *Hollington v. Hewthorn* was repealed in the United Kingdom by sections 11 to 13 of the Civil Evidence Act 1968, 16 & 17 Eliz. 2, c. 64. The rule was discussed by the Ontario Law Reform Commission which recommended its retention: Report on the Law of Evidence (1976), Ch. 6. The Alberta Institute of Law Research and Reform recommended its abolition: The Rule in *Hollington v. Hewthorn*, Report No. 16, February 1975; see also Proceedings of the 58th Meeting of the Uniform Law Conference of Canada 1976, p. 168 for a draft Uniform Act dealing with the rule. In its Report on The Rule in *Hollington v. Hewthorn* (1977), the Law Reform Commission of British Columbia recommended that, with certain exceptions, the rule should be repealed by statute.

<sup>35</sup> (1950), 218 P. 2d 514 (Colo.).

<sup>36</sup> (1950), 152 S.E. 506 (S.C.).

<sup>37</sup> *Ibid.*, at p. 511.

<sup>38</sup> Cal. Probate Code, §258 (West, 1956); Ind. Ann. Sta. §6-212.

conviction is not admissible in later civil proceedings<sup>39</sup> but if the conviction is based on a plea of guilty, the plea can be received in evidence.<sup>40</sup>

Some courts, even in jurisdictions where there was no statute providing for conviction, have held it conclusive in proceedings to determine the succession to property.<sup>41</sup>

## II. *Intestate Succession and Insanity.*

At one time it was thought in England, perhaps due to the American authorities, that as the question of intestate succession is entirely statutory it was for the legislature rather than the courts to say whether a killer could inherit from his victim. This view had and still does have authority in some American courts<sup>42</sup> but the problem has been solved in many states by statute.

Doubt however appears to have been felt as to the applicability of the rule to an intestacy situation in England. This doubt appears to have sprung from the case of *In Re Houghton: Houghton v. Houghton*.<sup>43</sup> There after a coroner's inquisition found that a man had murdered his brother and father, he was convicted of murder but found to be insane.

In determining the question of whether the murderer could share in the estate of the intestate father, Joyce J., relied heavily on the American case of *Carpenter's Estate*<sup>44</sup> which held that the rule of public policy could not override the express language of the statute of descent. He then went on to hold that as the murderer was insane he was not criminally responsible for the death, so that even if there had been a will there was no reason why he could not benefit thereunder.

Doubt was also expressed in *In re Pitts: Cox v. Kilsby*.<sup>45</sup> In that case a husband murdered his wife and son and immediately thereafter committed suicide. Farwell J., after holding that at the time of the murders the husband was insane, stated that the "public policy rule

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<sup>39</sup> *Goodwin v. Continental Gas* (1935), 53 P. 2d 241 (Okla.); *Metropolitan Life v. Hand* (1920), 102 S.E. 647.

<sup>40</sup> *Davis v. Aetna Life Ins.* (1960), 279 F.2d 304 (9th Cir.).

<sup>41</sup> *Estate of Laspy* (1966), 409 S.W. 2d 725 (Mo. App.). See also *Kravitz Estate* (1965), 211 A. 2d 443 (Pa) where the statute provided that the conviction should be "evidence" of the crime.

<sup>42</sup> *Carpenter's Estate* (1895), 32 A. 637 (Pa); *Wall v. Pfanschmidt* (1914), 106 N.E. 785 (Ill.); *Re Duncan's Estates* (1952), 246 P. 2d 445 (Wash.); *Austine v. Hawkins* (1968), 447 P. 2d 677 (Ida.).

<sup>43</sup> [1915] 2 Ch. 173.

<sup>44</sup> *Supra*, footnote 42.

<sup>45</sup> [1931] 1 Ch. 546.

postulates a *mens rea*, and a verdict of guilty but insane would have been equivalent to an acquittal . . . therefore the rule does not apply, and the husband's estate cannot be deprived of his distributive share".<sup>46</sup> Farwell J., went on to add in *obiter* that "in *In Re Houghton Joyce J.* thought that the rule did not apply to an intestacy, as the intestate succession was settled by statute. His observations on the point were only *obiter*, as the murderer was insane, but that may be the law, though it is difficult to see why".<sup>47</sup>

