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Forfeiture: Murder of Life Tenant by Remainderman

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usually stamped on checks by collecting banks.[9] In cases where the fraudulent employee has the authority to sign checks the opposite result is reached under the unamended N. I. L. so that it is the drawer of the checks who suffers the loss.[10]

But as already pointed out, in the Prugh case it was Prugh Co. who suffered the loss. This was because Missouri amended the N. I. L. 9-3 to read: "The instrument is payable to bearer when it is payable to the order of a fictitious or nonexisting person *or to a person not intended or entitled to have any interest in it* and such fact was known to the person making it so payable *or was known to his employee or other agent who supplies the name of such payee.*" The effect of this amendment is to make all of these cases end up as bearer paper cases because the guilty knowledge of the fraudulent employee is imputed to the employer so that it will be always the intent of the fraudulent employee that will control. If it does nothing more this amendment settles this otherwise confused phase of the law and makes the decisions uniform. But it does more than that; it puts the risk of loss on the party best able to prevent the fraud. Neither the drawee bank nor the collecting bank have any reasonable way to detect forged instruments. It seems unrealistic and arbitrary to put the loss on these banks when it is the drawer of the checks who has put this fraudulent employee in a position to perpetrate the deception. In most cases the employer is not negligent in putting the employee in a position of trust so the net effect of the amendment is to impose absolute liability on the employer, but this seems to be fairly includible as a risk of the business enterprise which the employer can protect himself from by fidelity insurance.

California has had no decision decided under its amended section as yet, but it is nearly identical with the Missouri amendment. One 1950 case mentions the amendment but the court chose not to apply it to the case since the transaction occurred before the amendment went into effect.[11] The English Bills of Exchange Act of 1882 seems to be in accord with the policy of the amendment.[12] The proposed final draft of the Uniform Commercial Code is intended to attain the same result as the amendment.[13]

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FORFEITURE: MURDER OF LIFE TENANT BY REMAINDERMAN.—In a recent Virginia case,[1] a husband and wife, owning certain property as joint tenants, executed a joint will whereby the survivor was to take all the property for life with power to

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[9]Bank of America Nat. Trust & Savings Assn. v. Security First Nat. Bank of Los Angeles, 32 Cal. App. 2d 647, 90 P. 2d 335 (1939); Second Nat. Bank of Pittsburgh v. Guaranty Trust & Safe Deposit Co. of Shamokin, 206 Pa. 616, 56 A. 72 (1903).

[10]Synder v. Corn Exchange Nat. Bank, 221 Pa. 599, 70 A. 876 (1908); Cohen v. Lincoln Sav. Bank of Brooklyn, 275 N. Y. 399, 10 N. E. 2d 457 (1938).

[11]Calif. Mill Supply Co. v. Bank of America Nat. Trust & Savings Assn., 36 Cal. 2d 334, 223 P. 2d 849 (1950).

[12]Sec. 7(3): "Where the payee is a fictitious or nonexisting person the bill may be treated as payable to bearer." See, also, Bank of England v. Vagliano Bros., 1891 A. C. 107.

[13]Uniform Commercial Code, sec. 3-405:

(1) With respect to a holder in due course or a person paying the instrument in good faith an indorsement is effective when made in the name of the specified payee by any of the following persons, or their agents or confederates:

(c) An agent or employee of the drawer who has supplied him with the name of the payee intending the latter to have no such interest.

[1]Blanks v. Jiggetts, — Va. —, 64 S. E. 2d 809 (1951).

dispose of the whole or any part thereof *inter vivos,* remainder to their issue in fee simple. The wife died leaving the husband and a son. The husband subsequently executed another will leaving all his property to his son. The son murdered his father for the purpose of obtaining the property.

Section 64-18 of the 1950 Virginia Code provided: "No person shall acquire by descent or distribution, or by will, any interest in the estate of another whom he has killed in order to obtain such interest."

This suit was instigated by other heirs of the victim for the purpose of having an adjudication that the son was barred from taking any of the property.

The court held that as the husband did not make an *inter vivos* disposition of the property, the son was entitled to possession of the property of which the wife died seized and devised to him as a vested remainder.[2]

The courts have frequently been concerned with the problem of whether the murderer should be allowed to acquire and keep property by virtue of his crime. The problem has arisen in a number of different forms, among them:

(1) Right of the murderer to take under the will of his victim.
(2) Right of the murderer to take by descent from his victim.
(3) Right of the murderer to take by survivorship from his joint tenant victim.

The basic problem and the arguments presented are substantially the same, but the various courts considering the problem are far from harmonious in the results they reach. All the courts are bothered by a basic moral repulsion against the idea of the murderer being allowed to profit by his crime. Generally the courts have taken three different positions.

