

# Homicide as Affecting the Devolution of Property

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## HOMICIDE AS AFFECTING THE DEVOLUTION OF PROPERTY

The question has arisen in a number of cases in this country whether a person who has murdered another ought to be entitled to take by descent or devise from the latter. At a first blush of the question propounded, one would think that there could be no dispute as to the rights of the murderer and to permit one who has acquired title in such manner would be abhorrent and repugnant to natural law and justice. It remains for us to see what opinions have been entertained and what conclusions have been arrived at. Like most perplexing questions of law, the question has been subject to conflicting opinions and the results achieved have no doubt met with disapproval by many of the members of both bench and bar. It may be said at the outset, that the present state of the law is highly unsatisfactory.

There are three possible views as to the legal effect of the murder upon the title to the property of the deceased.

1. The legal title does not pass to the murderer as heir or devisee.
2. The legal title passes to the murderer and he may retain it in spite of his crime.
3. The legal title passes to the murderer, but equity will treat him as a constructive trustee of the title because of the unconscionable mode of its acquisition and compel him to convey it to the heirs of the deceased, exclusive of the murderer.

Each of these views have been adopted in one or more of the cases. The first view was made ratio decidendi *Riggs vs. Palmer*, 115 N. Y. 506; 22 N. E. 188; 5 L. R. A. 340.

In this case, a lad of sixteen killed his grandfather to prevent the latter from revoking a will in which he was principal devisee. The question arose as to whether the murderer ought to be entitled to take title in spite of the fact that he murdered his benefactor for the sole purpose of acquiring his estate. The question was decided against the right of inheritance and that the murderer acquired no title. Judge Earl, expressing the opinion of the majority court, held that, "in enacting a general law providing for the devolution of property by will or descent, the Legislature could not have intended that the provisions should operate in

favor of one who murdered his ancestor or benefactor in order to speedily come into possession of his estate, either as a devisee, legatee, or heir at law.

“The Legislature, when it used general language, could not have intended that a murderer should inherit the property of his victim and besides, all law as well as contracts, may be controlled in their operation and effect by general fundamental action of the common laws. No one shall be permitted to profit by his own fraud nor to take advantage of his own wrong, nor to found any claim upon his own iniquity, not to acquire property by his own crimes.”

These maxims, dictated by public policy, have their foundation in universal law, administered in all civilized countries, and have nowhere been superseded by statute. This decision was approved in the case of *Ellerson vs. Westcott*, 148 N. Y. 149; 42 N. E. 549, though somewhat modified.

Quoting James Barr Ames in his work on “Lectures on Legal History,” it was said of the case of *Riggs vs. Palmer*, *supra*, viz: “It seems impossible to justify the reasoning of the court in this case. In the case of the devise, if the legal title did not pass to the devisee, it must be because the testator’s will was revoked by the crime of his grandson. But when the legislature enacted that no will shall be revoked except in certain specified modes, by what right can the court declare a will revoked by some other mode? In the case of inheritance, surely, the court cannot lawfully say that the title does not descend when the statute, the supreme law, says that it shall descend. It is not surprising, therefore, to find that the court of New York has abandoned its untenable position.”

In the light of the authorities to be hereinafter mentioned, the view that legal title does not pass to the murderer as heir or devisee of his victim, being unsound in principle and unlikely to have any following in the future, may be dismissed from further consideration.

The title, then, passing to the murderer, we have only to ask ourselves whether he may keep it in spite of his crime, or whether, because of his crime, he must surrender it to the other heirs of the deceased. The second view was recognized in the case of *Wellner et al vs. Eckstein et al*, 105 Minn. 444; 117 N. W. 830, and cases following:

Briefly stated, the facts are as follows:

