North Dakota Law Review

Volume 27 | Number 2 Article 12

1951

Wills - Descent and Distribution - Right of Murderer's Heirs to Inherit from Victim

Daniel J. Chapman

matic."[8] Practically speaking, the probability that sharp declivities will exist in an artificial body of water created by drainage into an excavation is considerably greater than the possibility that such declivities will be found in a natural formation.[9] The courts in a limited number of jurisdictions have allowed recovery in situations closely analogous to the facts in the principal case[10] based on the unnatural hidden dangers involved.[11] In *Sanchez v. East Contra Costa Irrigation Co.*,[12] the court stated that even though the children assumed the risk of a body of water they did not assume the risk of an unknown and unguarded hole in the bottom of that body. The objection that liability imposed upon the owner of land would create hardship upon that owner may be answered by pointing out that all the attractive nuisance doctrine imposes is the duty to exercise reasonable care. The courts which have allowed recovery in such cases do not appear to have worked a hardship or to have imposed unreasonable duties upon land owners.

It is self-evident that a blanket extension of the attractive nuisance doctrine to include a whole new general field would be indiscreet. However, a limited application of the doctrine, covering situations wherein the danger is great and could be easily or inexpensively remedied, should not be a violation of our historical concepts of property.

Daniel Twitchell

WILLS—DESCENT AND DISTRIBUTION—RIGHT OF MURDERER'S HEIRS TO INHERIT FROM VICTIM. A Kentucky statute[1] precluded petitioner's father from inheriting property from his par-

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[8] 92 N.E.2d at 641.

[9] See, *e.g.*, such cases as Sanchez v. East Contra Costa Irrigation Co., 205 Cal. 515, 271 Pac. 1060 (1928) (syphon in bottom of canal); Saxton v. Plum Orchards, 215 La. 378, 40 So.2d 791 (1949) (steep bank hidden under water of artificial pond).

[10] Coeur d' Alene Lumber Co. v. Thompson, 215 Fed. 8 (9th Cir. 1914) (child drowned in cistern covered by water); Malloy v. Hibernia Sav. & Loan Soc., 3 Cal. Unrep. 716, 21 Pac. 525 (1889) (sewage pit); Indianapolis v. Williams, 58 Ind. App. 447, 108 N.E. 387 (1915) (hole in bed of natural stream caused by sewage discharge; municipal corporation liable the same as a person if negligent); Indianapolis v. Emmelman, 108 Ind. 530, 9 N.E. 155 (1886) (excavation in bed of natural stream); Saxton v. Plum Orchards, *supra* note 9; Tucker v. Draper, 62 Neb. 66, 86 N.W. 917 (1901) (well); Bjork v. City of Tacoma, 76 Wash. 225, 135 Pac. 1005 (1913) (wooden flume with trap door in bottom).

[11] City of Pekin v. McMahon, 154 Ill. 141, 39 N.E. 484 (1895) (log floating upon pool; where some factor other than the mere existence of the pool attracts the children there is recovery); Kansas City v. Siese, 71 Kan. 283, 80 Pac. 628 (1905) (structure on pond); Price v. Atchison Water Co., 58 Kan. 551, 50 Pac. 450 (1897) (structure upon the water).

[12] 205 Cal. 515, 271 Pac. 1060 (1928).

[1] Ky. Rev. Stat. § 381.280 (1946): "If the . . . heir-at-law . . . takes the life of the decedent and is convicted therefor of a felony, the person so convicted forfeits all interest in and to the property of the decedent . . . and the property interest so forfeited descends to the decedent's other heirs-at-law, unless otherwise disposed of by the decedent."

ents, whom he had murdered. Subsequent to the acts of murder but prior to his conviction therefor, the murderer mortgaged to defendants his undivided interest in his parents' property. In a prior suit brought by the murderer's brother (the only other child of the murdered couple) against the mortgagee, it was *held*, that the conviction related back to the time of the murderous acts so that the murderer had nothing to mortgage.[2] Subsequently, the felon's four-year-old daughter, through her guardian, became a party to the action. She claims the share of her grandparents' estate to which her father would have been entitled, while the convict's brother claims all the estate as sole heir-at-law. The court *held*, that for the purposes of inheritance the murderer has predeceased his parents whom he killed and his daughter is entitled to take his share of the estate under the statutes of descent and distribution.[3] *Bates v. Wilson,* 232 S.W.2d 837 (C.A. Ky. 1950)