These doubts were finally erased in *In re Sigsworth, Bedford v. Bedford*.<sup>48</sup> There a son murdered his mother and committed suicide and the questions raised were whether the son's personal representative became entitled to the residuary estate of his mother under her will; or if not, whether he became entitled under the Administration of Estates Act<sup>49</sup> to her estate as to which she died intestate. Clauson J. held that the principle of public policy which precludes a murderer from benefiting from his victim's will similarly prevented him from claiming a benefit conferred by statute in the case of his victim's intestacy: "This view of the law is adopted by Fry L.J. in *Cleaver's* case and by Farwell J. in *In re Pitts* and must in my judgment prevail over the view taken by Joyce J. in *In re Houghton*. . .".<sup>50</sup>

It is worthy of note that six years before the *Sigsworth* decision Murphy J. in the British Columbia Supreme Court<sup>51</sup> held that a convicted murderer was not entitled to share in the intestacy of his victim.<sup>52</sup>

The reason assigned in some American decisions for refusing to deprive a murderer of benefits accruing to him under the intestacy of his victim, is that to do so would be to contravene the express provisions of the Statutes of Distribution. This reason would be equally valid in the case of a will which also depends upon a statute for its validity. . . . There is nothing which makes the Statutes of Distribution more sacrosanct than the Wills Act. If public policy is good ground for over-riding the latter, it is equally so for acting likewise in regard to the former. I, therefore, hold the murderer takes nothing under the intestacy.

As was previously pointed out, apart from statute many courts in the United States have allowed a murderer or his heirs to benefit

<sup>46</sup> *Ibid.*, at p. 550.

<sup>47</sup> *Ibid.*

<sup>48</sup> [1935] 1 Ch. 89.

<sup>49</sup> 15 Geo 5, c. 23.

<sup>50</sup> *Ibid.*, at p. 92.

<sup>51</sup> *Re Medaini*, [1927] 4 D.L.R. 1137 (B.C.S.C.).

<sup>52</sup> *Ibid.*, at p. 1139. In *Re Johnson Estate*, [1950] 1 W.W.R. 263, [1950] 2 D.L.R. 69 (Man. K.B.), it was held that the rule of public policy not only applied in an intestacy under the provisions of the Devolution of Estates Act, R.S.M., 1940, c. 53, but also prevented an unworthy heir's estate from benefiting under the terms of the Manitoba Dower Act, R.S.M., 1940, c. 55.

under intestate succession as these courts have held that it would be unwarranted judicial interference to engraft an exception to the statutes of descent. However, not all American courts have taken this position. Some have allowed the legal title to descend to the slayer but have held that the slayer's share be impressed with a constructive trust in favour of those next entitled.<sup>53</sup> While others, like their Anglo-Canadian counterparts have held that the public policy rule applies to preclude inheritance under the statutes of descent and distribution.<sup>54</sup> It should be noted that in cases involving testate succession American courts have shown little reluctance in depriving the slayer of his legacy either on the theory that the legacy became inoperative<sup>55</sup> or by application of the constructive trust doctrine.<sup>56</sup>

### III. *Onus and Problems of Proof of Insanity.*

While, as above stated, insanity is an exception to the rule,<sup>57</sup> it is often difficult to prove, especially where the slayer has immediately afterwards committed suicide. Although there appears to have been sufficient proof in *In re Pitts*<sup>58</sup> and in the British Columbia case of *Re Estate of Maude Mason*<sup>59</sup> to allow the personal representative of the slayer to take under the victim's intestacy, this is not always the case. Thus *In re Pollock, Pollock v. Pollock*<sup>60</sup> where a husband and wife were found dead in the circumstances which left no doubt that the husband first killed his wife and committed suicide it was held that as there was no evidence to show whether he was sane or not at the time, the court could "only act on the assumption that the act of the husband which caused the death of the wife was felonious and,

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In *Re Gore* (1971), 23 D.L.R. (3d) 534, at p. 536 (Ont. H.C.), it was argued that the heirs or next of kin of a person disqualified from inheriting because of his own wrongful act were likewise disentitled; however, because these heirs had claims against the estate in question independent of their relationship to the wrongdoer and his estate, they were not disentitled.

<sup>53</sup> *Garner v. Phillips* (1948), 47 S.E. 2d 845 (N.C.); *In Re Estate of Mahoney* (1966), 220 A. 2d 475 (Vt); *Parks v. Dumas* (1959), 321 S.W. 2d 653 (Tex. Civ. App.); *Dutell v. Dana* (1952), 113 A. 2d 499 (Me).

