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Disposition of Property Held in Joint Tenancy When One Cotenant Causes the Death of the Other

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DISPOSITION OF PROPERTY HELD IN JOINT TENANCY WHEN ONE COTENANT CAUSES THE DEATH OF THE OTHER

The most significant feature of property held by two persons[1] in joint tenancy is that on the death of one joint tenant his interest in the property ceases, leaving complete ownership in the survivor. According to property doctrine the surviving tenant acquires no new estate on the death of his cotenant, for an incident of joint tenancy ownership is that each cotenant holds an undivided moiety of the whole estate.[2] When one joint tenant wrongfully kills his cotenant, thus assuring his survivorship, the question raised is to what extent, if any, the killing should affect the disposition of the jointly held property.

When the representatives of murdered cotenants have attempted to defeat the killer's right of survivorship on the theory that the killer has inequitably gained by his unlawful act, they have been met with the often effective argument that the killer has *not* gained since he was possessed of the whole estate before the crime. In this situation the equitable doctrine that no man should benefit from his own wrong conflicts with the property concepts applicable to the joint tenancy.

A similar problem is presented in the case of a tenancy by the entirety. At common law a husband and wife were considered to be one person, and thus the individual act of one tenant by the entirety will not sever the tenancy.[3] By contrast a conveyance by one joint tenant constitutes a severance, and the grantee and the remaining joint tenant then hold as tenants in common.[4] Nevertheless, since the distinguishing characteristics of undivided ownership and survivorship exist in both of these types of ownership, both will be considered in this Note as presenting the same problem.

Since a joint bank account with right of survivorship is basically similar to the two types of ownership discussed above,[5] it also will be considered in this Note. It should be noticed, however, that

1. Joint tenancy property can of course be held by more than two persons. This Note, however, will deal only with the two owner situation, since no further clarification of the problem under consideration would follow from discussion of the multiple owner situation.

2. 4 Thompson, Real Property §§ 1775, 1778 (Perm. ed. 1940), 2 Tiffany, Real Property § 419 (3d ed. 1939).

3. 4 Thompson, Real Property § 1803 (Perm. ed. 1940).

4. *Id.* §§ 1778-80.

5. See Restatement, Restitution § 188, comment *b* (1937), Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 Harv. L. Rev. 715, 734 (1936).

the rights of the owners of a joint bank account are created by the contract of deposit which generally provides that either joint owner may withdraw the entire sum deposited at any time.[6]

Nearly all of the proposed or adopted solutions to the "killer-survivor" problem have been based upon the property concepts of right of survivorship and undivided ownership. This Note will discuss and evaluate the variety of solutions which have been adopted and will also discuss some of the more important problems related to these solutions.

NON-STATUTORY SOLUTIONS

Killer Keeps the Property

In the absence of a statute specifically stating that a killer may not inherit from or take under the will of his victim, many courts have held that the killer may not be prevented from taking his victim's property by inheritance or devise.[7] These courts have reasoned that it is the province of the legislature to declare public policy and that the criminal codes exclusively define the punishment for a felonious killing.

When the legislatures began to enact statutes preventing a killer from inheriting from or taking under the will of his victim,[8] most courts refused to apply these statutes to property held in joint tenancy or in tenancy by the entirety on the ground that such an interpretation would attribute to the legislature an intent that the statutes be applied unconstitutionally This application, it is argued, would be unconstitutional because of constitutional provisions which prohibit forfeiture of estate.[9] Since by property doctrine the killer's interest is the same before and after survivorship, to take his estate from him would work a forfeiture.[10]

Another argument expressed by many courts is based on the same property doctrine that the survivor acquires no new interest at the death of his cotenant. Although a statute may prohibit a killer from acquiring property from his victim, if the joint tenancy doc-

6. Wade, *supra* note 5, at 734.

7 Crumley v. Hall, 202 Ga. 588, 43 S.E.2d 646 (1947), Hagan v. Cone, 21 Ga. App. 416, 94 S.E. 602 (1917), Eversole v. Eversole, 169 Ky. 793, 185 S.W 487 (1916), Owens v. Owens, 100 N.C. 240, 6 S.E. 794 (1888), Halloway v. McCormick, 41 Okla. 1, 136 Pac. 1111 (1913).

8. *E.g.*, Minn. Stat. § 525.87 (1953), Kan. Gen. Stat. Ann. § 59-513 (1949).

9. *E.g.*, Minn. Const. Art. I, § 11, Ill. Const. Art. II, § 11, Mo. Const. Art. I, § 30.

