The court in the instant case, by reaching its decision only after reversing its first opinion on rehearing, illustrates its hesitancy in reversing a strong case for the state on an error in evidence, the actual effect of which on the outcome of the case may well be doubted.[15] There are a number of decisions in which courts have held that the comment of the prosecutor on the failure of defendant to testify or proof of defendant's silence while under arrest does not result in a miscarriage of justice warranting reversal when defendant's guilt is otherwise clearly established.[16] The American Law Institute and American Bar Association have adopted resolutions declaring that prosecutors should be permitted to comment upon the failure of accused to testify at the trial.[17] Although these resolutions deal with failure to talk at the trial, rather than while under arrest, as in the instant case, they indicate a tendency to relax the strict protection of the privilege against self-incrimination. It is significant to note that the number of states permitting an inference to be drawn from the failure of accused to testify at the trial is gradually being enlarged.[18]

A. M. E.

INSURANCE—RECOVERY BY BENEFICIARY WHO IS CONVICTED OF VOLUNTARY MANSLAUGHTER AFTER KILLING INSURED—[Federal].—The wife of the deceased insured, beneficiary of the policies in question, killed her husband and was convicted of manslaughter. The insurance company filed a bill of interpleader naming her among the defendants. From the record of the criminal case the court found that the killing had occurred under circumstances amounting to a clear case of common law voluntary manslaughter, there being no grades or degrees of the crime in Michigan.[1] *Held:* the wrongful and intentional killing of the insured by the beneficiary precludes

15. The court says in the instant case, at page 753: "We think the record shows that a strong case was made by the State." At page 754, the court says: "There is no contention that the State's counsel referred in argument to Dowling's refusal to discuss his whereabouts, or that they contended his silence was an admission of guilt. In other words, there was no aggravation of the error * * *."

16. State v. Howard (1890) 102 Mo. 142, 14 S. W. 937, 938; State v. Murray (1895) 126 Mo. 611, 29 S. W. 700, 702. See State v. Lee (Mo. 1920) 225 S. W. 928, 930, where the court said: "But, even if the statement aforesaid had not been withdrawn, and defendant's objection thereto had been overruled, it would not have constituted reversible error in this case. The evidence heretofore set out is clear and convincing as to defendant's guilt." Contra, State v. Hogan (Mo. 1923) 252 S. W. 387, 389.

17. For discussion of these proposals, see Reeder, Comment Upon Failure of Accused to Testify (1932) 31 Mich. L. Rev. 41; Bruce, The Right to Comment on the Failure of Defendant to Testify (1932) 31 Mich. L. Rev. 226.

18. 8 Wigmore, *Evidence* (3rd ed. 1940) 412, §2272. See Anderson, The Privilege Against Self-Incrimination (1940) 74 N. Y. L. Rev. 453, 458.

1. Mich. Stat. Anno. 28. 553, C. L., §16717. The statute simply penalizes manslaughter, leaving it to be defined by common law.

her from receiving any part of the proceeds of the policies. *Metropolitan Life Ins. Co. v. McDavid et al.*[2]

Cases involving murder of the insured by the beneficiary uniformly hold that there can be no recovery by him.[3] Where the killing amounts to involuntary manslaughter, the great weight of authority is that the beneficiary is not barred.[4] The attention of the courts in these cases has seldom been directed at distinctions based on the nature of the homicide or the presence or absence of any particular intent.[5] However, no case has been found permitting recovery where there was any design on the part of the slayer to take the life of the insured,[6] and every case which allows recovery

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2. (D. C. E. D. Mich. 1941) 39 Fed. Supp. 228.
This comment does not consider the problem of the principal case with reference to the effect of policy provisions, when they exist, against a killing by the beneficiary, or in relation to statutes enacted in many states which bear on this contingency. For discussion of these aspects of the problem see Grossman, Rights and Liability of the Insurer When the Death of the Insured is Caused by the Beneficiary or by an Assignee (1930) 10 B. U. L. Rev. 281; Wade, Acquisition of Property by Wilfully Killing Another, A Statutory Solution (1936) 49 Harv. L. Rev. 715.