<sup>54</sup> *Weaver v. Hollis* (1945), 22 So. 2d 525 (Ala); *Price v. Hitaffer* (1933), 165 A. 470 (Md); *Parker v. Potter* (1931), 157 S.E. 68 (N.C.); *Perry v. Strawbridge* (1908), 108 S.W. 641 (Mo.).

<sup>55</sup> *Estate of Wilkins* (1927), 211 N.W. 652 (Wis.).

<sup>56</sup> *Whitney v. Lott* (1944), 36 A. 2d 88 (N.J.); *In Will of Wilson* (1958), 92 N.W. 2d 282 (Wis.).

<sup>57</sup> American courts have also held that if the killer is insane he is not disqualified see e.g., *Re Estate of Lupka* (1968), 289 N.Y.S. 2d 705 (1968); *Campbell v. Ray* (1968), 245 A. 2d 761 (N.J.).

<sup>58</sup> *Supra*, footnote 45.

<sup>59</sup> (1917), 31 D.L.R. 305 (B.C.S.C.).

<sup>60</sup> [1941] 1 Ch. 219.

therefore, one which prevented any person claiming through the husband from benefiting from the wife's estate".<sup>61</sup> Farwell J. pointed out that "if a claim is made by a person on behalf of a deceased who killed another it is for that person to show by evidence that the act was in fact not felonious but was done under a condition of mind which rendered it not criminal at all".<sup>62</sup>

The presumption of sanity rule enunciated in *In Re Pollock* was applied in a Manitoba case where a husband had also killed his wife and himself so that it was held that his estate could neither claim under his wife's will or intestacy.<sup>63</sup>

The onus of proof upon a slayer (and presumably those claiming under him) was spelled out by the Supreme Court of Canada in *Nordstrom v. Baumann*.<sup>64</sup> There the Supreme Court overruled the British Columbia Court of Appeal by holding that it was a necessary concomitant of the jurisdiction of civil courts that they have the right to determine the question of whether or not the conduct of an individual amounted to a crime for the purpose of invoking the public policy rule. The trial court had found a widow who had killed her husband by setting fire to the house did not appreciate the nature and quality of her act or know that it was wrong and could thus take on her husband's intestacy. In upholding the trial court's judgment Ritchie J. with whom all members of the Supreme Court of Canada agreed, stated, quoting Anglin J. in *Clark v. The King*,<sup>65</sup> the following:<sup>66</sup>

The onus of proof lying upon the appellant was that of showing that . . . balancing the probabilities upon the whole case, there was such a preponderance of evidence as would warrant . . . reasonable men in concluding that it had been established that the accused when [she] committed the act was mentally incapable of knowing its nature and quality, or if [she] did know it, did not know that [she] was doing what was wrong. . . .

This preponderance of probabilities standard of proof was placed on the next of kin of an intestate successor who killed his adopted parents and himself in *Re Jensen Estates*.<sup>67</sup> There the court carefully considered the transcript (although not the verdict) of a coroner's inquest, the slayer's medical history, and the testimony of a psychiatrist, and concluded that the killer was incapable of

<sup>61</sup> *Ibid.*, at p. 223.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Re Johnson Estate*, *supra*, footnote 52. This case contains a thorough review of the English authorities. For a more recent application of the presumption of felony rule in a murder-suicide case see *Re Missirlis*, [1971] 1 O.R. 303 (Sur.Ct.).

<sup>64</sup> [1962] S.C.R. 147

<sup>65</sup> (1920-21), 61 S.C.R. 608, at p. 626.

<sup>66</sup> *Supra*, footnote 64, at p. 158.

<sup>67</sup> (1963), 40 D.L.R. (2d) 469 (B.C.S.C.).

knowing that his acts were wrong in the sense that they were against the law and was insane within the meaning of section 16 of the Criminal Code,<sup>68</sup> so that his estate was not debarred from inheriting from the intestate parents.<sup>69</sup>

#### IV. *Application of the Rule to Joint Tenancies.*

Where one joint tenant kills the other the public policy rule has also been applied but problems have arisen in reconciling the rule with the independent right of survivorship which existed before the commission of the crime.

