COMMENTS

REAL PROPERTY—EFFECT OF MURDER OF ONE CO-TENANT BY ANOTHER ON THE RIGHT OF SURVIVORSHIP.

Husband and wife owned as joint tenants four tracts of real estate and three bank accounts.[1] The husband, who was later declared insane, killed his wife, and the heirs of the deceased brought suit to have a constructive trust declared in the real and personal property that was jointly held. One half, they contended, was to be held by the husband for their immediate use, while the other half was to be held by him to his own use during his lifetime, and on his death, the title to all the property was to vest in them. The trial judge entered a decree dismissing the complaint, and the plaintiffs appealed. The Supreme Court of Illinois affirmed the decree of the trial court, ruling that since legal title to all of the property had already vested in the husband, not by the death of his wife but by the instrument creating the joint tenancy before her death, to hold that he held as trustee would violate the state constitutional provision against corruption of blood or forfeiture of estate due to conviction. The argument that public policy would not permit a construction of law that would allow a wrongdoer to profit by his crime was rejected on the ground that the state constitution was the declaration of public policy of the state and that the judicial and legislative departments must accept that declaration as final.[2] In brief, then, two principal issues were discussed in the court's opinion, *i.e.*, the effect of the murderer's having a present vested interest in the property before his felony and the applicability of the constitutional provision against forfeiture due to conviction. These subjects will be considered in that order.

Whether one who has been instrumental in causing the death of another may assert the same rights to property owned by the deceased or the deceased and the killer that he would have, had

1. There always has been a controversy as to whether entireties doctrines had any proper application to mere personal property, which always could be disposed of absolutely by the husband; but there can be no doubt that in a majority of the United States they were early and consistently applied in appropriate cases to marital co-ownership of any types of assets. Phipps, *Tenancy by Entireties*, 25 TEMPLE L. Q. 24, 25 (1951).

2. Welsh v. James, 408 Ill. 18, 95 N.E.2d 872 (1950).

the deceased died at the same time but in a different manner, is a problem that has, in the main, been dealt with on the basis of four different types of relationships between the parties; *i.e.*, testator-devisee, ancestor-heir, tenancy by the entireties and joint tenancy. As to the first two categories there have been roughly three lines of decision:

1. The legal and equitable title pass to the murderer in spite of his crime.[3]
2. The legal title goes to the heirs or devisees of the deceased and not to the murderer because of the equitable principle that no one shall be permitted to profit by his own wrong.[4]
3. The legal title passes to the murderer, but equity, because of the illegality of his acquisition, will treat him as a trustee *ex maleficio* and will compel him to hold the title for the benefit of those next entitled.[5]

This comment, however, is concerned chiefly with the problems raised when, in the same factual situation, the relationship of joint tenancy or tenancy by the entireties exists between the guilty party and the decedent. Since the two tenancies are so closely related, they will be grouped together for discussion purposes.[6]

3. Wall v. Pfanschmidt, 265 Ill. 180, 106 N.E. 785 (1914); McAllister v. Fair, 72 Kan. 583, 84 Pac. 112 (1906); Holloway v. McCormick, 41 Okla. 1, 136 Pac. 1111 (1913); *In re* Carpenter's Estate, 170 Pa. 203, 32 Atl. 637 (1895); Blanks v. Jiggetts, 64 S.E.2d 809 (Va. 1951). In the two cases where the question was whether a wife who participated in the killing of her husband lost her dower rights thereby, it was held that she did not. Eversole v. Eversole, 169 Ky. 793, 185 S.W. 487 (1916); Owens v. Owens, 100 N.C. 240, 6 S.E. 994 (1888). No cases directly on curtesy were found. However, in Perry v. Strawbridge, 209 Mo. 621, 108 S.W. 641 (1908), the problem was raised of construing a statute which provided that the "widower" of a wife who dies without children or descendants should be entitled to one half of her real and personal property. The court ruled against allowing the heirs of a husband who had killed his childless wife and then committed suicide to claim title to the wife's real estate through the husband on the ground that such a construction of the statute would violate its reason, if not its letter. Also, in a case involving an insurance policy payable to the wife of insured if she survived him, otherwise to his legal representatives, the husband murdered his wife, and the administrator of the husband was prevented from taking. Box v. Lanier, 112 Tenn. 393, 79 S.W. 1042 (1904).