John Wellner and Emelie Wellner were husband and wife. On January 6th, 1899, the said John Wellner died intestate, the owner of a farm, of which 80 acres was their homestead, leaving him surviving his widow and two minor children. The estate was admitted to probate and the property distributed as provided by the statute, whereby the widow obtained her homestead rights, with an undivided one-third of the real estate, and the balance thereof to the two children. The facts show that the deceased was murdered by his wife and hired man that they might marry each other and enjoy his property; and both married and thereafter executed for a valuable consideration a quitclaim deed of the land, so decreed by the probate court, who then had full knowledge of the facts herein stated. Thereafter each of the grantors was convicted of the crime of the murder and sentenced to life imprisonment. An action was commenced by the minor children upon the foregoing facts to secure a decree adjudging that the defendants hold the legal title to such property as was assigned by the probate court to Emelie Wellner as trustee ex maleficio for their benefit. The complaint was demurred to and sustained on the ground that the facts stated in the complaint were not sufficient to constitute a cause of action.

The precise question presented by the record is: Did any beneficial interest in the land of her deceased husband ever vest in Emelie Wellner, by reason of the fact that she was his wife and that he died intestate, having been feloniously murdered by her, leaving her his surviving widow?

In his opinion Chief Justice Stark says: "The descent and distribution of the property of the decedent is a matter within the exclusive control of the Legislature, which may give or withhold the right upon such conditions as it deems just, and if the Legislature's intention as to such matters is expressed in clear and unambiguous language, there is no room for construction, and effect must be given to the statute as it reads. \* \* \*

"It is to be noted that the statute is specific and clear and has prescribed the exact conditions upon which the surviving spouse shall be entitled to share in the land of a decedent. If it had been the intention of the Legislature to impose on such right a further condition or exception to the effect that no one should, by virtue of the statute, take or inherit property from a decedent whom he had murdered, it would have been a very easy matter to have expressly provided for such a contingency.

“The contention that the widow holds as trustee, *ex maleficio* and that equity can compel the spouse to convey the legal title to the rightful heirs, can have no application to the precise facts of the case. If it be conceded that the legal title to the property in question vested in the widow by virtue of the statute, the concession defeats the conclusion, for equity follows the law, and where in this case, the legal title to property vests not by the act or contract, express or implied, of the parties, but by the operation of a positive statute, which was given effect by a final judgment of a court, the owner of such title cannot be charged as a trustee *ex maleficio*. \* \* \* Solely by operation of the statute the absolute title to the property vested in the widow. There is then no basis for charging her as trustee *ex maleficio* and decreeing the property to the children. To hold otherwise would be the setting aside of the positive written law of the state, the annulling of a final judgment of a court of competent jurisdiction giving effect to the statute and the forfeiture of an estate as punishment for a crime, contrary to the mandate of our Constitution.”

Elliott, J., (dissenting): “While as a general proposition I find no difficulty in holding that this statute was not intended for the benefit of such a criminal, I nevertheless am of the opinion that under the conditions of this case the legal title vested by fraud and crime and a court of equity, acting in person, should deprive her of the fruits of her crime.”

In the case of *McAllister et al vs. Fair et al*, 84 Pac. 112; 3 L. R. A. 726, it was held that the court cannot ingraft an exception upon a plain provision of the statute of descent because the distributee has murdered the ancestor to secure possession of the property.

Johnston, Ch. J. (commenting): “The argument that a literal interpretation of the statute would, in effect, encourage crime and contravene public policy, is no reason why the court should disregard a plain statutory provision, nor justify it in determining the policy of the state upon the question. The right to determine what is the best policy for the people is in the Legislature, and courts cannot assume that they have a wisdom superior to that of the Legislature, and proceed to inject into a statute a clause which, in their opinion, would be more in consonance with good morals or accomplish better justice than the rule declared by the Legislature. It has been said that the well considered cases warrant the pertinent conclusion that when the Legislature, not

transcending the limits of its powers, speaks in clear language upon a question of policy, it becomes the judicial tribunal to remain silent. *Deem vs. Millikin*, 6 Ohio C. C. 357. The statute makes nearness of relationship to the decedent and not the character or conduct of the heir, the controlling factor as to the right of inheritance — nor is it easy to attribute to the Legislature an intention to take from a criminal the right to inherit as a consequence of his crime, since the constitution provides that no conviction should work a corruption of blood or forfeiture of estate. So far as the descent of property is concerned, the courts are practically unanimous in holding that all the power and respectability rests with the Legislature. They have spoken with one voice in opposition to the exclusion of an heir from taking an estate on account of crime, where the statute in plain terms designates him as one entitled to inherit.”