10. *E.g.*, Wenker v. Landon, 161 Ore. 265, 88 P.2d 971 (1939), Beddingfield v. Estill & Newman, 118 Tenn. 39, 100 S.W 108 (1906).

trine of undivided ownership is strictly adhered to, such a statute cannot affect the killer's right of survivorship since his interest before and after the crime is the same.[11]

In the absence of a statute stating that a killer may not inherit from or take under the will of his victim, it would seem that the courts can adequately deal with the problem by applying the equitable maxim that no one shall be permitted to profit by his own wrong.[12] In the case of a joint tenancy the survivor takes no new estate at the death of his cotenant, but he no longer must share the profits or suffer the interference of his cotenant; his heirs may take the property after his death, or he may devise it.[13] It seems, therefore, that the killer in reality does acquire new rights which can be withheld from him without causing a forfeiture of estate.[14]

Killer Is Deprived of the Whole Estate

Some courts have felt that it would be unconscionable to permit a killer to take by descent or devise from his victim, even though there is no statute to that effect.[15] The courts of New York have gone even further and held that a surviving joint tenant,[16] tenant by the entirety,[17] or surviving owner of a joint bank account[18] is deprived of *all* interest in the property because he has killed his cotenant; the representatives of the victim take the entire estate. This view has not met with favor because it disregards the nature of a joint tenancy.[19] A better reason for disapproving of this view is that it deprives the killer of all his interest including those rights

11. Wenker v. Landon, *supra* note 10; Wyckoff v. Clark, 77 Pa. D. & C. 249 (C.P 1951), Hamer v. Kinnan, 16 Pa. D. & C. 395 (C.P. 1931), Beddingfield v. Estill & Newman, *supra* note 10.

12. Weaver v. Hollis, 247 Ala. 57, 22 So. 2d 525 (1945), Grose v. Holland, 357 Mo. 874, 211 S.W.2d 464 (1948), Perry v. Strawbridge, 209 Mo. 621, 108 S.W 641 (1908).

13. See United State v. Jacobs, 306 U.S. 363, 370-71 (1939); Grose v. Holland, 357 Mo. 874, 880-81, 211 S.W.2d 464, 467 (1948), Wenker v. Landon, 161 Ore. 265, 272, 88 P.2d 971, 974 (1939).

14. Bradley v. Fox, 7 Ill. 2d 106, 129 N.E.2d 699 (1955), Grose v. Holland, *supra* note 13, *In re* King's Estate, 261 Wis. 266, 52 N.W.2d 885 (1952).

15. Perry v. Strawbridge, 209 Mo. 621, 108 S.W 641 (1908), Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889).

16. Bierbrauer v. Moran, 244 App. Div. 87, 279 N.Y. Supp. 176 (4th Dep't 1935).

17 Van Alstyne v. Tuffy, 103 Misc. 455, 169 N.Y. Supp. 173 (Sup. Ct. 1918).

18. *In re* Santourian's Estate, 125 Misc. 668, 212 N.Y. Supp. 116 (Surr. Ct. 1925).

19. See Oleff v. Hodapp, 129 Ohio St. 432, 438-39, 195 N.E. 838, 841 (1935), Reppy, *The Slayer's Bounty—In New York*, 20 N.Y.U.L.Q. Rev. 424 (1945).

which he held before the crime, it effects, in substance, a forfeiture of estate.

Constructive Trust Imposed on the Killer

Perhaps the most popular modern view is that, in the absence of a statute preventing it, the killer takes the property to which he would otherwise be entitled, and equity imposes a constructive trust upon him for the benefit of the heirs of his victim.[20] The amount of the property subjected to the constructive trust varies with the jurisdiction. The purpose of this approach is to preserve the basic property concepts of undivided ownership and right of survivorship and still give recognition to the equitable maxim that no one shall be permitted to profit by his own wrong.[21] It has been suggested that the relative life expectancies of killer and victim should be determined by mortality tables, and if the tables determine that he would have survived his victim, the killer should be allowed to keep the entire property, except that half the income from the property should be held in trust for the heirs of the victim during the estimated life span of the victim;[22] if it should be determined that the victim would have survived, this view would allow the heirs of the victim to take the entire property but would reserve to the killer half the income for his life. Another view, not based on mortality tables, is that the killer holds half of the income in trust for the heirs of his victim and keeps half the income for his own use, but upon his death the entire property passes to the heirs of the victim, under this view it is assumed that the victim would have survived the killer, since the killer prevented a natural determination of who would survive.[23]

It has been said that the constructive trust theory allows the killer to retain the bare legal title and hence does not violate the constitutional provisions against forfeiture of estate.[24] It seems,

20. Colton v. Wade, 32 Del. Ch. 122, 80 A.2d 923 (Ch. 1951), Neiman v. Hurff, 11 N.J. 55, 93 A.2d 345 (1952), Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188 (1927) *Accord,* Vesey v. Vesey, 237 Minn. 295, 54 N.W.2d 385 (1952), Diamond v. Ganci, 328 Mass. 315, 103 N.E.2d 716 (1952), Garner v. Phillips, 229 N.C. 160, 47 S.E.2d 845 (1948), Pritchett v. Henry, 287 S.W.2d 546 (Tex. Civ. App. 1955). See Ames, Lectures on Legal History 321-22 (1913), 3 Bogert, Trusts and Trustees § 478 (2d ed. 1946), 4 Pomeroy, Equity Jurisprudence § 1054d (5th ed. 1941), IV Scott, Trusts § 493 (2d ed. 1956), Restatement, Restitution § 188 (1937), Reppy, *The Slayer's Bounty—In New York,* 20 N.Y.U.L.Q. Rev. 424, 429-31 (1945).