4. Perry v. Strawbridge, 209 Mo. 621, 108 S.W. 641 (1908); Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889); *In re* Tyler's Estate, 140 Wash. 679, 250 Pac. 456 (1926).

5. Whitney v. Lott, 134 N.J. Eq. 586, 36 A.2d 888 (Ch. 1944); Garner v. Phillips, 229 N.C. 160, 47 S.E.2d 845 (1948).

6. A distinction has been made between joint tenancy and tenancy by the entireties in that in the former one tenant succeeds to the share of the other, whereas in the latter the whole estate merely continues, as before, in the sur-

Where either of the latter tenancies is present difficulty arises from the fact that the wrongdoer has an interest that was existent before his act in all of the property since all the tenants have in legal contemplation but one estate in all the land.[7] The courts are consequently presented with the argument that since the guilty party, prior to the murder, had legal title to the whole of the property, he acquired nothing by his act that he did not already have, and therefore he did not profit by it; consequently, the equitable rule that a person should not be allowed to profit by his own wrong, which may be applied to the will and inheritance cases, cannot be used to bar a guilty joint tenant.[8] In addition, the fact that the culprit had a vested interest in all of the property before the felony gives rise to the argument that depriving him of either the legal or equitable ownership of any part of the estate would work a forfeiture of estate due to conviction of a felony, a penalty prohibited by the constitutional provision.[9]

Prior to the principal case, only one court of last resort had considered a similar factual situation. In *Oleff v. Hodapp*,[10] the Ohio Supreme Court was confronted with a case where one joint tenant of a building and loan association account procured the murder of the other joint tenant. The court ruled that, in the absence of a statute depriving the wrongdoer of his right to the account, he could not be prevented from taking it by survivorship. The court pointed out that the guilty party had had a present, vested interest in the whole of the account before the murder and that this could not be taken away from him because he violated a public policy.[11] The Colorado Supreme Court in a very recent case pointed out that joint tenancy in that state was lim-

vivor. Whatever other distinctions have been made between them, this one is without substance. Phipps, *supra* note 1, at 35, n. 33.

7. 2 TIFFANY, REAL PROPERTY 196 (3rd ed., Jones, 1939).

8. Beddingfield v. Estill & Newman, 118 Tenn. 39, 100 S.W. 108 (1907).

9. Welsh v. James, 408 Ill. 18, 95 N.E.2d 872 (1950); Grose v. Holland, 357 Mo. 874, 211 S.W.2d 464 (1948).

10. 129 Ohio St. 432, 195 N.E. 838 (1935).

11. In the *Oleff* case, the court said:

> Counsel insist that Tego's [the one who procured the murder] right should be denied him because it would be in contravention of sound public policy and place a premium on murder. We are not subscribing to the righteousness of Tego's legal status; but this is a court of law and not a theological institution. . . . Property cannot be taken from an individual who is entitled to it because he violates a public policy. Property rights are too sacred to be subjected to a danger of that character.

Id. at 438, 195 N.E. at 841.

ited strictly by statute, but that despite this limitation, the legislature had not seen fit to place a condition on the right of the surviving joint tenant to the whole interest in the joint tenancy property. On this ground the court allowed the felon to keep all the property.[12] The inferior New York courts lend a lone dissenting voice to this otherwise unanimous opinion. They have consistently held that the guilty joint tenant loses all property rights in the whole of the property to the heirs or administrator of the deceased.[13] Notwithstanding these New York rulings, it is clear that the highest tribunals in the joint tenancy cases have been unwilling to penalize the wrongdoer except by criminal prosecution.