Modern statutes have reaffirmed the common law doctrine that the murderer shall not profit by sharing in his victim's estate.[4] Early American cases decided after the adoption of statutes of descent and distribution were not entirely in accord with this principle, however.[5] Courts were reluctant to read implied exceptions into the statutes of descent with the inevitable result that the murderer inherited from one whose death he caused.[6] This obviously repugnant conclusion was thought by some courts to be the signal for more equitable construction of the statutes of descent,[7] by others a signal for legislative action.[8] The subsequent decisions, in their efforts to disinherit the murderer, have followed three lines of reasoning. One group of courts, following precedent which dates back to the 1888 decision of *Owens v. Owens*[9] holds that the legal and equitable title to the property must pass to the murderer under the statutes of descent and whatever change is needed must come from the legislature.[10] A second theory, first set out in *Riggs v. Palmer*[11] is that to allow title to pass to the murderer under the statutes of descent would be contrary to public policy; courts which follow this reasoning find an implied legislative

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[2] Wilson v. Bates, 313 Ky. 333, 231 S.W.2d 39 (1950).

[3] Ky. Rev. Stat. § 391.010 (1946): "When a person having right or title to any real estate or inheritance dies intestate as to such estate, it shall descend in common to his kindred, male and female, in the following order . . . (1) To his children and their descendants; . . ."

[4] See 27 Texas Law Review 551 (1949), where it is said that about half of the states have statutes covering this situation, readopting the view held at the English common law as expressed in *Re* Sigsworth, (1935) Ch. (Eng.) 89.

[5] Shellenberger v. Ransom, 41 Neb. 631, 59 N.W. 935 (1894) (title vested in murderer *eo instanti*); Owens v. Owens, 100 N.C. 240, 6 S.E. 794 (1888) (widow who murdered husband got dower).

[6] Wall v. Pfanschmidt, 265 Ill. 180, 106 N.E. 785 (1914); Deem v. Millikin, 3 Ohio Cir. Dec. 491 (1892).

[7] Riggs v. Palmer, 115 N.Y. 506, 22 N. E. 188 (1889); *cf.* Ellerson v. Westcott, 148 N.Y. 149, 42 N.E. 540 (1896).

[8] McAllister v. Fair, 72 Kan. 533, 84 Pac. 112 (1906).

[9] 100 N.C. 240, 6 S.E. 794 (1888), subsequently changed by statute.

[10] Hagan v. Cone, 21 Ga. App. 416, 94 S.E. 602 (1917); Wall v. Pfanschmidt, 265 Ill. 180, 106 N.E. 785 (1914); McAllister v. Fair, 72 Kan. 533, 84 Pac. 112 (1906); Eversole v. Eversole, 169 Ky. 793, 185 S.W. 487 (1916); Shellenberger v. Ransom, 41 Neb. 631, 59 N.W. 935 (1894).

[11] 115 N.Y. 506, 22 N.E. 188 (1889).

intent to disinherit the murderer in statutes which are otherwise unambiguous.[12] A third and much smaller group of courts, supported by a good majority of the legal writers,[13] have taken the view that the legal title passes under the statutes of descent and distribution but that the murderer holds the property in constructive trust for the decedent's heirs.[14] No courts, however, have held that an insurance beneficiary can collect where he has caused insured's death.[15]

While today it is generally agreed that the slayer should not inherit from his victim, the courts disagree upon who takes the murderer's share. A few courts have refused recovery to the murderer's heirs, asserting that if the slayer cannot recover, those claiming through him are also precluded.[16] The two decisions which most nearly approach the precise issue of the instant case do not support it. The Oregon case of In re *Norton's Estate*,[17] embracing precisely the same fact situation and a similar statute, held that the statute served only to disqualify the slayer as an heir and did not empower the court to create new heirs; thus the son of the murderer was refused a share in his grandmother's estate. The result of the instant case was reached in *Rasor v. Rasor*,[18] where the grandchildren were allowed to inherit; but the decision is based upon a statute, clearly stating that the children of the slayer should take the felon's share.