21. See 4 Pomeroy, *op. cit. supra* note 20.

22. Sherman v. Weber, 113 N.J. Eq. 451, 167 Atl. 517 (Ch. 1933) See 3 Bogert, Trusts and Trustees § 478 (2d ed. 1946).

23. Colton v. Wade, 32 Del. Ch. 122, 80 A.2d 923 (Ch. 1951). See IV Scott, Trusts § 493.2 (2d ed. 1956), Restatement, Restitution § 188, comment *b* (1937).

24. See IV Scott, Trusts § 492 (2d ed. 1956)

however, that these provisions in the various state constitutions were adopted for the substantial purpose of protecting the heirs of a criminal[25] and should not be disposed of by the application of a fiction. The preservation of property concepts should not be paramount to an equitable disposition of the property.

In *Vesey v. Vesey*,[26] the Minnesota Supreme Court approved the constructive trust theory, stating as its reasons that it does not take any vested legal rights from the killer and gives effect to the doctrine that one should not be permitted to profit by his own wrong. The court did not indicate what portion of the estate the killer would be required to hold in trust in the case of a joint tenancy, since the case involved a joint bank account. The court distinguished a joint tenancy from a joint bank account on the basis that a bank account is created by the contract of deposit, and hence, contract law and not property law controls. The contract provided that the funds deposited became the joint property of the obligees, but that the balance of the account upon the death of one obligee became the sole property of the survivor. By the terms of this contract either obligee had a right to withdraw the entire sum on deposit. The court held that since the killer had prevented a natural determination of who would first have withdrawn the fund, the doubt should be resolved against the killer, and the killer was required to hold the entire sum on a constructive trust for the benefit of the heirs of the victim.

It is not clear what portion of the estate will be withheld from the killer in the case of a joint tenancy where property law controls rather than contract law. It does seem clear, however, that the Minnesota Supreme Court will not deprive the killer of his vested *legal* interests in the property, but recognizing that the killer has benefiited by his crime, it will require him to hold some portion of the estate in trust for his victim's heirs. It is quite possible that the court will recognize that the heirs of the killer should not be deprived of all their present or prospective interest; if the court recognizes this, it is probable that it will require the killer to hold half of the entire estate in trust for the victim's heirs, and allow him to keep half for himself.

The Tenancy Continues with the Victim's Heirs Taking His Place

The Wisconsin Supreme Court in *In re King's Estate*[27] advanced a theory which no other court has used. Under this theory the

25. Wallach v. Van Riswick, 92 U.S. 202 (1875).
26. 237 Minn. 295, 54 N.W.2d 385 (1952).
27. 261 Wis. 266, 52 N.W.2d 885 (1952).

status of the victim as a joint tenant continues in his representatives until the killer dies, whereupon the victim's heirs take the property as surviving joint tenant. The killer is presumed to be the first to die, since he has eliminated the possibility of a natural determination of the survivor. In the *King* case the killer committed suicide and thus it was unnecessary for the court to determine what rights the killer would have received had he lived. If the theory of the *King* case should be extended to cases where the killer does not commit suicide but continues to live as a joint tenant to the property, it is not clear from the court's opinion whether he would be allowed to sever and convert the tenancy to a tenancy in common. It seems, however, that the presumption raised by the court that the killer would die first indicates that a severance would not be allowed. Hence, the effect of the case is that the killer is entitled only to half the income for his life and all the rest goes to the heirs of the victim.

The difficulty with this theory is that it ignores the fact that the joint tenancy has in reality been terminated by the act of the killer. The Wisconsin Supreme Court is primarily concerned with upholding the familiar property concepts associated with a joint tenancy, but it still wishes to prevent the killer from profiting by his own wrong. The Wisconsin solution is an example of the manipulations of property doctrine courts can and do perform to reach their pre-desired results. More equitable results are foreclosed by the court's concern with the killer's guilt. If the court should begin with the predilection to treat the heirs of both killer and victim equally, property doctrine can be easily manipulated to yield half the property to each group of claimants.

The Joint Tenancy Is Severed by the Killer's Crime and Converted Into a Tenancy in Common

The unlawful killing of one joint tenant by the other terminates the unities of time, title, interest, and possession. Though it is true that these unities are also destroyed at the natural death of one joint tenant, it can be argued that property law should not recognize a right of survivorship not contemplated by the grantor or purchasers of an estate in joint tenancy The termination of the tenancy through the act of one tenant in killing the other is clearly not within the contemplation of the parties, and for that reason the property law should recognize no survivorship.