However, in the closely related tenancy by the entireties situation, the consistency of decision breaks down, and the rulings fall into four divisions. Tennessee and Oregon have adopted the theme predominant in the joint tenancy cases, *i.e.*, that the survivor should get all the property in spite of his crime since, in theory at least, he had it all along.[14] The New York view that the guilty party (or his heirs) should get nothing, and that legal title should vest in the heirs of the deceased is followed in only that state.[15] New York is also the only jurisdiction to have considered both of the tenancies in the same factual setting, and in both situations the same conclusion has been reached without any attempt at distinguishing between them.[16] In none of the New York cases was the question of forfeiture raised, though there is a statute in New York against forfeiture of estate due to conviction.[17]

12. Smith v. Greenburg, 218 P.2d 514 (Colo. 1950).

13. Bierbrauer v. Moran, 244 App. Div. 87, 279 N.Y. Supp. 176 (4th Dept. 1935); *In re* Santourian's Estate, 125 Misc. 668, 212 N.Y. Supp. 116 (Surr. Ct. 1925).

14. Beddingfield v. Estill & Newmann, 118 Tenn. 39, 100 S.W. 108 (1907); Wenker v. Landon, 161 Ore. 265, 88 P. 2d 971 (1939).

15. Van Alstyne v. Tuffy, 103 Misc. 455, 169 N.Y. Supp. 173 (Sup. Ct. 1918). But see *In re* Eckardt's Estate, 184 Misc. 748, 54 N.Y.S.2d 484 (Surr. Ct. 1945). There the court held the rule inapplicable and permitted a somnabulistic wife, who had killed her husband, with whom she had held as a tenant by the entireties, to take as a survivor. The court distinguished the other cases on the ground that here the wife committed no legal wrong, whereas in the other cases the party causing the death was guilty of some crime.

16. Bierbrauer v. Moran, 244 App. Div. 87, 279 N.Y. Supp. 176 (4th Dept. 1935) (joint tenancy); *In re* Santourian's Estate, 125 Misc. 668, 212 N.Y. Supp. 116 (Surr. Ct. 1925) (joint tenancy); Van Alstyne v. Tuffy, 103 Misc. 455, 169 N.Y. Supp. 173 (Sup. Ct. 1918) (tenancy by the entireties).

17. N.Y. PENAL LAW § 512.

Third is the line of reasoning employed by the Supreme Court of North Carolina in *Bryant v. Bryant*[18] that legal title to all the property vests in the felon but that he may enjoy beneficially only his original interest therein, and that only for his life. As regards the original interest of the decedent, the malefactor holds that as a constructive trustee for the benefit of the heirs of the decedent during his (the malefactor's) life. On the death of the felon, complete legal and equitable title to all the property vests in the heirs of the decedent. No explicit mention of the forfeiture problem was made in this case, but the court does seem to pay heed to it in the following statement:

> It is therefore manifest that, if the deceased wife were now living, the appellant could not be deprived of his interest in the estate by an arbitrary judgment of the court. None the less is he entitled to the enjoyment of such interest after her death, but for the benefit of her heirs at law a court of equity will interpose its protecting shield.[19]

The court then went on to state that equity will impose a constructive trust on property when the legal title has been obtained from another through a breach of some duty owed to him and held in hostility to the rights of the one beneficially entitled, and that these requisites were met here because the felon had by his crime taken away the decedent's interest.[20]

A somewhat similar ruling was made in New Jersey. There the chancery court, in view of the fact that the murdered wife had been older than her husband and in the natural course of events would probably have predeceased him, held that the fee vested in him as the survivor, but subject to a trust in favor of the wife's heirs to the extent of the present value of her interest in the net income of the property for her normal life expectancy. However, the court, using the same reasoning about the relative ages, permitted the whole of the property to pass under the husband's will subject to the trust.[21]

