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that the attractiveness of the object is an element only to the extent that it helps answer this question: "Did the landowner know or by reasonable care could he have known that children were likely to trespass on a part of the land upon which he maintained a condition likely to be dangerous to them because of their childish propensities to intermeddle or otherwise?"[37]

The principal case, while in harmony with the reasoning of past decisions and while the result seems equitable, continues what is submitted as an undesirable precedent by classifying certain instrumentalities as attractive or dangerous instead of clearly recognizing that liability should rest primarily upon foreseeability of injury to a child whose presence should have been anticipated. "The greater the hazard, the greater the care required."[38] The court should repudiate all reference to the fiction of implied invitation and "attractive nuisance" and affirm the principle that recovery be based entirely on general principles of negligence.

LENNOX P. MCLENDON, JR.

Trusts—Inheritance by Murderer—The Constructive Trust and a Statutory Solution*

In a recent case,[1] the Georgia Supreme Court decided that a husband inherited his wife's estate under the statute of descent and distribution in spite of the fact that he had murdered her, holding that it was not justified in reading into a clear and unconditional statute an exception denying the right of a murderer to inherit from his victim.

Statutes of descent and distribution and the Statute of Wills generally contain no such exception, and in the absence of other specific

[37] RESTATEMENT, TORTS §339, comment *a* (1934). Gimmestad v. Rose Bros. Co., 194 Minn. 531, 261 N. W. 194 (1935).

[38] Gimmestad v. Rose Bros. Co., 194 Minn. 531, 536, 261 N. W. 194, 196 (1935). At page 536, 261 N. W. 194, 196, the court continues: "Nothing more is needed to support the proposition that one who maintains on his premises an artificial condition is liable for resulting injury to young children trespassing thereon if:

'(a) The place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

'(b) The condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily injury to such children, and

'(c) The children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and

'(d) The utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein.' RESTATEMENT, TORTS (Tentative Draft No. 4) §209 [RESTATEMENT, TORTS §339 (1934)]."

* The closely related problems arising in the fields of insurance, bank deposits, and other property relationships are outside the scope of this note.

[1] Crumley v. Hall, 43 S. E. 2d 646 (Ga. 1947).

legislative declaration on the matter, a number of cases[2] have reached the same result as the Georgia decision on the grounds that the devolution of property is completely controlled by statute and to make an exception thereto would be judicial legislation. Some courts[3] have also felt that a denial of the right to inherit would constitute a forfeiture of estate for conviction of crime in violation of statutory or constitutional provisions. On the other hand, several cases[4] have denied the right of a murderer to take from his victim by descent or devise, reasoning that the legislature could not have intended to let a murderer so acquire property when it enacted the statute and that the statute must be construed with reference to the common law principle that no man may profit from his own wrong. Neither view is satisfactory; the first allows the murderer to acquire property by his crime, while the second involves the reading of implied exceptions into an unambiguous and peremptory statute.

Conceding that under the law a murderer may acquire property by his crime, and this appears to be the sounder of the two views mentioned,[5] was the court in the instant case bound to let him retain it? Several writers[6] have suggested the use of a constructive trust to resolve this problem. This device has been employed by a few courts[7] and incorporated into the RESTATEMENT OF RESTITUTION.[8] The North Car-

[2] *E.g.*, Wall v. Pfanschmidt, 265 Ill. 180, 106 N. E. 784 (1894); McAllister v. Fair, 72 Kan. 533, 84 Pac. 112 (1906); Eversole v. Eversole, 169 Ky. 993, 185 S. W. 487 (1916); Shellenberger v. Ransom, 41 Neb. 631, 59 N. W. 935 (1894), *reversing* 31 Neb. 61, 47 N. W. 700; Owens v. Owens, 100 N. C. 240, 6 S. E. 794 (1888) (dower); *In re* Carpenter's Estate, 170 Pa. 203, 32 Atl. 637 (1895); Hill v. Noland, —— Tex. Civ. App. ——, 149 S. W. 288 (1912). Note that all the above cases involve intestacy. See cases collected in 3 BOGERT, TRUSTS AND TRUSTEES §478, n. 27 (1946).