Yet the fact remains that the unities have been destroyed. According to property concepts destruction of the unities can give rise

to two relationships only, survivorship with the entire property going to the surviving tenant or severance with each tenant taking only half the property. Since survivorship should not be permitted to result from the killing of a cotenant, severance is the only doctrinal solution. A felonious killing, thus, can be viewed as just another means by which a joint tenancy may be severed. In the case of a tenancy by the entirety, the tenancy may be severed by divorce, and so a felonious killing, which also terminates the marriage status, should sever the tenancy too.[28]

The equal division of the property on the basis that the killing has caused a severance has received substantial support in recent years[29] and appears to be the preferable solution. It will perhaps not do complete justice in every case, but if a general rule is desirable this would appear to be the most practical. It leaves the punishment of the killer to the criminal law and provides for both the heirs of the victim and those of the killer. In the case where a husband and wife own property in joint tenancy and both have children by former marriages, the justice of the result under this theory is evident.[30]

Statutory Solutions

The majority of the states have statutes dealing with the problem which arises when a person takes property by killing another, but these statutes vary a great deal in their provisions.[31] The most common type of statute provides that one who feloniously causes the death of another shall not take from his victim by testate or intestate succession, or as life insurance beneficiary.[32] These statutes have generally been said to be inapplicable where one joint tenant kills another.[33] They have often been narrowly construed because they are said to be penal,[34] and some have been circumvented on

28. Hogan v. Martin, 52 So. 2d 806 (Fla. 1951), Ashwood v. Patterson, 49 So.2d 848 (Fla. 1951), Cowan v. Pleasant, 263 S.W.2d 494 (Ky. 1954), Goldsmith v. Pearce, 345 Mich. 146, 75 N.W.2d 810 (1956), Grose v. Holland, 357 Mo. 874, 211 S.W.2d 464 (1948), Barnett v. Couey, 224 Mo. App. 913, 27 S.W.2d 757 (1930).

29. See Bradley v. Fox, 7 Ill. 2d 106, 129 N.E.2d 699 (1955) and cases cited at note 28 *supra*.

30. See Cowan v. Pleasant, 263 S.W.2d 494 (Ky. 1954).

31. See IV Scott, Trusts § 492.1 (2d ed. 1956).

32. *E.g.*, Minn. Stat. § 525.87 (1953), Kan. Gen. Stat. Ann. 59-513 (1949). See notes 52-61 *infra* and related text.

33. *E.g.*, *In re* King's Estate, 261 Wis. 266, 52 N.W.2d 885 (1952), Anderson v. Grasberg, 247 Minn. 538, 545, 78 N.W.2d 450, 455 (1956) (dictum).

34. *E.g.*, Smith v. Greenburg, 121 Colo. 417, 423, 218 P.2d 514, 517-18 (1950), *In re* Kuhn's Estate, 125 Iowa 449, 101 N.W 151 (1904).

questionable grounds.[35] Sometimes the statutes are poorly drafted[36] and given literal interpretation.[37] Although most of these statutes do not deal with jointly held property, it should be expected that similar difficulties will be met with those that do.

Only a few states have statutes expressly dealing with the problem which arises when one joint owner assures his survivorship by killing the other. Pennsylvania and South Dakota[38] have enacted an elaborate statutory solution proposed by Professor Wade.[39] In the case of a tenancy by the entirety, this solution would give one half of the property to the victim's estate, and the killer would retain one half for his life, at the killer's death, his half would pass to the victim's estate also.[40] In the case of a joint tenacy or joint bank account the result is the same, with the important exception that the killer may obtain a division or severance of the property during his lifetime.[41] This distinction is made because according to property doctrine a joint tenant or a joint obligee can compel a division of the property by his individual act, while one tenant by the entirety cannot.[42] Wade admits that his solution is not designed to protect the heirs of the killer, but he argues that after all they have no claim except through the killer.[43]

Although it is true that the heirs of the killer have no claim to property except through the killer, Wade's argument fails to explain why the killer's innocent heirs should be deprived of the possibility of succeeding to the property The fact that a property interest has passed through a felon does not seem to constitute an argument for depriving the ultimate heirs of their expectant interest in the prop-

35. Where Kansas and Oklahoma had similar statutes to the effect that one convicted of taking another's life may not inherit from his victim, a federal court held that one convicted of third degree manslaughter (killing in the heat of passion with no design to effect death) in Kansas could not be precluded from inheriting Oklahoma property because the Kansas conviction had no extraterritorial effect. Harrison v. Moncravie, 264 Fed. 776 (8th Cir.), *appeal dismissed,* 255 U.S. 562 (1920).

36. Where a statute prevented one from taking an estate which he killed to obtain, it was held that one was not prevented from taking when there was no evidence that the killing was committed for the purpose of taking the victim's property. Ward v. Ward, 174 Va. 331, 6 S.E.2d 664 (1940). This statute has since been modified. See *infra* note 50.

37 A statute which said that one finally adjudged guilty of murder may not inherit from his victim, was held to be inapplicable when the killer committed suicide immediately after killing his victim. Shuman v. Schick, 95 Ohio App. 413, 120 N.E.2d 330 (1953).