The first view is that complete ownership of the property will pass to the murderer in spite of his crime. This view represents the weight of authority, at least in the intestacy situation, and it derives its strength from three main arguments. The first is that to deny the property to the murderer because of his crime would be a punishment in addition to that received under his sentence, and it is the function of the legislature and not the courts to fix the punishment for crime.[3] Similarly, the second argument is that such a denial would amount to a forfeiture for crime and this is against our traditions and expressly forbidden by statute in most states.[4] The third

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[2]The court did not consider the effect of the joint tenancy in the opinion. The well-established rule is that there can be no severance of a joint tenancy by devise, since the right of survivorship takes precedence over the will. (48 C. J. S., sec. 4, at 928.) Apparently a severance was found in the execution of the joint will, it being considered an agreement to terminate the joint tenancy. (Tiffany on Real Property, 3d ed., vol. 2, 425, 426; Hiltbrand v. Hiltbrand, 13 Cal. App. 2d 330, 56 P. 2d 1292 (1936).) A joint will is in legal effect the separate will of each of the persons executing it as makers, the execution of the others being considered mere surplusage. (69 C. J. at 1295; In re Cole's Will, 171 N. C. 74, 87 S. E. 962 (1916).) When such a severance is found, the husband and wife each own an undivided one-half as tenants in common. If such a severance were not found, the wife's property would have gone to the father by survivorship, and the son, taking under the later will of the father, would have been barred by the express terms of the statute. The court did not spell out of what share of the property the mother died seized, and which the son took as a vested remainder.

[3]Carpenter's Estate, 170 Pa. 203, 32 A. 637 (1895); 29 L. R. A. 145; Hagen v. Cone, 21 Ga. App. 416, 94 S. E. 602 (1917) [Heir].

[4]Holloway v. McCormick, 41 Okla. 1, 136 Pac. 1111 (1913) [Heir]; Hagen v. Cone, 21 Ga. App. 416, 94 S. E. 602 (1917) [Heir-Uxoricide].

argument is that the devolution of property is entirely controlled by the statutes of descent and wills, and the courts are bound thereby unless there be an express exception for the murderer. It is stated that the power to declare the rule for the devolution of property is vested in the legislature, and where no exception is made on account of criminal conduct, the court is not justified in making one.[5]

The second view taken by the courts is that no title shall pass to the murderer. The main basis for this view is the equitable doctrine that one shall not profit from his own wrong.[6] Some of the cases have based the refusal to pass legal title to the murderer on a reasonable interpretation of the statutes of descent and wills to the effect that it could not have been the legislative intent to have these statutes operate in favor of one murdering his ancestor or testator.[7] This view has found considerably more support when the devisee has murdered his testator. It is argued that by depriving the testator of the right to change his will in accordance with his own volition, the murderer has disabled himself from benefiting by that will.[8]

The third view taken by the courts is that the murderer will be allowed to take the bare legal title as constructive trustee for the other heirs or devisees. The theory is that equity will impose a trust on the property because of the unconscionable mode of its acquisition.[9]

In the present case it is clear that the murderer is profiting from his own wrong in two respects: (1) he has precluded the life tenant's exercise of his *inter vivos* power of disposition, and (2) he has accelerated his remainder. But it would be a manifest abuse of the judicial function to deprive the son of this property interest because of a moral repulsion and a vague equity doctrine that one shall not profit from his own wrong. The court would be imposing another judicial exception on the statutes of descent and wills. This is an excellent example of what Dean Pound refers to as "Spurious Statutory Construction."[10] Furthermore, the court would be punishing the son in addition to his criminal penalty. True, there is a public policy against murder, but the courts are not theological institutions. They can't take property away from a person merely because he violates a public policy.[11] Property rights are too precious for that. The criminal code fixes the punishment for crimes, and the demands of public policy are met by the proper execution of the criminal law. Public policy doesn't demand forfeiture of property to buttress the criminal law.[12]

Also, almost all states have statutes which provide that no conviction of any person for a crime works any forfeiture of property except in cases when the forfeiture is expressly provided by law.[13] In this case, by the terms of his mother's will, the son

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[5]McAllister v. Fair, 72 Kan. 533, 84 Pac. 112 (1906); In re Kirby, 162 Cal. 91, 121 Pac. 370 (1912) [Heir]; 16 Am. Jur., Descent and Distribution, sec. 74-78; 8 N. Y. U. L. Q. 492.

[6]Perry v. Strawbridge, 209 Mo. 621, 108 S. W. 641 (1908) [Heir-Uxoricide]; Re Tyler, 140 Wash. 679, 250 Pac. 456, 57 A. L. R. 1088 [Heir-Uxoricide].

[7]Riggs v. Palmer, 115 N. Y. 206, 22 N. E. 188 (1889) [Devisee].

[8]In re Wilkin's Estate, 192 Wis. 111, 211 N. W. 652 (1927), 51 A. L. R. 1106, 51 Am. Jur., Wills, 156 [Devisee].

[9]Whitney v. Lott, 134 N. J. Eq. 586, 36 A. 2d 888 (1944) [Devisee].

[10]Pound, "Spurious Construction," 7 Col. L. Rev. 379 (1907).

[11]Oleff v. Hodapp, 129 Ohio St. 432, 195 N. E. 838 (1935).

[12]U. S. v. Miltberger, 5 Wheat 76 (1820); Welsh v. James, 408 Ill. 18, 95 N. E. 2d 872 (1950) [Joint Tenant-Survivorship].

[13]Cal. Pen. Code, sec. 2604; 12 Cal. Jur. 635; 23 Am. Jur. 600.