REAL PROPERTY: A SLAYER'S RIGHT TO PROPERTY HELD JOINTLY WITH HIS VICTIM

It is abhorrent to the mind of every right-thinking person that anyone should be permitted to benefit by wrongfully taking the life of another.[1] Generally, a felonious slayer may not take benefit from his victim's estate by will or heirship.[2] However, in some states[3] a slayer is allowed to retain the entire property interest formerly held in joint-tenancy with his victim,[4] although the artificial control of survivorship is a material benefit to the slayer.

This is illustrated by a recent Kansas case[5] which approved a probate distribution allowing a slayer-husband to keep real property held jointly with his victim-wife. The court stated that the husband took nothing from the victim because his title vested at the time of the original conveyance and, therefore, a statute saying that a felonious slayer "shall not inherit or take by will or otherwise"[6] from his vic-

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1. Similar language is found frequently in cases, see, e.g., In re Foster's Estate, 182 Kan. 315, 321, 320 P.2d 855, 860 (1958); Perry v. Strawbridge, 209 Mo. 621, 629, 108 S.W. 641, 642 (1908); Riggs v. Palmer, 115 N.Y. 506, 511, 22 N.E. 188, 190 (1889).

That no one shall benefit from his own wrong was stated as an early common law maxim. Broom, Legal Maxims 279 (7th ed. 1874).

2. Today, over twenty-five states have statutes specifically barring a slayer from participating in his victim's estate, either by will or as an heir. See, e.g., Iowa Code Ann. § 636.47 (1950) (felonious taker of life); Neb. Rev. Stat. § 30-119 (1956) (unlawful killer); Ohio Rev. Code § 2105.19 (Baldwin 1958) (first or second degree murderer). Many other states bar the slayer by decision. See, e.g., Price v. Hitaffer, 164 Md. 505, 165 Atl. 470 (1933); Perry v. Strawbridge, 209 Mo. 621, 108 S.W. 641 (1908); Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889).

For discussion, see Annot., 39 A.L.R.2d 477 (1955) (slaying of ancestor); Annot., 36 A.L.R.2d 960 (1954) (slaying of testator); Wade, Acquisition of Property by Wilfully Killing Another—A Statutory Solution, 49 Harv. L. Rev. 715 (1936).

3. See, e.g., Smith v. Greenburg, 121 Colo. 417, 218 P.2d 514 (1950) (joint bank account); Oleff v. Hodapp, 129 Ohio St. 432, 195 N.E. 838 (1935) (joint bank account); Beddingfield v. Estill, 118 Tenn. 39, 100 S.W. 108 (1907) (tenancy by entirety in real estate).

4. For the purpose of this article joint-tenancy and tenancy by the entirety will not be distinguished. They are essentially alike. In both, title in the entire property vests by the original conveyance. 2 Tiffany, Real Property §§ 418, 430 (3d ed., Jones 1939). Functionally there is no difference, because in each the exclusive interest vests in the survivor. Phipps, Tenancy by Entireties, 25 Temp. L.Q. 24, 35 (1951).

5. In re Foster's Estate, 182 Kan. 315, 320 P.2d 855 (1958).

6. Kan. Gen. Stat. Ann. § 59-513 (1949). Such general statutory language, following specific language preventing the taking by will or as heir, is usually

tim was not applicable.[7] The court admitted that the slayer benefited, but felt a rule which would deprive the slayer of the victim's interest in the joint-tenancy property should be declared by the legislature.[8] These reasons and that the requested deprivation would be unlawful under statutory or constitutional provisions which prohibit forfeiture of property for conviction of a crime are typical reasons given by courts[9] when refusing to prevent a slayer's enrichment in jointly-held property.

The better view imposes a constructive trust on the property in the hands of the slayer for the benefit of the victim's heirs. This is the position of the Restatement of Restitution[10] and several cases.[11] By such a procedure the objections normally raised to the deprivation of the wrongfully acquired property are minimized, if not extinguished.[12]

The constructive trust theory recognizes that the argument that the slayer takes nothing additional by the killing is fallacious in that it substitutes for reality a common law fiction of title, i.e., that joint-tenants take title to the entire property by the original conveyance.[13] The substance of the relationship is that the slayer materially benefits[14] by extinguishing the possibility of his title being defeated by his predeceasing the co-tenant. By imposing a constructive trust on

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held insufficient to cover the joint-tenancy situations. See, e.g., Ore. Rev. Stat. § 111.060 (1957) (or receive any interest as surviving spouse), Wenker v. Landon, 161 Ore. 265, 88 P.2d 971 (1939); Tenn. Code Ann. § 31-109 (1955) (take . . . otherwise), Beddingfield v. Estill, 118 Tenn. 39, 100 S.W. 108 (1907).