38. Pa. Stat. Ann., tit. 20, §§ 3445, 3446 (Purdon Supp. 1956), S.Dak Code § 56.0505 (1939).

39. Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution,* 49 Harv. L. Rev. 715 (1936)

40. *Id.* at 728.

41. *Id.* at 732.

42. *Id.* at 733.

43. *Id.* at 730.

erty. Indeed, the policy behind anti-forfeiture clauses in our constitutions is based on the idea that it is unjust to deprive the heirs of a felon of their expectancy.[44]

In a Pennsylvania case it was held that a statute adopting this solution did not apply where the property had been acquired before the enactment of the statute.[45] The killing had occurred after the statute was enacted, but the court held that the statute was not retroactive in application and therefore did not affect the disposition of an estate by the entirety acquired before the statute was in force. It was unnecessary to pass upon the constitutionality of the statute, but the court indicated that there might be a question as to whether it violated the constitutional provision against forfeiture of estate.[46]

Kentucky has a statute which provides that a joint tenant who has been convicted for feloniously killing his cotenant forfeits "all interest in and to the property of the decedent, including any interest he would receive as surviving joint tenant", the property forfeited goes to the victim's estate.[47] The Kentucky court's solution to an analogous problem indicates that it will probably interpret the statute's ambiguous language as demanding a half and half division of jointly held property.[48]

South Carolina has a statute which provides that a killer may not inherit from his victim, but if the killer has children who would inherit from the victim if the killer were dead, the children shall take whatever interest their parent would have taken.[49] This statute is, of course, inapplicable in the case of a joint tenancy, but it illustrates the idea that the heirs of a killer should be provided for and not punished.

The most desirable statutory solution would be one which provides that the heirs of the victim take one half of the property and the killer takes the other half. This, in effect, makes the act of killing the means by which the joint tenancy is severed.

44. See Wallach v. Van Riswick, 92 U.S. 202 (1875), Note, 44 Yale L. J. 164 (1934).
45. Wyckoff v. Clark, 77 Pa. D. & C. 249 (C.P. 1951).
46. Wyckoff v. Clark, *supra* note 45 at 257 (dictum).
47. Ky. Rev. Stat. Ann. § 381.280 (Baldwin 1955).
48. Cowan v. Pleasant, 263 S.W.2d 494 (Ky. 1954) involved the disposition of a tenancy by the entirety where the husband killed his wife and then himself. The Kentucky statute did not apply, since conviction of the husband was impossible. The court distributed half the property to the heirs of the wife and half to the heirs of the husband. In deciding the case the court surveyed the non-statutory solutions of other jurisdictions and settled on its decision as the most logical and just. It seems then that, in construing the ambiguous statute, should occasion arise, the court will abide by its prior determination of justice and logic.
49. S.C. Code § 19-5 (1952).

REQUIREMENTS OF AN INTENT TO KILL

If the fundamental principle running through these cases is that one shall not profit from his wrong, a problem in defining "wrong" is presented. It appears to be well settled law that in order to prevent a killer from taking an interest in property as a result of the victim's death, it is unnecessary that the killing be committed with the motive of obtaining such an interest.[50] It follows that in preventing profit through wrong, the courts will go beyond frustration of unconscionable plans. It also appears clear that a person whose negligent but non-criminal act causes the death of another will not be barred from acquiring the victim's property as the result of his death, as applied to the joint tenancy situation, death resulting from an unintentional tort is so nearly like a natural determination of survivorship that it may fairly be supposed to have been within the contemplation of the parties who created the joint tenancy.[51] It thus appears that the question is not merely whether a legal wrong was committed, but whether the legal wrong is wrong enough. The answer to such a question must necessarily be based on emotional reaction.

Statutes which deal with the problem of defining "wrong" are varied in their terms.[52] Sometimes only murder will prevent the killer from taking property,[53] while other statutes require murder

50. See IV Scott, Trusts § 492.3 (2d ed. 1956). Gollnik v. Mengel, 112 Minn. 349, 128 N.W 292 (1910), involving the statutory inheritance rights of a widow who murdered her husband, implies the contrary but the case is now superseded by Minn. Stat. § 525.87 (1953) Since similar considerations are involved, authorities cited in this section deal with the killer's rights to life insurance proceeds and to testate and intestate succession as well as rights as surviving cotenant.

51. In Minasian v. Aetna Life Ins. Co., 295 Mass. 1, 5, 3 N.E.2d 17 18-19 (1936), the court reasoned that if the maxim that no one should be permitted to profit by his own wrong were applied literally, then the slightest negligence would be a bar; this would be impractical and unjust. In Schreiner v. High Court of I.C.O. of F., 35 Ill. App. 576, 580 (1890), the court said that no homicide which is the result of carelessness or which is unintentional should bar the beneficiary's right to the proceeds of a life insurance policy, since a contract of insurance impliedly assumes the risk of all careless acts.