The situation first arose in Anglo-Canadian law in the British Columbia case of *Re Pupkowski*.<sup>70</sup> There both the husband and wife jointly held a registered right to purchase lands. The husband was charged although not convicted of murder and appears to have been awaiting trial in a mental hospital when he petitioned the Registrar to register a transmission to him. The Registrar of Land Titles refused to register the transmission to the husband as surviving joint tenant, and an assignment of the right to purchase, on the grounds that, as he had been advised that a charge had been laid against the husband, and that if he was convicted neither he nor his representatives could enforce any right resulting from the crime; the Registrar was not satisfied that the husband had a good safeholding and marketable title under the Land Registry Act.<sup>71</sup>

Macfarlane J. upheld the position of the Registrar on the ground "that the documents and evidence produced to the Registrar have failed to establish a good safeholding and marketable title because of the palpable blot upon the face of the title which no examiner of titles could safely pass in the discharge of his duty".<sup>72</sup>

In arriving at this decision the court considered that the Registrar had a right to refuse transmission to the surviving joint tenant when there was some evidence that the right of the survivor, though not yet adjudicated upon, could be affected by reason of the principle that a person cannot take a benefit from his own wrong, and indicated that the right of survivorship would not vest the full interest in the husband:

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<sup>68</sup> S.C., 1953-54, c. 51.

<sup>69</sup> In the United States, the law is less clear for while some cases indicate that the test of insanity for this purpose is the same as is used by the criminal law (*Estate of Bobula* (1967), 227 N.E. 2d 49 (N.Y.)), it has been held that a slayer may be capable of succeeding to the property of his victim even if he is not insane within the McNaughton rules: *Anderson v. Grasberg* (1956), 78 N.W. 2d 450 (Minn.).

<sup>70</sup> (1956), 6 D.L.R. (2d) 427 (B.C.S.C.).

<sup>71</sup> R.S.B.C., 1948, c. 171, s. 164.

<sup>72</sup> *Supra*, footnote 70, at p. 431.

Now it is quite true that one of the incidents of a joint tenancy is the *jus accrescendi* which the survivor enjoys upon the death of the other but I think it is entirely contrary to the inherent conception of a joint tenancy that one joint tenant can defeat the right of the other or bring into being the *jus accrescendi* by his own act.<sup>73</sup>

The *Pupkowski* case decided nothing more than that the Registrar could withhold registration in the circumstances. While implicit in the decision was the assumption that the right of survivorship would not vest the full interest in the husband, the case did not reveal what interest the husband did in fact have, nor whether the murder of one joint tenant by the other effected a severance of the joint tenancy.

The question was again raised in *Schobelt v. Barber*.<sup>74</sup> There an action was brought on behalf of the next of kin of one joint tenant (the wife) against the surviving joint tenant (the husband) for a declaration that they should share in the deceased's interest in the land. It appears that the husband had been convicted of murdering his wife<sup>75</sup> and was claiming no interest in his wife's estate either under her will or by virtue of the Devolution of Estates Act<sup>76</sup> so that the question was solely what effect the crime had on the destination of the rights created by the joint tenancy. In arriving at his decision Moorhouse J. considered four alternatives:

1) That the whole estate accrued to the survivor. This was rejected because it violated the rule. While one joint tenant or both may voluntarily terminate the joint tenancy the court declined to add murder to the approved methods by which one joint tenant could convert the tenancy into another interest thereby acquiring an estate which he did not have before his crime.

2) That the *jus accrescendi* be held inoperative so that the survivor takes nothing. This the court felt would be too harsh as it would deprive the survivor of the right which he acquired on the creation of the joint tenancy: "To give effect to this view would in my opinion be imposing a further penalty on the survivor who has been sentenced for the crime of which he has already been convicted. It would be a return to the principle of forfeiture which has been abolished by the *Criminal Code*, s. 5(1)(b)."<sup>77</sup>

<sup>73</sup> *Ibid.*, at p. 430.

<sup>74</sup> [1967] 1 O.R. 349 (Ont. H.C.).

<sup>75</sup> The court appears to have unquestioningly admitted the fact that the husband was convicted of the murder without making any determination of that fact as would seem to be now required in light of *Re Charlton*, *supra*, footnote 28.

<sup>76</sup> R.S.O., 1970, c. 129.

<sup>77</sup> *Supra*, footnote 74, at pp. 353-354.