Finally, there is the variation upon the equitable approach developed by the Missouri courts and then adopted by the Su-

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18. 193 N.C. 372, 137 S.E. 188 (1927).
19. *Id.* at 373, 137 S.E. at 191.
20. *Ibid.*
21. Sherman v. Weber, 113 N.J. Eq. 451, 167 Atl. 517 (Ch. 1933). But see RESTATEMENT, RESTITUTION § 188, comment *a* (1934): "It is immaterial that because of their respective ages, state of health or the like, it is probable that the murderer would have been the survivor."

preme Court of Florida. They have decided that where equitable principles intervene, the legal fiction that each tenant had ownership of the whole from the beginning is to be ignored and that the tenants will be regarded as holding separate and equal interests. The next step in this approach is that the felon by his crime has disqualified himself from taking as legal survivor, and accordingly is not entitled to the interest of the other tenant in the estate by the entirety. The ground of his disqualification is, of course, the same equitable principle that no one should be permitted to profit by his own wrong.[22]

The question of the applicability of the constitutional provisions against forfeiture of estate for conviction in cases where either of the tenancies is involved has been considered by the highest tribunals of only four states: Illinois (the principal case), Oregon, Tennessee and Missouri. The first three have ruled that to deprive the felon of any part of the property held under the tenancy, or to make him hold any part of it as a trustee only, would bring about a forfeiture covered by the constitutional prohibition since his interest was vested before the felony. Thus the felon is permitted to keep all.[23] On the other hand, the Missouri Supreme Court has decided that where equitable principles enter in, the tenants will be considered as having separate interests. Under this theory, the felon never really had a vested interest in the deceased's share and thus there is nothing on which the constitutional provision can operate.[24] The court cited as a basis for its so dividing up the estate in this particular factual setting the situation where tenants by the entirety are

22. Ashwood v. Patterson, 49 So.2d 848 (Fla. 1951); 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). In the *Grose* case the Missouri Supreme Court first distinguished the two tenancies on the ground that in the case of tenancy by the entireties there was no survivorship but only a continuation of the estate in the survivor as it originally stood. However, the court later quoted, apparently with approval, 3 BOGERT, TRUSTS AND TRUSTEES § 478 (1st ed. 1935) where no such distinction is made. But this difference or lack thereof had no effect on the court's decision. Grose v. Holland, *supra*.

23. Welsh v. James, 408 Ill. 18, 95 N.E.2d (872 (1950); Wenker v. Landon, 161 Ore. 265, 88 P.2d 971 (1939); Beddingfield v. Estill & Newmann, 118 Tenn. 39, 100 S.W. 108 (1907).

24. Grose v. Holland, 357 Mo. 874, 211 S.W.2d 464 (1948). The courts have unanimously held that statutes barring the culprit's taking by inheritance or will from the decedent are inapplicable to the joint tenancy or tenancy by the entireties situation. Ashwood v. Patterson, 49 So.2d 848 (Fla. 1951); Wenker v. Landon, 161 Ore. 265, 88 P.2d 971 (1939); Beddingfield v. Estill & Newman, 118 Tenn. 39, 100 S.W. 108 (1907).

divorced and it would be unfair to give one spouse all the property. Consequently, it is divided into halves.[25]

At this point it is clear that there is a definite split of authority on this subject. Two observations can be made, however. One is that with a court before whom the question of forfeiture has not been raised, the chief consideration is whether the equitable principle should override the established law relating to inheritance, wills and the two tenancies. Once that basic policy decision has been made, it apparently matters little which type of relationship existed as between the culprit and the decedent.[26] The other observation is that where either of the tenancies is concerned and where the forfeiture problem has been brought up, it has been the chief factor preventing the courts in the majority of cases from reaching a result consistent with the equitable principle.[27] However, with regard to joint tenancy and tenancy by the entireties, it would seem that the argument that the killer cannot be prevented from taking all of the property because he had a present, vested interest in it before his felonious act follows a little too strictly the common law concepts and fails to recognize the practical realities of the situation. It has been pointed out that the guilty party is benefitted anew by the predecease of the other tenant in that he is no longer required to divide the profits and in that no longer does he have to worry about losing his interest.[28] This gain could be fairly gauged at one-half of the value of the property held under the tenancy. This reasoning