7. In re Foster's Estate, 182 Kan. 315, 321, 320 P.2d 855, 860 (1958).

8. Id. at 322, 320 P.2d at 860. See also Oleff v. Hodapp, 129 Ohio St. 432, 438, 195 N.E. 838, 841 (1935); Wenker v. Landon, 161 Ore. 265, 276, 88 P.2d 971, 975 (1939).

9. See 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, 118 Tenn. 39, 100 S.W. 108 (1907).

10. § 187 (1937).

11. See cases cited notes 22-23 infra.

A few states have specific statutes covering the disposition of joint interests. Ky. Rev. Stat. Ann. § 381.280 (Baldwin 1955) (forfeits all interest), Cowan v. Pleasant, 263 S.W.2d 494 (Ky. 1953) (only one-half of property to victim's heirs); Pa. Stat. Ann. tit. 20, §§ 3445-46 (Supp. 1957) (one-half at slaying and other half at death of slayer to victim's heirs); S.D. Code § 56.0505 (1939) (same disposition as under the Pennsylvania statute).

12. This article does not discuss the problem of what degree of moral fault should give rise to a finding of injustice in the enrichment. For discussion, see Restatement, Restitution § 187 (1937); Wade, supra note 2, at 721-24.

13. See note 4 supra.

14. For a discussion of the amount of the benefit, see text supported by notes 22-26 infra.

the legal title, unjust enrichment is prevented while the common law concept of title is not overthrown.[15]

The courts that permit the slayer to retain the entire joint-tenancy property usually consider the legislature as the body which should establish the rule concerning the slayer's enrichment in the property.[16] The reason given is that control over distribution of decedents' estates is within the strict province of the legislature. It is submitted that this reason should not preclude a court from acting to prevent unjust enrichment.[17] The joint-tenant relationship is more analogous to a contract relationship than to the ancestor-heir or testator-devisee relationships. In both the joint-tenancy situation and in an insurance contract situation the rights of the parties are fixed by the written instrument; the interests are not, therefore, regarded as within the scope of the statutes of descent and distribution. Where an insured is slain by the beneficiary under a life insurance contract the courts have not hesitated to invoke, without the aid of a statute, a policy preventing the slayer's enjoyment of the insurance proceeds.[18] Thus, it seems an argument that the policy concerning a joint-tenant slayer's unjust enrichment must come, of necessity, from the legislature is not valid.

The use of the constructive trust as a device for depriving a felonious slayer of the benefit resulting from his wrongful act, in addition, effectively prevents a possible violation of the prevalent provisions against forfeiture of property for conviction.[19] Such provisions are intended to guard against situations such as existed under the English crown when a wrong to the state resulted in revocation

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15. Legal title to the entire property remains in the slayer as trustee until the slayer is removed from the position of being unjustly enriched. This can be accomplished either by voluntary conveyance of the legal title, specific enforcement of his duty to convey, or by such adequate legal remedies as tort or quasi-contract actions. See 3 Scott, Trusts §§ 462.2-62.3 (1939).

16. See note 8 supra.

17. Cf. Colton v. Wade, 32 Del. Ch. 122, 129-30, 80 A.2d 923, 927 (1951); National City Bank v. Bledsoe, 144 N.E.2d 710, 715 (Ind. 1957).

18. See Prudential Ins. Co. v. Harrison, 106 F. Supp. 419 (S.D. Cal. 1952); Equitable Life Assurance Soc'y v. Weightman, 61 Okla. 106, 160 Pac. 629 (1916); Grossman, Liability and Rights of the Insurer when the Death of the Insured is Caused by the Beneficiary or by an Assignee, 10 B.U.L. Rev. 281, 284 (1930).

Another similar situation is the relationships of holders of future interests in the same property, i.e., reversioner-remainderman, remainderman-life tenant. There are, however, only a few cases concerned with these problems. See Annot., 24 A.L.R.2d 1120 (1952). But there is strong dictum in Eisenhardt v. Siegel, 343 Mo. 22, 28, 119 S.W.2d 810, 813 (1938), indicating that title to land will not revert to a murderer-reversioner from his remainderman-victim.

19. Most state constitutions have provisions against forfeiture of estate for conviction. Stimson, Federal and State Constitutions of the United States. § 142 (1908). See Mo. Const. art. I, § 30 (1945).

of the privilege of owning property.[20] This purpose is not violated when a constructive trust is imposed to prevent unjust enrichment because conviction is only a standard for finding injustice.[21] The slayer retains legal title in the whole but is prevented from enjoying the amount of his enrichment.