3) That the full interest vest in the survivor and when he dies, the victim is deemed to have died after the slayer. This solution was used by the Supreme Court of Wisconsin in *Re King's Estate*<sup>78</sup> where a husband had murdered his wife and immediately after committed suicide. While this method covers the murder-suicide situation it would cause difficulties in cases where the slayer lived for many years afterwards and as Moorhouse J. said "this solution could only be accomplished by legislation".<sup>79</sup>

4) That the full interest accrues to the survivor who then holds an interest as constructive trustee for the victim's estate. This was the approach Moorhouse J. took in deciding that the defendant was constructive trustee of the whole property subject to a beneficial interest in himself for an undivided one-half holding the remaining undivided one-half for the next of kin of the deceased.

In reaching the decision that the defendant "holds the property upon trust, one half for himself and the other one half for the next of kin"<sup>80</sup> of his deceased wife the court effectively took away the defendant's right of survivorship:

This I know is but a feeble attempt to undo the advantage gained by the wrongdoer. It is true it takes away a right previously possessed i.e., the *jus accrescendi*, and to that extent it is a forfeiture, but he could have terminated that incident lawfully—by his own act he could have converted the estate into a tenancy in common. It seems to me the method I adopt interferes less with the rights acquired by the joint tenants under the original document than any other method apparent to me and yet conforms to the established rule of public policy.<sup>81</sup>

The *Schobelt* decision however leaves many questions unanswered. Moorhouse J. in going through the alternatives was referring to a comment by Professor R. St. J. Macdonald<sup>82</sup> which had suggested that the survivor's only beneficial interest under the fourth approach "is a life estate in one-half of the property, the entire remainder in fee being held in trust for the deceased's heirs or devisees".<sup>83</sup> Yet nowhere in his judgment does Moorhouse J. mention that the survivor only takes the half interest for life; indeed, he cites the case of *Sherman v. Weber*<sup>84</sup> which while it held that the slayer held the interest of his deceased wife as constructive trustee

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<sup>78</sup> (1952), 52 N.W. 2d 885.

<sup>79</sup> *Supra*, footnote 74, at p. 354.

<sup>80</sup> *Ibid.*, at p. 356.

<sup>81</sup> *Ibid.*, at p. 355.

<sup>82</sup> (1957), 35 Can. Bar Rev. 966.

<sup>83</sup> *Ibid.*, at p. 969.

<sup>84</sup> (1933), 167 A. 517 (N.J.).

for her heirs, further held that as the slayer had a greater life expectancy he was entitled to all the property at the end of the period of the victim's life expectancy.

If the court is in effect making the defendant a life tenant of an undivided one half interest does this mean that on his death the heirs of the wife take the whole or that the heirs as beneficiaries of the trust can demand the legal interest in half at any time during his life leaving the slayer with only a life interest in half?

Perhaps really all that was intended in *Schobelt* was that as the death of the co-tenant was caused by the other; the husband would be allowed to sell the property as the legal survivor but would, in equity, have to hand half the proceeds over to the wife's next of kin. But then could not it still be said that the slayer was benefiting as in effect he is getting half whereas if his wife had survived him his estate would have gotten nothing? If the court is not allowing a severance by the criminal act in law, it seems to be allowing one in equity.

The *Schobelt* decision was followed in *Re Gore*<sup>85</sup> where both the joint tenant wrongdoer and his wife were deceased. In that case Osler J. stated:<sup>86</sup>

While the principle that a wrongdoer must not profit from his crime remains applicable, that principle does not go so far as to work a forfeiture of rights already enjoyed by the wrongdoer at the time of the crime and hence, the real property in the present case is owned under a tenancy in common as to one-half by the estate of Joseph Hector Gore and as to one-half by the estate of Ruth Ann Gore.

In the United States the problem has arisen where the husband and wife have held property as tenants by the entirety<sup>87</sup> or as joint tenants or a combination of both. A number of results are discernible in these cases:

1) It has been held that the murderer is entitled to all the property because the statutes barring inheritance are inapplicable to the joint tenancy and tenancy by the entirety situations.<sup>88</sup>

2) That the murderer hold the property upon a constructive trust but only to the extent of the value as of the date of the victim's

<sup>85</sup> *Supra*, footnote 52.

<sup>86</sup> *Ibid.*, at p. 536.