3. N. Y. Mutual Life Ins. Co. v. Armstrong (1886) 117 U. S. 591; Slocum v. Metropolitan Life Ins. Co. (1923) 245 Mass. 565, 139 N. E. 816, 27 A. L. R. 1517; Schmidt v. Northern Life Ass'n (1900) 112 Iowa 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323; Ohio State Life Ins. Co. v. Barron (1935) 274 Mich. 22, 263 N. W. 786; Sharpless v. Grand Lodge (1916) 135 Minn. 35, 159 N. W. 1086, L. R. A. 1917B 670; Smith v. Todd (1930) S. C. 323, 152 S. E. 506, 70 A. L. R. 1529.

4. Throop v. Western Indemnity Co. (1920) 49 Cal. App. 322, 193 Pac. 263; Schreiner v. High Court (1890) 35 Ill. App. 576; Minasian v. Aetna Life Ins. Co. (1936) 295 Mass. 1, 3 N. E. (2d) 17; Hull v. Metropolitan Life Ins. Co. (1917) 26 Pa. Dist. Rep. 197; Metropolitan Life Ins. Co. v. Hill (1934) 115 W. Va. 515; 177 S. E. 188; but see In re Spark's Estate (1939) 172 Misc. 642, 15 N. Y. S. (2d) 926 (husband's right in estate of intestate wife); De Zotell v. Mutual Life Ins. Co. of N. Y. (1932) 60 S. D. 532, 245 N. W. 58.

5. Additional discussion of this question is found in substantially similar cases as to the right of a killer to take the property of his intestate victim by descent. See Note (1927) 51 A. L. R. 1096. There are few pertinent cases, however, owing no doubt to the past unwillingness of courts to engraft exceptions on statutes of descent and distribution which confer positive rights in clear and unambiguous language. The majority of American jurisdictions have held that a murderer may inherit, even though, the courts declare, public policy would prevent recovery under rights granted by private contracts, such as insurance contracts, or by wills. Note also that the most recent cases support the minority view that these statutes grant no such absolute rights. Garwols v. Bankers Trust Co. (1930) 251 Mich. 420, 232 N. W. 239; DeZotell v. Mutual Life Ins. Co. of N. Y. (1932) 60 S. D. 532, 245 N. W. 58; Parker v. Potter (1931) 200 N. C. 348, 157 S. E. 68; Re Tyler's Estate (1926) 140 Wash. 679, 250 Pac. 456, 51 A. L. R. 1088, and note following. Cf. Note (1927) 51 A. L. R. 1113 (murderer barred from taking under will); Note (1927) 51 A. L. R. 1106 (qualifying right of survivorship where tenant by the entireties murders co-tenant); see Note (1931) 71 A. L. R. 277, 288 (murderer of spouse loses rights in other's estate) for cases further illustrating the operation of this public policy.

6. Minasian v. Aetna Life Ins. Co. (1936) 295 Mass. 1, 3 N. E. (2d) 17, held that the rule established for murder "does not apply to a man-

involves facts constituting involuntary manslaughter.[7] But the decisions simply lay down the broad proposition that murder will and manslaughter will not preclude the beneficiary.[8]

It is a fundamental public policy of the common law that none shall be permitted to take advantage of his own wrong.[9] Courts agree that this principle limits the right to acquire property as the result of a wrongful killing. The decisions which apply this limitation to insurance cases have developed a rule which is perhaps best discussed in *Schreiner v. High Court*.[10] Here, deciding on a demurrer, the court concluded that only a wrongful *and intentional* homicide would operate to bar the beneficiary.[11] This rule was always at least implicit[12] and has been expressly adopted by the subsequent decisions.[13] But it is clear that the real basis of limiting recovery is public policy, and that it is entirely a matter of opinion how far that policy should extend.[14]

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slaughter where there was no intentional injury of a kind likely to cause death."

7. The principal case is said to be one of first impression in the United States, but see DeZotell v. Mutual Life Ins. Co. of N. Y. (1932) 60 S. D. 532, 245 N. W. 58, where the court cited murder cases and ruled, without discussion, that a beneficiary who pleads guilty to a charge of voluntary manslaughter is barred from recovery.