25. Russell v. Russell, 122 Mo. 235, 26 S.W. 677 (1894).

26. This is shown by a comparison of cases in states that have been confronted with more than just one of the relationships in the same factual setting. The New York courts have ruled that the killer is not to take under any of the relationships. Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889) (will); Bierbrauer v. Moran, 244 App. Div. 87, 279 N.Y. Supp. 176 (4th Dept. 1935) (joint tenancy); Van Alstyne v. Tuffy, 103 Misc. 455, 169 N.Y. Supp. 173 (Sup. Ct. 1918) (tenancy by the entireties). The New Jersey and North Carolina courts have taken the same position. See Whitney v. Lott, 134 N.J. Eq. 586, 36 A.2d 888 (Ch. 1944) (will); Sherman v. Weber, 113 N.J. Eq. 451, 167 Atl. 517 (Ch. 1933) (tenancy by the entireties); Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188 (1927) (tenancy by the entireties); Garner v. Phillips, 229 N.C. 160, 47 S.E.2d 845 (1948) (inheritance). But see concurring opinion by Zimmerman, J. in Oleff v. Hodapp, 129 Ohio St. 432, 195 N.E. 838 (1935). For similar consistency, but holding the other way, see the principal case and Wall v. Pfanschmidt, 265 Ill. 180, 106 N.E. 785 (1914) (inheritance).

27. See note 23 *supra*.

28. Grose v. Holland, 357 Mo. 874, 211 S.W.2d 464 (1948); 3 BOGERT, TRUSTS AND TRUSTEES § 478 (1st ed. 1935).

suggests the soundness of the Missouri and Florida decisions,[29] *i.e.*, one-half of the property should remain vested in the guilty party and the other half should go to the heirs of the decedent.

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PERSONAL PROPERTY—GIFT OF A FUR COAT REVOKED—CONTRACT FOR ITS SALE RESCINDED.

On April 4, 1947, donor and donee went into Saks's fur salon. They looked over the selection of fur coats and finally found a mink coat that donee liked. The price of the coat was $5,000. Donor told the salesman that he wished to buy the coat for donee but would pay no more than $4,000 for it.[1] Saks rejected donor's repeated offers of $4,000 for the coat. Donee wanted the coat very much, and without donor's knowledge she went to Saks and asked Saks to pretend to sell the coat to donor for $4,000, promising to pay the balance of $1,000 herself. Saks agreed and told donor that they would sell the mink coat to him for $4,000. Donor signed a sales slip believing that $4,000 was the full price of the coat. He received the coat and then gave it to donee saying that it was hers to keep. The following day donee returned to Saks, paid the additional $1,000, and left the coat to be monogramed. Later that day donor called Saks's and told them that he had revoked the gift and would pay the $4,000 only if Saks delivered the coat to him. At the time of the revocation donor was unaware of any negotiations between Saks and donee and of the fact that donee had paid $1,000 of the purchase price. A series of suits followed. First, donee refused to accept the $1,000 reimbursement tendered by Saks, and sued Saks for the conversion of the coat. Saks then filed a cross-bill against donor and donee for the remaining $4,000 due on the coat and also a separate complaint against donor on the contract of sale between donor and Saks. All of these actions and cross-bills were joined in one suit.

On the basis of these facts the California Court of Appeals found that the gift was complete, that donee should receive the

29. Ashwood v. Patterson, 49 So.2d 848 (Fla. 1951); 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).

1. Earl v. Saks & Co., 226 P.2d 340 (Cal. 1951).