The decision in *Riggs v. Palmer*[19] has been severely criticized in subsequent opinions because of its spurious construction of the statute involved.[20] Much of the same criticism can be directed at the Kentucky

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[12] Garwol's v. Bankers Trust Co., 251 Mich. 420, 232 N.W. 239 (1930); Perry v. Strawbridge, 209 Mo. 621, 108 S.W. 641 (1908); Price v. Hitaffer, 164 Md. 505, 165 Atl. 470 (1933) Box v. Lanier, 112 Tenn. 393, 79 S.W. 1042 (1904).

[13] Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 Harv. L. Rev. 715 (1936); Reppy, *The Slayer's Bounty—in New York*, 20 N.Y.U.L.Q. 270, 461 (1945); 64 U. of Pa. L. Rev. 307 (1916).

[14] Whitney v. Lott, 134 N.J. Eq. 586, 36 A.2d 888 (1944). Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188 (1927).

[15] N.Y. Mut. Life Ins. Co. v. Armstrong, 117 U.S. 591 (1886).

[16] Price v. Hitaffer, 164 Md. 505, 165 Atl. 470 (1933); Perry v. Strawbridge, 209 Mo. 621, 108 S.W. 641 (1908).

[17] 175 Ore. 115, 151 P.2d 719 (1944).

[18] 173 S.C. 365, 175 S.E. 545 (1934).

[19] 115 N.Y. 506, 22 N.E. 188 (1889).

[20] See Eversole v. Eversole, 169 Ky. 793, 185 S.W. 487, 489 (1916) (". . . the statute of descent and distribution declare (*sic*) the public policy of this state . . . That policy cannot be changed to conform to the court's idea of justice or of natural right."); Deem v. Millikin, 3 Ohio Cir. Dec. 491 (1892) (commenting on the Riggs v. Palmer case: "The decision . . . is a manifest assertion of wisdom believed to be superior to that of the legislature. . .")

[21] N. D. Rev. Code § 56-0423 (1943).

[22] See Rasor v. Rasor, 173 S.C. 365, 175 S.E. 545 (1934). Also, Kan. Gen. Stat. § 22-133 (1935); Neb. Rev. Stat. § 30-119, 30-120 (1943); Page's Ohio Gen. Code Ann. § 10503-17 (1926-1935 Supp.).

[23] Bates v. Wilson, 232 S.W.2d at 838: "I cannot believe that it was the intention of the legislature of Kentucky to deny the right to inherit the estate to an innocent child, even though the child is a daughter of the person who committed the murder."

[24] Wallach v. Van Riswick, 92 U.S. 202, 208 (1875).

court in the instant case, which when faced with the unambiguous directive to distribute the estate of the murdered couple to the other heirs-at-law exclusive of the murderer, took upon itself the right to create new heirs. However, in declaring that the murderer predeceased his victims, a course which North Dakota[21] and other jurisdictions[22] have chosen to take by statute, the court has reached a commendable result. Aside from the reasoning in the instant case, which appears to be founded as much upon emotional as legal considerations,[23] it is arguable that the innocent children of murderers should not be made to suffer because of the iniquity of their parents. It was for this reason that forfeitures were originally abolished.[24] Statutory solutions such as that found in North Dakota[25] achieve the result of disqualifying the murderer from inheritance and at the same time distributing his victim's estate in accord with the spirit of the corruption of blood and forfeiture provisions.[26] Similarly, application of the constructive trust theory would also appear to satisfy the requirements of the law and public policy.[27]

Daniel J. Chapman.

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[25] N.D. Rev. Code § 56-0423 (1943): "No person who has been finally convicted of feloniously causing the death of another shall take or receive any property . . . by succession, will, or otherwise, but all property of the deceased . . . shall vest as if the person convicted were dead when the testator died."

[26] Constitution of Kentucky § 20: "No person shall be attainted of treason or felony by the General Assembly, and no attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the commonwealth." (Similar provisions are found in most other jurisdictions.)

[27] *Compare* Whitney v. Lott, 134 N.J. Eq. 586, 36 A.2d 888 (1944), *with* Wall v. Pfanschmidt, 265 Ill. 180, 106 N.E. 785 (1914).