8. See Restatement, *Restitution* (1937) §189; 37 C. J. 576, §341.

9. An early statement of this principle is found in 1 Coke, *On Littleton* (1853) 148b "nullus commodum capere potest iniuria sua propria." Byrne, *Broom's Legal Maxims*, (9th ed., 1924) 197. Note that "iniuria" refers to any civil wrong, intentional or otherwise.

10. (1890) 35 Ill. App. 576.

11. Other reasons assigned for the decision are that the killing by the beneficiary of the insured is an impliedly accepted risk, and that, since the policy would undoubtedly be void if expressly providing for payment to the beneficiary in case of such homicide, it should not be so construed as to allow him to recover when the policy is silent.

12. Most of the cases are concerned with murder by the beneficiary and uniformly deny recovery, but murder is always an intentional crime, and the courts did not refine the principle beyond the needs of the particular situation.

13. See cases in note 5, supra; cf. In re Sparks' Estate (1939) 172 Misc. 642, 15 N. Y. S. (2d) 926 which followed Riggs v. Palmer (1889) 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819, an early New York decision denying any recovery, and rejected the notion that any distinction in effect should be made between voluntary and involuntary manslaughter. This "would imply that the intentions of a killer ought to be investigated." The court was concerned with the husband's rights in his intestate wife's property where he was charged with her death and convicted of first degree manslaughter, but the language applies equally well to insurance cases. The English and the Canadian views are the same. Estate of Hall (1914) 1 Probate 1; Lundy v. Lundy (1895) 24 Can. S. Ct. 650.

14. Further support for the rule that the intention is the important element is found in fire insurance cases when the insured has caused the destruction of the property. Those cases which deny recovery indicate that the loss must result from the intentional act of the insured, or its equivalent. See 26 C. J. 347, §443 and cases cited. Similarly, in life insurance cases, recovery is permitted by the beneficiary of an insane insured who commits suicide, 37 C. J. 553, §304. It has also been held that there may be recovery to the use of an insane beneficiary who kills the insured. Holdom

The instant case accepted the rule which emphasizes intention as the crucial factor. The court said that the previous cases did not bar the killer because he was a murderer, but because he intended to kill; or, that the cases allowed recovery because that intention was absent. The opinion set forth the hypothetical case of a woman who killed her husband by mistake while engaged with him in deliberately attempting to cause the death of their daughter's ravisher. By hypothesis the death of the husband would be murder according to the rules of criminal law, but the court declared that, on these facts, it would permit the wife to recover as the beneficiary of her husband's life insurance policy. Such a killing, the court said, is not intentional within the meaning of the insurance rule.[15] The court then quoted the common law definition of voluntary manslaughter as an intentional crime and denied recovery in the principal case because of the "wicked intentional killing."[16]

The opinion of the court rests upon the principle that a beneficiary will be barred when the facts show an "intentional" killing. The authorities which have used this rule in insurance cases, and which have barred recovery, have held that the killing must be intentional in the sense that the beneficiary must have been aware that the act would result in death. But, in applying this rule, the court adopted a different basis for the meaning of "intention." It treated the death as having been "intentional" because the facts established the crime of voluntary manslaughter; and voluntary manslaughter is defined (by criminal law) as an "intentional," *i. e.*, a volitional, crime.[17] But it is very possible that one may be guilty criminally of voluntary manslaughter without having had an awareness that death would result from the acts in question.[18] This reference to the general rules of criminal law for definition of the term "intention" will most frequently, but not always, lead to the same results as in earlier insurance cases. Under this rule, recovery would be denied if criminal liability for voluntary manslaughter would exist, although the facts might show that there was not an awareness that death would result.

It has been shown that in the life insurance cases the real question in issue is that regarding the extent of public policy against allowing one to

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v. Ancient Order (1896) 159 Ill. 619, 43 N. E. 772, 50 Am. St. Rep. 183, 31 L. R. A. 67.

15. Query whether the court would allow recovery by a beneficiary who sued on a policy after killing his insured by mistake while engaged with him in the commission of a rape.