<sup>87</sup> A tenancy by the entirety is similar to a joint tenancy between a husband and wife in Canada but is distinguishable in that it can only be terminated by joint action of the husband and wife while a joint tenancy may be terminated by one tenant: Black, *op. cit.*, footnote 1, p. 1635.

<sup>88</sup> *In Re Estate of Foster* (1958), 320 P. 2d 855 (Ky), (joint tenants); *Welsh v. James* (1951), 95 N.E. 2d 872 (Ill.), (joint tenants); *Beddingfield v. Estill & Newman* (1906), 100 S.W. 108 (Tenn.), (tenancy by the entirety).

death of one half of the property for the period of the victim's life expectancy.<sup>89</sup>

3) That the murderer is chargeable as constructive trustee of the whole of the property for his victim's estate.<sup>90</sup>

4) That the murderer is chargeable as constructive trustee of his victim's estate of one half of the property in effect dividing the property equally.<sup>91</sup>

In Pennsylvania it is provided by statute that: "One-half of any property held by the slayer and the decedent as joint tenants, joint owners or joint obligees shall pass upon the death of the decedent to his estate, and the other half shall pass to his estate upon the death of the slayer unless the slayer obtains a separation or severance of the property or a decree granting partition".<sup>92</sup> This statute allows the slayer to exercise his right to separate property by the proper means if he is still alive, while at the same time if he does not exercise his right before he dies for instance, in the murder-suicide situation the killer's rights are lost.

Scott suggests that if one joint tenant kills the other, he should be chargeable as constructive trustee for the estate of the other at least to the extent to which his interest is enlarged by the murder so that the slayer should be deprived of the whole property except a life interest in half.<sup>93</sup> This was not the effect of the *Schobelt* decision, furthermore, the subsequent cases of *Re Gore*<sup>94</sup> and *Re Dreger*<sup>95</sup> have made it clear that in Canada where the wrongdoer is dead his estate becomes a constructive trustee of the whole property subject to a beneficial interest for his estate for an undivided one-half interest and as trustee for the estate of his victim as to the other undivided one-half interest.

#### V. Insurance Proceeds in Canada.

As we have seen from the *Cleaver* case the public policy rule applies where a beneficiary causes the death of an insured. The rule has also been held to apply in Canada to disentitle an insured's estate from

<sup>89</sup> *Sherman v. Weber*, *supra*, footnote 78.

<sup>90</sup> *Van Alstyne v. Tuffy* (1918), 169 N.Y. Supp. 173 (Sup. Ct); *Estate of Cox* (1963), 380 P. 2d 584 (Mont.).

<sup>91</sup> *Ashwood v. Patterson* (1951), 49 S. 2d 848 (Fla); *Bradley v. Fox* (1957), 129 N.E. 2d 699 (Ill.); *National City Bank of Evansville v. Bledsoe* (1957), 144 N.E. 2d. 710 (Ind.).

<sup>92</sup> Pa. Stats. Ann., tit. 20, § 3446.

<sup>93</sup> 5 A. Scott, *Trusts* (3rd ed., 1967), p. 3520; see also *Hargrove v. Taylor* (1964), 389 P. 2d 36 (Ore.), and *Restatement of Restitution* (1937), § 188.

<sup>94</sup> *Supra*, footnote 52.

<sup>95</sup> (1976), 69 D.L.R. (3d) 47 (Ont. H.C.).

benefiting from the proceeds of policies where he has killed the beneficiary. This was part of the holding in *Deckert v. Prudential Insurance*<sup>96</sup> which also held that the slayer's personal representative's claim was unenforceable because the event insured against, that is, the execution of the slayer for murder, was not included in the policies of insurance.<sup>97</sup>

It has however been held that where the insured kills the beneficiary of insurance proceeds his estate is not disentitled to the proceeds of the policy. In reaching this decision in *Re. Gore*<sup>98</sup> Osler J. quoted the following words from the American case of *Union Central Life Ins. Co. v. Elizabeth Trust Co. et al.*:<sup>99</sup>

To say that the object of the murder was to accomplish what could be accomplished by the mere scratch of a pen carries its own refutation and leads to the conclusion that profit via the policy was not the object of the crime. The reason for the application of the rule failing, the rule cannot be invoked.