In the case of *Shellenberger vs. Ransom*, 31 Neb. 61; 47 N. W. 700; 10 L. R. A. 810; 41 Neb. 631; 59 N. W. 935; 25 L. R. A. 564, the facts were that a father murdered his daughter for the purpose of possessing himself of her estate as her only heir at law. The father was indicted for murder, convicted and, while under sentence of death, was hanged by a mob. The court upon the original hearing of the case held, following *Riggs vs. Palmer*, that the estate of the daughter did not pass, upon her death, to her father, for the reason that a person cannot take by statute of descent the estate of a person whom he murders for the purpose of possessing such estate. But the court, on a rehearing of the case, receded from its decision and held that by virtue of the plain and unambiguous provision of the statute of descent, which left no room for construction or interpretation, and by operation of the statute, title to the property in controversy vested eo instanti in the father upon the death of his daughter intestate, without reference to the cause or manner of her death. In so holding, the court said: “In our statute of descent there is neither ambiguity nor room for construction. The intention of the Legislature is free from doubt. \* \* \* The majority opinion in *Riggs vs. Palmer*, as well as the opinion already filed in this case, seems to have been prompted largely by the horror and repulsion which it may justly be supposed the framers of our statute may have viewed the crime and its consequences. This is no justification to this court for assuming to supply legislation, the necessity for which has been suggested by

subsequent events. Neither the limitations of civil law nor the prompting of humanity can be read into a statute from which they are absent, no matter how desirable the result to be obtained may be. The well considered cases warrant the pertinent conclusion that when the Legislature, not transcending the limits of its power, speaks in clear language upon a question of policy, it becomes judicial tribunals to remain silent. \* \* \* *Riggs vs. Palmer* is the manifest assertion of a wisdom believed to be superior to that of the Legislature upon the question of policy."

It was held by the Supreme Court of Ohio in *Deem vs. Milliken*, 53 Ohio St. 668; 44 N. E. 1134, that a statute of descent, clear in its terms, cannot upon the grounds of public policy or otherwise be so construed as to exclude one who murders his intestate for the purpose of succeeding to his estate, from the inheritance.

In *Owen vs. Owen*, 100 N. C. 240; 6 S. E. 794, the court had under consideration the question whether a wife who had been convicted of being accessory to the killing of her husband was disabled to take the share of the estate left by the deceased which the statute gave her. It was said: "We are unable to find any sufficient legal ground for denying to the petitioner the relief which she demands; and it belongs to the law-making power alone to prescribe additional grounds of forfeiture of the right which the law itself gives to the surviving wife. Forfeiture of property for crime are unknown to our law; nor does it intercept for such cause the transmission of an intestate's property to heirs and distributees; nor can we recognize any such operating principle."

In *Kuhn vs. Kuhn*, 125 Iowa, 449; 101 N. W. 151, it was held that a widow, who was the murderer of her husband, was nevertheless entitled to the distributive share of his estate given in general terms by the statute of descent. Anent the claim that it would be contrary to public policy to permit a person to derive an advantage from his criminal act, the court said: "But the public policy of a state is the law of that state as found in its Constitution, its statutory enactments, and its judicial records. \* \* \* And when public policy touching a particular subject has been declared by statute, it is limited by such statute, and the courts have no authority to say that the Legislature should have made it of wider application."