Of course when the contest is over life insurance, the insurer cannot escape liability even if the killer-beneficiary is prevented from taking the proceeds. When the beneficiary cannot take the life insurance fund, the estate of the deceased will. Protective Life Ins. Co. v. Linson, 245 Ala. 493, 17 So.2d 761 (1944), West Coast Life Ins. Co. v. Crawford, 58 Cal. App. 2d 771, 138 P.2d 384 (1943). In three situations, however, the insurer will be relieved of liability if the beneficiary has slain the insured (1) when murder of the insured is an excepted risk; (2) when the insurance contract is fraudulently made; (3) when only the beneficiary has an interest in the policy. IV Scott, Trusts § 494.2 (2d ed. 1956).

52. Statutes are collected in IV Scott, Trusts § 492.1 n.1 (2d ed. 1956)

53. *E.g.*, Colo. Rev. Stat. Ann. § 152-2-13 (1953), Fla. Stat. § 731.31 (1953).

or manslaughter,[54] murder or voluntary manslaughter,[55] felonious killing, [56] or intentional,[57] willful[58] or unlawful[59] causation of death. These statutes also vary in the requirement of a conviction,[60] and the nature of the succession to property from which the killer is barred.[61]

Cases decided in the absence of statute are also inconsistent as to the degree of wrong required to bar the killer. There is sparse authority for limiting the the definition of "wrong" to murder.[62] The great majority of cases require an intentional criminal homicide.[63] Thus because an insane killer is incapable of forming the requisite intent, he will not be prevented from succeeding to his victim's property.[64] A few jurisdictions hold that one who commits any criminal homicide cannot take from his victim.[65] New York has held that first[66] or second degree manslaughter,[67] both defined as homicide without a design to effect death,[68] is sufficient to bar the

54. D.C. Code Ann. § 18-109 (1951).
55. Cal. Prob. Code § 258 (West 1956), S.C. Code § 19-5 (1952).
56. *E.g.,* Minn. Stat. § 525.87 (1953), Kan. Gen. Stat. Ann. 59-513 (1949).
57 Ind. Ann. Stat. § 6-212 (Burns 1953).
58. Miss. Code Ann. §§ 479, 672 (1942).
59. *E.g.,* Neb. Rev. Stat. §§ 30-119, 30-120 (1943), Pa. Stat. tit. 20, §§ 3441-3456 (Purdon 1956). See Okla. Stat. tit. 84, § 231 (1951) (conviction of causing death), Tenn. Code Ann. §§ 31-109, 31-207 (1955) (killing other than accidental or in self defense).
60. See p. 652 *infra.*
61. See note 32 *supra* and related text; note 50 *supra.*
62. See Gollnik v. Mengel, 112 Minn. 349, 128 N.W. 292 (1910), which is superseded by Minn. Stat. § 525.87 (1953), Restatement, Restitution, §§ 187, 189 (1937). A number of cases hold that one guilty of manslaughter is not prevented from taking property through his victim's death. These cases, however, deal with involuntary manslaughter, not voluntary manslaughter. See discussion and cases cited in Metropolitan Life Ins. Co. v. McDavid, 39 F Supp. 228 (E.D. Mich. 1941).
63. *E.g.,* Metropolitan Life Ins. Co. v. McDavid, *supra* note 62.
64. Anderson v. Grasberg, 247 Minn. 538, 78 N.W.2d 450 (1956), Eisenhardt v. Siegal, 343 Mo. 22, 119 S.W.2d 810 (1938), *In re* Eckhardt's Estate, 184 Misc. 748, 54 N.Y.S. 2d 484 (Surr. Ct. 1945).
The killer may be excused from standing trial in a criminal proceeding by reason of insanity, but this fact does not prevent a court, in a civil proceeding held to determine the disposition of the property, from determining whether the killer was insane at the time of the killing. Anderson v. Grasberg, *supra;* Goldsmith v. Pearce, 345 Mich. 146, 75 N.W.2d 810 (1956).
It has been held that the minority of the killer is not ground for excluding him from the rule that one may not profit by his wrong. *In re* Sengillo's Estate, 206 Misc. 751, 134 N.Y.S. 2d 800 (1954).
65. *In re* Sparks' Estate, 172 Misc. 642, 15 N.Y.S.2d 926 (Surr. Ct. 1939), In The Estate of Hall, [1914] P 1 (C.A.), Lundy v. Lundy, 24 Can. Sup. Ct. 650 (1895).
66. *In re* Sparks' Estate, supra note 65.
67 *In re* Drewes' Estate, 206 Misc. 940, 136 N.Y.S.2d 72 (Surr. Ct. 1954). *But see* 2 App. Div. 2d 806, 153 N.Y.S.2d 632 (4th Dep't 1956) in which a related case was remanded for a factual determination of the manner in which decedent met death.
68. N.Y. Pen. Law §§ 1050, 1052.

killer from taking the property In the leading New York case of *In re Sparks' Estate*[69] the court directed its attention not to the question whether the killer *intended* to kill his victim, but to the problem of whether manslaughter is sufficient wrong to bar the killer from succeeding to his victim's property In deciding in the affirmative, the court quoted from *Van Alystyne v. Tuffy:*