[3] *E.g.*, Wilson v. Randolph, 50 Nev. 371, 261 Pac. 654 (1927); Owens v. Owens, 100 N. C. 240, 6 S. E. 794 (1888) (dower); *In re* Carpenter's Estate, 170 Pa. 203, 32 Atl. 637 (1895).

[4] *E.g.*, Weaver v. Hollis, —— Ala. ——, 22 So. 2d 525 (1945) (intestacy); Price v. Hitaffer, 164 Md. 505, 165 Atl. 470 (1935) (intestacy); Perry v. Strawbridge, 209 Mo. 621, 108 S. W. 641 (1908) (intestacy, *followed* in Eisenhardt v. Siegel, 342 Mo. 22, 119 S. W. 2d 810 [1938]); Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188 (1889) (will); *Re* Estate of Edith Wilkins, 192 Wis. 111, 211 N. W. 652 (1927) (will); in the Estate of Hall (1914) Probate 1 (C. A.) (England). And see cases collected in 3 BOGERT, TRUSTS AND TRUSTEES §478, n. 30 (1946).

[5] AMES, LECTURES ON LEGAL HISTORY 310-12 (1913); Note, 8 N. Y. U. L. Q. REV. 492 (1931).

[6] Ames, *op. cit. supra* note 5 at 310 (1913); Notes, 9 ILL. L. REV. 505 (1915); 4 HARV. L. REV. 394 (1891); 8 HARV. L. REV. 170 (1896); 29 MICH. L. REV. 745 (1931); 79 U. OF PA. L. REV. 100 (1931).

[7] *E.g.*, Whitney v. Lott, 134 N. J. Eq. 596, 36 A. 2d 888 (Ct. of Ch. 1944) (will); Sherman v. Weber, 113 N. J. Eq. 45, 167 Atl. 517 (Ct. of Ch. 1933) (tenancy by the entirety); Ellerson v. Westcott, 148 N. Y. 149, 42 N. E. 540 (1896) (in effect overruling Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188 [1889]); Van Alstyne v. Tuffy, 103 Misc. 455, 169 N. Y. Supp. 173 (1918) (tenancy by the entirety); Bryant v. Bryant, 193 N. C. 372, 137 S. E. 188 (1927) (tenancy by the entirety).

[8] §187: (1) Where a devisee or legatee murders the testator, he holds the

olina Supreme Court in *Bryant v. Bryant*[9] imposed a constructive trust on property in the hands of a tenant by the entirety who had murdered his spouse, but has not yet had occasion to employ it in a case involving a will or intestacy.

Equity, in preventing unjust enrichment, has long used the constructive trust to deprive one of property wrongfully acquired, and it has been pointed out that acquisition of property by murder presents an apt case for the application of this remedy.[10] By its use the objections to reading implied exceptions into a statute are avoided, for the trust is imposed on the property after it reaches the hands of the murderer. The argument that a denial of the right to inherit constitutes a forfeiture of estate is inappropriate here because there is no such denial, the statute being allowed to operate in the normal manner. And it would appear that the contention in an Illinois case[11] that the imposition of a constructive trust constitutes such a forfeiture is untenable because this is a civil action, not criminal, and the trust is imposed not as a punishment for his crime as such, but because the murderer has been unjustly enriched.[12] If the means by which property is acquired are such as to shock the conscience of equity, it would appear irrelevant that they also constitute an offense punishable in a criminal action. At any rate, those courts employing the constructive trust have not been concerned with any violation of constitutional prohibitions. This remedy renders any distinction between devise and descent unnecessary,[13] and motive immaterial,[14] because it does not depend upon the terms of any statute or contract nor upon any particular fact situation, but is a remedial device intended to prevent unjust enrichment whenever and wherever found. An advantage of the constructive trust is the fact that bona fide purchasers without notice from the murderer are protected since equity will not raise a trust against such innocent parties, but will instead raise it on the proceeds of the

property devised or bequeathed to him upon a constructive trust for the persons who would have been entitled to the property upon the death of the testator if the devise or bequest had been revoked. (2) Where a person is murdered by his heir or next of kin and dies intestate, the heir or next of kin holds the property thus acquired upon a constructive trust for the person or persons who would have been heirs or next of kin if he had predeceased the intestate.

§188: Where two or more persons have an interest in property and the interest of one of them is enlarged by his murder of the other, to the extent to which it is enlarged, he holds it upon a constructive trust for the estate of the other.