Osler J., went on to find that it could not be assumed that the husband in that case murdered his wife to divest his wife of her contingent right to the proceeds of the policies and that therefore "[a] proper case for the application of the rule does not arise, the rule being based on the axiom that nothing should be done to encourage murder".<sup>100</sup>

#### *Conclusion: The Limits of The Public Policy Rule.*

I wish to conclude this article with two cases which in my opinion clearly show that the public policy rule is too widely applied and should be re-examined to determine not whether the rule applies but why the rule is applied.

In *Re Dellow's Will Trusts, Lloyds Bank v. Institute of Cancer Research*,<sup>101</sup> the issue was whether the wife feloniously killed her husband so that those claiming under her could not claim his estate and the gift to her in his will would not take effect. There the husband and wife were both found dead in their home with the gas jets on. The evidence presented further indicated that the husband had suffered two strokes and was mentally helpless while his wife had been very depressed, had threatened to commit suicide, and had expressed her concern for her husband should she die first. There was no evidence to show that she was legally insane. Having found

<sup>96</sup> [1943] O.R. 448 (Ont. C.A.).

<sup>97</sup> See also *The Standard Life Assurance Co. v. Trudeau* (1901), 31 S.C.R. 376.

<sup>98</sup> *Supra*, footnote 52, at p. 537.

<sup>99</sup> (1936), 183 Atl. Rep. 181, at p. 185. (N.J.).

<sup>100</sup> *Supra*, footnote 52, at p. 537.

<sup>101</sup> [1964] 1 All. E.R. 771 (Ch.).

on the evidence that the wife feloniously killed her husband and that the rule applied *Ungoed-Thomas J.* added.<sup>102</sup>

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 as the husband. It is in these circumstances that I find it somewhat repellent to have to hold that the wife was guilty of a crime which ranks amongst the most serious that can possibly be committed. The law in its concern for the protection of human life must be strong, and, indeed, severe, but I cannot refrain from saying that, in its bearing on such a case as this, it is clumsy, crude, and indeed, nowadays, if the case is regarded sympathetically, somewhat uncivilized. . . . This is clearly a case for compassion rather than for condemnation.

A similar case arose in Ontario. There, *Kingstone J.* expressed no compassion in applying the rule to a case which shows even more clearly than the *Dellow* case that the rule is too broad for application to every factual situation. In the *Whitelaw* case<sup>103</sup> the plaintiffs (the next of kin of the deceased wife) brought an action against the defendant husband for a declaration that he not be entitled to any share of his wife's estate. It appears that the husband and wife had made mutual wills leaving all to each other in the event of one predeceasing the other. Two years later, the husband was in a very depressed state of mind, suffering from the delusion that he was hopelessly ill and would not recover. His wife being concerned about her husband dying before herself entered into a mutual suicide pact with him. The wife then took poison and a few hours later the husband did likewise. When they were later discovered medical assistance was rendered, but too late to save the wife's life. At the time of the trial the husband was an inmate of an Ontario hospital.

*Kingstone J.* found that the defendant would have been liable under the Criminal Code for counseling, procuring, or aiding and abetting his wife to commit suicide or at least, in failing to obtain for her, after she had taken the poison, medical assistance which could have saved her life. He further held that despite the fact that the husband did not procure or suggest that his wife commit suicide for the purpose of benefiting from her estate, the principle of public policy "that no man shall benefit by his own wrong, should apply regardless of what the intention or motive or the ultimate object of the act may be".<sup>104</sup> The court went on to hold that the defendant was capable of appreciating the nature and quality of the act he and his wife were committing and knew that his omission to render her assistance was wrong.

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<sup>102</sup> *Ibid.*, at p. 775.

<sup>103</sup> *Whitelaw et al. v. Wilson et al.* [1934] O.R. 415.

<sup>104</sup> *Ibid.*, at p. 419.

The *Whitelaw* case has no counterpart in Anglo-Canadian law. While the *Dellow* case is just as pathetic as *Whitelaw*, in my view *Whitelaw* more than any other case highlights the severity of the public policy rule. Why did not the court give more weight to the fact that the wife willingly killed herself? Why should the husband have had to suffer further for an act which, at the time, both he and his wife believed was the only course they could take? Lastly, why should the wife's next of kin be beneficiaries of the whole tragic affair? These questions were neither asked nor discussed in the *Whitelaw* decision where the public policy rule was righteously, and blindly applied.

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