16. The court adopted the definition of voluntary manslaughter in Maher v. People (1862) 10 Mich. 212, 218, 81 Am. Dec. 781. In part: "If the act of killing, though intentional, is committed under the influence of passion * * * before a reasonable time has elapsed * * * for reason to resume its habitual control, and is the result of temporary excitement by which the control of reason was disturbed, rather than of any wickedness of heart * * * "

17. 29 C. J. 1125, §113.

18. 29 C. J. 1129, §116. See also 1 Wharton, *Criminal Law* (12th ed.) 646, §426. "Passion thus aroused must be so violent as to dethrone the reason of the accused, for the time being; and prevent thought and reflection, and the formation of a deliberate purpose."

profit from his wrongful act. It is suggested that that policy is not best served by reference to mechanical definitions established primarily for purposes of criminal law. R. W. K.

WORKMEN'S COMPENSATION — COURSE OF EMPLOYMENT — STREET ACCIDENTS—[Missouri].—Claimant's duties required him to spend part of his time on the street. As he was crossing the street, an automobile passed, and a foreign substance was blown into his eye, injuring it. The award of the Workmen's Compensation Commission was in favor of the employee, for an "accident arising out of and in the course of his employment."[1] *Held:* Reversed[2] and remanded with instructions that if claimant could prove it was the automobile which stirred up the dust, he should recover, but if the dust was merely stirred up by the wind, recovery should be denied, since in the latter case the hazard was one unconnected with his employment because one common to the public generally. *Morrow v. Orscheln Bros. Truck Lines.*[3]

Recovery by an injured employee under the Workmen's Compensation Act in situations of this kind depends upon whether the accident arose "out of" the employment within the meaning of the legislation. The Missouri rules with respect to whether various types of street accidents may be said to arise "out of" the injured employee's work are in the formative stage. There are few decisions involving this question, and until the instant one, street accident cases have, in the main, been confined to situations in which the employee was injured in or by a moving vehicle.[4] The reason given

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1. R. S. Mo. (1939) §3691.
2. The circuit court had reversed the award of the commission on the sole ground that the claim for compensation was not filed within the time allowed by law. The court of appeals found for claimant on this point.
3. (Mo. App. 1941) 151 S. W. (2d) 138.
4. Howes v. Stark Bros. Nurseries Co. (1930) 223 Mo. App. 793, 22 S. W. (2d) 839 (employee on way to bus furnished by employer, struck by automobile); Wahlig v. Krenning-Schlapp Grocer Co. (1930) 325 Mo. 677, 29 S. W. (2d) 128 (salesman killed when car was struck by train); Sawtell v. Stern Bros. & Co. (1931) 226 Mo. App. 485, 44 S. W. (2d) 264 (bond salesman in making temporary visit didn't materially deviate from course of employment, so that injury when struck by automobile arose out of and in course of employment); Barlow v. Shawnee Inv. Co. (1932) 229 Mo. App. 51, 48 S. W. (2d) 35 (collector for credit company killed as result of accident when his car hit tree); Wyatt v. Kansas City Art Institute (1935) 229 Mo. App. 1166, 88 S. W. (2d) 210 (employee killed by automobile when crossing street); Schroeder v. Western Union Tel. Co. (Mo. App. 1939) 129 S. W. (2d) 917 (messenger boy on bicycle injured by automobile); McCoy v. Simpson (Mo. 1940) 139 S. W. (2d) 950 (salesman killed when his car hit rear of another automobile). A number of cases involving salesmen in automobile accidents have been decided on other grounds, and the fact that the accident arose out of the employment seems to have been assumed. See, e. g., Schulte v. Grand Union Tea & Coffee Co. (Mo. App. 1931) 43 S. W. (2d) 832; Duggan v. Toombs-Fay Sash & Door Co. (Mo. App. 1933) 66 S. W. (2d) 973 (salesman had deviated from employment, otherwise compensation would have been granted); Shroyer v. Missouri Livestock Comm. Co. (1933) 332 Mo. 1219, 61 S. W. (2d) 713.