[9] 193 N. C. 372, 137 S. E. 188 (1927), commented upon in 5 N. C. L. REV. 373 (1927).

[10] Ames, *op. cit. supra* note 5 at 316 (1913); Note, 30 HARV. L. REV. 622 (1917).

[11] Wall v. Pfanschmidt, 265 Ill. 180, 106 N. E. 784 (1894).

[12] RESTATEMENT, RESTITUTION §187, comment *c* (1937).

[13] Van Alstyne v. Tuffy, 103 Misc. 455, 169 N. Y. Supp. 173 (1918); Bryant v. Bryant, 193 N. C. 372, 137 S. E. 188 (1927).

[14] See note 13 *supra*.

sale in the hands of the murderer. The persons entitled to invoke equity's aid would appear to be those persons who would have inherited had the murderer predeceased his victim, or, in case of wills, those persons who would have taken had the bequest or devise to the murderer been revoked,[15] since the murderer by his act has made his contingent right absolute thus destroying any possibility that they might succeed to the victim's estate.

The Georgia Supreme Court would have reached a much sounder result, in accord with the letter of the law and fundamental principles of equity, had it declared the murderer a constructive trustee of the property inherited.[16]

Many states have enacted statutes on this subject,[17] some for the specific purpose of overruling judicial decisions allowing the murderer to inherit. In general, these statutes declare that a murderer may not take any property, real or personal, from his victim by descent or devise, but there are variations as to types of devolution affected,[18] crimes included,[19] and requirements of conviction.[20]

The North Carolina legislature, after the decision in *Owens v. Owens*[21] holding that a wife who murdered her husband could not be denied her dower because only the legislature could prescribe additional grounds for forfeiture of a statutory right, enacted three statutes.[22] The statutes provide that a spouse convicted of the murder or as an accessory before the fact of the murder of the other shall lose all rights in the other's personal estate, including the right of administration, a year's provision, and a distributive share thereof and further shall lose all right to dower or curtesy and all rights to property settled on the deceased solely by reason of the marriage. It will be noted that the statutes apply only to the husband-wife relation and do not apply to other realty descending in intestacy or to any property rights conferred by will. A revisal of the statutes is needed to broaden their scope both

[15] See RESTATEMENT, RESTITUTION §187 (1937); Note, 30 HARV. L. REV. 622 (1917).

[16] For an historical treatment of the problem, see Reppy, *The Slayer's Bounty—History of the Problem in Anglo-American Law*, 19 N. Y. U. L. Q. REV. 229 (1942), and Reppy, *The Slayer's Bounty in New York, I, II*, 20 N. Y. U. L. Q. REV. 270, 424 (1945).

[17] See statutes collected in 3 BOGERT, TRUSTS AND TRUSTEES §478, n. 32 (1946).

[18] *E.g.*, CAL. PROB. CODE (Deering, 1941) §258 (applying to intestacy only); MISS. CODE ANN. (1942) §672 (applying only to wills).

[19] *E.g.*, COLO. STAT. ANN. (1935) c. 2, §258 (applying only to murder); KAN. GEN. STAT. (Corrick, 1935) §22-133 (including manslaughter).

[20] *E.g.*, S. C. CODE (1942) §8874 (conviction of crime necessary); VA. CODE (Michie *et al.*, 1942) §5274 (no conviction required), and see Ward v. Ward, 174 Va. 331, 6 S. E. 2d 664 (1940) (wherein acquitted murderer was proved guilty of unlawful homicide in a civil action under the statute, but held not to have forfeited estate because his motive in committing the murder was not to acquire property).

[21] Owens v. Owens, 100 N. C. 240, 6 S. E. 794 (1888).

[22] N. C. GEN. STAT. (1943) §§28-10, 30-4, 52-19.

as to persons and rights affected. It is believed that the following would suffice for this purpose:

No person convicted of the murder of another, or as an accessory before the fact of such murder, shall take any right, title, or interest in the victim's property, real or personal, by descent, survivorship, devise, or bequest: Provided that in cases of intestacy or survivorship such property shall descend to those who would be lawfully entitled thereto had the murderer predeceased his victim, and in cases of devise or bequest shall pass to the persons who would have taken had the devise or bequest to the murderer been revoked.[23]

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[23] See comprehensive statute suggested and discussed in Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936).