In *Carpenter's Estate*, 170 Pa. 203; 29 L. R. A. 145, it was

held that a son who murdered his father for the purpose of securing the father's estate was entitled to take the estate under the intestate laws, and that his crime did not destroy his right of inheritance. The court, among other things, remarked: "The intestate law casts the estate upon certain designated persons and this is absolute and peremptory, and the estate cannot be diverted from those persons and given to other persons without violating the statute. There can be no public policy which contravenes the positive language of a statute."

We now come to a phase of the question wherein some of the authorities are inclined to take the view that the legal title passes to the murderer, yet because of the unconscionable mode of its acquisition, equity will treat him as a constructive trustee of the title and compel him to convey it to the heirs of the deceased, exclusive of the murderer. A result such as this must no doubt commend itself to everyone's sense of justice, yet it seems most courts have been inclined to take a different view of the question. Of the numerous cases consulted, but one case seems to recognize the principle that a court of equity will intervene to compel one who acquires property by the commission of a wrong to hold it as a trustee *ex maleficio* for the persons rightfully entitled, a view which has been approved by the highest tribunal of the state of New York when commenting upon the case of *Riggs vs. Palmer* in *Ellerson vs. Westcott*, 148 N. Y. 149; 42 N. E. 540.

Without entering into a discussion of the details of the case, it may be said that the case of *Ellerson vs. Westcott*, *supra*, has laid down the broad rule that the killing of a testator by a devisee for the sole purpose of realizing under a will does not render the devise void, but merely authorizes equity to deprive the devisee of the fruits of his iniquity. This case has, in fact, established the law in so far as the state of New York is concerned and no subsequent case has been found overruling it. The court, in commenting upon the case of *Riggs vs. Palmer*, *supra*, said, "that the case must not be interpreted as deciding that the grandfather's will was revoked. On the contrary, the devise took effect and transferred the legal title to the grandson. But the court, acting as a court of equity, compelled the criminal to surrender his ill-gotten title to the other heirs of the deceased. In other words, the third view is now recognized as the established law in New York.

## *HOMICIDE AS AFFECTING THE DEVOLUTION OF PROPERTY*

With our discussion of the cases now completed, it may be said with a degree of certainty that the prevailing rule in most states unquestionably recognizes the right of a murderer to take absolute title, either by descent or devise, and to hold otherwise would involve a forfeiture of property for crime, such as is not recognized in this country. The conclusion arrived at is regrettable. The cases, though no doubt correct in so far as they decide that the legal title passes to the murderer, are probably incorrect in that they fail to apply or recognize the principle that a court of equity will intervene to compel one who acquires property by the commission of a wrong to hold it as a trustee *ex maleficio* for the persons rightfully entitled. It is to be noted that of the authorities heretofore reviewed, namely, the courts of Minnesota, Nebraska, Ohio, Iowa, Pennsylvania, North Carolina, Kansas and New York, the latter state is the only one that recognizes the equitable doctrine applicable thereto. It is beyond doubt the most satisfactory, if not the most acceptable, view of the three herein mentioned.

The writer wishes to impress upon his readers that the question herein presented is as yet undecided in our state. What our Supreme Court would hold should this question be submitted in actual controversy is difficult to say. Our Constitution, Article I, Section 12, expressly provides that, "No bill of attainder, *ex post facto* law, nor any law impairing the obligation of contracts, shall be passed, and no conviction shall work corruption of blood or forfeiture of estate." Our statutes, particularly Sections 2159, 2180, 2270, 2271, which govern and control the distribution of the deceased, are too clear, too definite to be subject to implications. With the Constitution as it reads, together with the Legislative enactments pertaining to the devolution of property to contend with, it cannot be doubted that the court would be greatly influenced thereby. It remains to be seen whether our court would follow the prevailing rule in this country or hold itself aloof from the majority opinion and accept instead the more just view of the question by applying the doctrines of equity. We are fortunate in having our supreme tribunal graced by individuals who are gradually drifting from the hard and fast rules of law and are instead assuming an attitude tending toward a disregard of mere formality and looking, as we might say, into the substance of a question. A recognition of the equitable doctrine applicable to the question would no doubt be a step in the

right direction. A view such as this would go a great ways in elevating the present state of the law from the depths of barbarism. To hold that a murderer ought to be allowed to enjoy the fruits of his iniquity is highly unethical, repugnant to justice and a stain upon civilization. It cannot be doubted that the framers had this in view when enacting our laws and presumed at the time that the courts would, when the occasion arose, supplant or ingraft this implication.