> [W]here the natural and direct consequence of a criminal act is to vest property in the criminal, whether he be a thief or a murderer, the thought of his being allowed to enjoy it is too abhorrent for the courts of this state, or of the United States, to countenance, and this whether the crime was committed for that very purpose or with some other felonious design.[70]

And from the opinion of Hamilton, L. J., in *Estate of Hall.*

> The distinction [between murder and manslaughter] seems to me either to rely unduly upon legal classification, or else to encourage what, I am sure would be very noxious — a sentimental speculation as to the motives and degree of moral guilt of a person who has been justly convicted and sent to prison.[71]

Thus the language of the *Sparks'* case could support the rule that any criminal homicide regardless of intent or motive is sufficient to bar the killer from taking property as a result of his victim's death. However, while not clearly stated in the opinion it appears that the killer feloniously assaulted his victim,[72] although he did not intend to kill, this plus the reference to "felonious design" in the above quoted portion of the *Van Alstyne* case could limit the *Sparks'* case at least to homicides resulting from an intentional felonious act, and perhaps to homicides resulting from an intentional felonious act directed toward the actual victim.

In *Metropolitan Life Ins. Co. v. McDavid*[73] a federal court was faced with the problem of whether manslaughter was a sufficient wrong to prevent the killer from benefiting under an insurance policy on the victim's life. This court held that manslaughter was

69. 172 Misc. 642, 15 N.Y.S.2d 926 (Surr. Ct. 1939).

70. 103 Misc. 455, 457, 169 N.Y.S. 173, 175 (Sup. Ct. 1918) This case considered only whether the killing was required to be for the purpose of obtaining the victim's property and is thus removed from context in the *Sparks'* case.

71. [1914] P 1, 7-8 (C.A.)

72. It was alleged and not contested that the deceased was the victim of the killer's "felonious violence." See also 40 Colum. L. Rev. 333 n. 39 (1940).

73. 39 F Supp. 228 (E.D. Mich. 1941). See also United States v. Kwasniewski, 91 F Supp. 847 (E.D. Mich. 1950), 35 Minn. L. Rev. 415 (1951).

sufficient, but only if the killer intended to kill the victim. The court criticized the Restatement of Restitution for laying down a flat rule that murder was a sufficient wrong and manslaughter was not. The court indicated that it would reach an opposite result in the case of "statutory" manslaughter such as homicide resulting from reckless operation of an automobile, attempted abortion, setting a spring trap or gun, or careless use of firearms. The court also stated by way of dictum that a killer convicted of murder under the felony-murder rule should not be prevented from taking property because of the victim's death since there was no intent to kill the actual victim even though there may have been intent to kill someone else.[74] This court does not expressly deal with the situation where the killer intended to inflict harm on his victim but not to kill him, although the literal language suggests that the killer could take under these circumstances.

The most rational solution would appear to lie between the *Sparks'* and *McDavid* cases. Where there is an intent to kill the actual victim, there should be no distinction between murder and manslaughter; niceties such as the existence of "the heat of passion" and a "colling off period" may be appropriate to questions of life and liberty, but seem inappropriate to determination of property rights. For similar reasons, it seems inappropriate to distinguish between an intentional infliction upon the victim of harm that was not intended to prove fatal, and an intent to kill. Where the homicide results from reckless or dangerous conduct that was not intended to cause either harm or death, the killer should not be deprived of property rights even though the homicide is punishable as a crime. Here the "wrong" more closely resembles simple negligence —a natural termination of life—than does an intentional infliction of harm. In the felony-murder situation, where death of the victim although not intended, results from an attempt to kill another or even an attempt to commit a felony other than murder, the killer should be barred. The judicial conscience should be shocked no less by the thought of a killer enjoying property as a result of a chain of fortuitous but still fatal circumstances set in motion by the killer's intentional felonious act than by the thought of one enjoying property as the direct result of an intent to kill his victim.

74. See also Legette v. Smith, 226 S.C. 403, 85 S.E.2d 576 (1955), where it was held that one who kills his wife while firing his revolver at another does not lose his right to inherit from her; in order to deprive the killer of his right of inheritance it must be shown that his intent was to kill the person from whom he was to inherit; transferred intent was held to be insufficient.

REQUIREMENT OF A CONVICTION

Some state statutes preclude a killer from taking property from his victim only if he is *convicted* of a criminal homicide.[75] Where the killer commits suicide before conviction, these statutes do not prevent him from taking his victim's property.[76] A requirement of conviction, however, seems unwise, since suicides appear to be quite common in these cases.[77]

The state must prove the killer guilty beyond a reasonable doubt to obtain a conviction in a criminal proceeding.[78] In a civil proceeding to determine the right of the killer to take the property, the guilt of the killer need only be proved by a preponderance of the evidence.[79] Therefore, if the killer is not found guilty in a criminal proceeding, it is still possible to find him guilty on the same evidence in a civil proceeding.[80]

The requirement of a conviction is tantamount to requiring proof beyond a reasonable doubt in a civil proceeding. The necessity for a high degree of proof in criminal cases is based on the policy that the severe consequences of punishment should not be imposed unless the tribunal is highly certain of the defendant's guilt.[81] Transferring the strict requirement of proof from the criminal to the civil trial is undesirable, since only a determination of property rights between two private claimants is at stake in the civil case.