However, the cases are in disagreement on the quantity of interest which should be placed under constructive trust for the victim's heirs. The quantity has ranged from the value of the victim's life estate (presuming the slayer's natural survival from a discrepancy in the ages)[22] to the whole interest.[23] It is submitted that the better view is to place everything within the trust except an estate in one-half for the life of the slayer, because during the existence of the joint-tenancy the slayer had a right to one-half the profits for life and *only a possibility* that his interest would ripen into a fee interest in the whole.[24] While it is true that actuaries are capable of making fairly accurate estimates of relative survival chances,[25] even if the actuarial chance of the victim being the natural survivor were extremely slim, the slayer would be unjustly enriched if given the benefit of that chance. Thus, the slayer should be allowed to retain only a life estate in one-half the beneficial interest.[26]

What the Missouri courts would do in this situation is not certain. Only two reported Missouri cases have considered the problem; the cases involved bank deposits[27] and real property[28] held in tenancy by the entireties. Although in each a constructive trust was imposed for only one-half the beneficial interest, this fact is not considered conclusive because in each case the plaintiff's prayer was limited to one-

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20. See Comment, 17 Md. L. Rev. 45 (1957).

21. Id. at 58-59; Lore v. Habermeyer, 261 Wis. 266, 272, 58 N.W.2d 885, 888 (1952).

22. Sherman v. Weber, 113 N.J.Eq. 451, 167 Atl. 517 (1933) (slayer four years younger than the victim). But see Neiman v. Hurff, 11 N.J. 55, 93 A.2d 345 (1952) (presumed natural survival of victim).

23. Bierbrauer v. Moran, 244 App. Div. 87, 279 N.Y.S. 176 (4th Dep't 1935); In re Santourian's Estate, 125 Misc. 558, 212 N.Y.S. 116 (Surr. Ct. 1925); Van Alstyne v. Tuffy, 102 Misc. 455, 169 N.Y.S. 173 (Sup. Ct. 1918).

See also Barnett v. Couey, 224 Mo. App. 913, 27 S.W.2d 757 (1930) (one-half the interest); Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188 (1927) (all, except a life interest in the slayer).

24. See note 4 supra.

25. Cf. Dublin & Lotka, The Money Value of a Man 134-35 (1946).

26. See Colton v. Wade, 32 Del. 122, 80 A.2d 923 (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); Restatement, Restitution § 188 (1937); 3 Scott, Trusts § 493.2 (1939). Contra, 3 Bogert, Trusts and Trustees § 478 (2d ed. 1946).

27. Barnett v. Couey, 224 Mo. App. 913, 27 S.W.2d 757 (1930).

28. Grose v. Holland, 357 Mo. 874, 211 S.W.2d 464 (1948).

half.[29] The Missouri courts, without the benefit of a legislative declaration of policy, state that because the slayer unjustly benefits from the slaying, equitable principles enter and the common law fictions of title give way to prevent the enjoyment of the benefit.[30] The plaintiffs' arguments in the cases, of course, were limited by the prayer to a showing that the unjust enrichment consisted of one-half the property. It is submitted, however, for the reasons given previously,[31] that the unjust enrichment consisted of the entire interest excepting an estate in one-half for the slayer's life.[32] There is nothing within the language of the Missouri cases to indicate that in a proper case such an argument would not be approved by the Missouri courts.[33]

Obviously, there is room for variances or differences among courts concerning the moral issue of what types of conduct will cause enrichment to be unjust.[34] There also is room for differences on ancillary issues, such as the position of a slayer who commits suicide before a trial is had on the factual issues.[35] However, once it is determined that any enrichment of a joint-tenant slayer would be unjust, it should be found that the amount of the enrichment in the joint-tenancy property consists of the entire property interest, excepting an estate for the life of the slayer in one-half the beneficial interest.

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29. Grose v. Holland, 357 Mo. 874, 877, 211 S.W.2d 464, 465 (1948); Barnett v. Couey, 224 Mo. App. 913, 914, 27 S.W.2d 757, 758 (1930).

30. Grose v. Holland, 357 Mo. 874, 879, 211 S.W.2d 464, 466 (1948); Barnett v. Couey, 224 Mo. App. 913, 917, 27 S.W.2d 757, 759 (1930).

31. See text supported by notes 24-26 supra.

32. Contra, Note, 1951 Wash. U.L.Q. 582, 588.

33. See Wenker v. Landon, 161 Ore. 265, 275, 88 P.2d 971, 975 (1939); accord Note, 1951 Wash. U.L.Q. 582, 587-88; Note, 37 Iowa L. Rev. 582, 587-88 (1951-52); Note, 13 Mo. L. Rev. 463, 464-66 (1948).

34. See note 12 supra.

35. See Wade, Acquisition of Property by Wilfully Killing Another—A Statutory Solution, 49 Harv. L. Rev. 715, 723 (1936), for a discussion of the problem.