Unfortunately, the question has not as yet been presented to our Supreme Court, as no doubt there are many who are anxiously awaiting the time when a decision can be rendered. It cannot be disputed that the question is of vital importance, particularly in the law of real property. Would a person so acquiring title be capable of passing a good title? Would a grantee, with or without knowledge of the facts, acquire a good title? Such questions as these arise particularly when it comes to the examination of abstracts. It may be said that a situation such as just mentioned actually occurred in this state. Particular reference is made to the famous *Hedger case*, tried some years ago in the County of Milwaukee. Hedger was indicted for the murder of his wife. He was tried, convicted and sentenced to life imprisonment at Waupun. While imprisoned, the estate of his wife was duly administered in the probate court, and it was adjudged that Mr. Hedger was the only heir at law. The final decree of the probate court assigned the entire interest of the deceased to Mr. Hedger. In other words, Hedger, the murderer, acquired an absolute fee in the estate of his wife. The interest thus acquired by Mr. Hedger by virtue of the decree of the probate court was subsequently conveyed by him. The records show that the title has been transferred several times thereafter, and it remains to be seen whether such parties acquired a good title. Assuming that the next of kin of the deceased Mrs. Hedger would have instituted equitable proceedings, would they have prevailed in their action? Seemingly, in the light of the prevailing rule in this country, it cannot be doubted that the title is good, yet it is to be determined whether our Supreme Court would take this view. Whether Mr. Hedger killed his wife for the purpose of acquiring her estate or not is immaterial.

It is to be remembered that this is a decree of the probate court and not of our Supreme Court. Whether our State Court would uphold the judgment of the probate court is highly conjectural.

With the present state of the law, it may be said that the conclusion arrived at has left our jurisprudence in a deplorable condition. A view such as has been taken by the majority opinion shocks the moral sense of right-thinking people, and that fact in itself would suggest that it is wrong in law, morals and justice. The courts are unanimous in the opinion that the conclusion arrived at is regrettable and that the only remedy rests with the Legislature. The law should be otherwise, and the Legislature ought to awaken to the fact that they still have a duty to perform.

ARTHUR E. LENICHECK.

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## EDWARD W. SPENCER

Marquette University, College of Law, thru the medium of *The Law Review*, announces with regret the withdrawal of Edward W. Spencer from its faculty. In view of his long association with both the Marquette College of Law and its predecessors, respectively the Old Milwaukee Law Class, and the Milwaukee Law School, we, the editors, feel that a short sketch of his life to date is appropriate at this time, since a little deserved praise to the living is better than flowers to the dead.

Edward W. Spencer was born in Milwaukee, December 24th, 1865. He was educated in the schools of Milwaukee, received his commercial and academic training in Cleveland, Ohio. He studied law and was admitted to the bar in 1892. About that time he began teaching classes in Business Law in his father's school, The Spencerian Business College, of which he is now President. The following year, 1893, he began delivering lectures to the Old Milwaukee Law Class, later reorganized by the students as the Milwaukee Law School. From that date he remained a member of the faculty until the school was purchased by Marquette University, when he became Associate Dean under the headship of Judge James G. Jenkins. He remained in this position for about two years, and continued teaching various branches of the law, particularly Contract Law, until the end of the school year in 1919.

Mr. Spencer has, during the past years, given to the bar many valuable books on various topics, among which are his *Manual of Commercial Law*, now used in many of the leading universities of the country in connection with their Commerce Courses; a volume on *Domestic Relations*; and a *Treatise on*