Where a conviction for criminal homicide is a statutory requisite in a civil proceeding to prevent the killer from taking the property, the conviction is, of course, admissible in evidence and is conclusive of the killer's guilt.[82] Where a conviction is not required, however, the verdict in a criminal proceeding is not conclusive of guilt or innocence.[83] It has even been held that the verdict in the criminal proceeding is not admissible in the civil proceeding.[84] It would

75. See IV Scott, Trusts § 492.1 (2d ed. 1956).
76. Hogg v. Whitham, 120 Kan. 341, 242 Pac. 1021 (1926).
77 See *e.g.,* Hogg v. Whitham, 120 Kan. 341, 242 Pac. 1021 (1926), Cowan v. Pleasant, 263 S.W.2d 494 (Ky. 1954), Van Alstyne v. Tuffy, 103 Misc. 455, 169 N.Y. Supp. 173 (Sup. Ct. 1918), Halloway v. McCormick 41 Okla. 1, 136 Pac. 1111 (1913), *In re* King's Estate, 261 Wis. 266, 52 N.W.2d 885 (1952).
78. McCormick, Evidence § 321 (1954).
79. *Id.* § 319.
80. IV Scott, Trusts § 492.4 (2d ed. 1956).
81. McCormick, Evidence § 321 (1954)
82. IV Scott, Trusts § 492.4 (2d ed. 1956).
83. United States v. Kwasniewski, 91 F Supp. 847 (E.D. Mich. 1950), 35 Minn. L. Rev. 415 (1951) (acquittal not conclusive), Sovereign Camp W.O.W v. Gunn, 227 Ala. 400, 150 So. 491 (1933) (conviction not conclusive).
84. Carter v. Carter, 88 So.2d 153 (Fla. 1956) (verdict of acquital inadmissible), Lillie v. Modern Woodmen of America, 89 Neb. 1, 130 N.W 1004 (1911) (verdict of conviction inadmissible)

appear that where the criminal proceeding resulted in a conviction, even though it is not a requisite of a civil action to prevent the killer from taking property, the verdict should be admissible in evidence and conclusive of the killer's guilt. If an issue of fact has been decided in a criminal proceeding with more extensive procedural safeguards and a greater burden of proof to overcome, retrying the same issue in a civil proceeding seems unsound judicial administration. Conversely, it is clear that a verdict of acquittal in the criminal proceeding, since the acquittal proves only that the higher burden of proof was not met by the prosecution. It seems sound to refuse to receive the verdict of acquittal in evidence on the ground that the jury will fail to understand the difference in burden of proof between civil and criminal proceedings to the prejudice of the alleged victim's estate. Any argument that the result of the criminal proceeding should yield mutual benefits and burdens to the parties in the civil action, with reference to presumptions and the exclusionary rules of evidence, would seem to be based upon emotional reaction rather than upon sound analysis of the principles of evidence.

Conclusion

The treatment which the courts have given to the problem of a joint tenancy destroyed by an unlawful killing has been rather narrow and unrealistic. The approach which has generally been taken has been to patch up the shattered joint tenancy as well as possible and to attempt to restore the tenancy to the state it was in before the killing. At one extreme is the position that the fact of survivorship is controlling and the killer must be permitted to keep the interest he acquired by killing his cotenant.[85] At the other extreme is the view that the killer may not profit by his wrongful act and that it will be presumed that the victim would have survived if he had not been killed.[86] It appears evident that no amount of judicial mending will put the joint tenancy back together again, and this should be recognized.

Two policies must be compromised to reach a fair solution of the problem. The manifest unfairness of permitting the killer to take the entire property by right of accelerated survivorship demands that some interest be given to the victim's estate. The policy that one should not benefit by doing wrong can remedy the unfairness by taking the killer's ill gotten *gains*. Yet the substance of the constitutional provisions against forfeiture of estate requires that the

85. Wenker v. Landon, 161 Ore. 265, 88 P.2d 971 (1939).
86. Neiman v. Hurff, 11 N.J. 55, 93 A.2d 345 (1952).

heirs of a wrongdoer should not suffer for their ancestor's crime, and therefore some interest must be preserved to the killer. To take what is gained does not conflict with the proposition that punishment should be left to the criminal law, but to take the whole property would resemble punishment in a civil case. By use of the doctrine of severance the compromise can be made so that each group of claimants receives half the property Thus the killer is prevented from profiting by his survivorship, and yet he is permitted to keep what he clearly had power to vest in himself before the act; the victim's estate receives its wergild, and yet the anti-forfeiture policies are satisfied by provision for the innocent heirs of the killer. This is achieved through a reasonable manipulation of property doctrine.