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Public Policy as Affecting Property Rights Accruing to a Party as a Result of Wrongful Acts

INTRODUCTORY NOTE ON PUBLIC POLICY.

"Public policy," said Judge Burrough in 1824,¹ " is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail." It is nearly a century later and the steed is still unbroken.

There are two divergent views as to the exact nature of public policy. The first, and more popular, sense of the term denotes that principle which holds that a person may not lawfully do that which tends to injure the public.²

The second sense limits it to what has been declared to be

¹ In *Richardson v. Mellish*, 2 Bing. 229, 252. 9 Eng. Com. L. R. 557.

² *Moher v. O'Grady*, 4 L. R., Ir. 54; *Consumers' Oil Co. v. Nunemaker*, 142 Ind. 560, 41 N. E. 1048; *McNamara v. Garrett*, 68 Mich. 454, 36 N. W. 218; *Brooks v. Cooper*, 50 N. J. Eq. 761, 26 Atl. 978; *Good-year v. Brown*, 155 Pa. St. 514, 26 Atl. 665.

public policy by the law-making department of government. Between these two views every conceivable opinion may be entertained, and to support each such opinion authority is available.

Daniel Webster, in his argument in the *Girard Will Case*,³ said that public policy is established "either by law, by courts, or general consent." The court did not sustain his contention as to general consent. Mr. Justice Story said in this connection, "Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions make known to us. The question, what is the public policy of a state, and what is contrary to it, if inquired into beyond these limits will be found to be of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ. . . . We disclaim any right to enter upon such examinations" (into religious polity) "beyond what the state constitutions, and laws, and decisions necessarily bring before us."

This rejection of general consent, although not recognized in all the cases, seems proper. The rights of parties should not be determined by an element so changing, and so incapable of ascertainment, as public opinion. It is said⁴ that "the principles to be applied have always remained unchanged and unchangeable, and public policy is only variable in so far as the habits, capacities and opportunities of the public have become more varied and complex."

The establishment of public policy by court decisions may best be defended on the principle which underlies the theory of the common law, i. e., that the courts are not indulging in judicial legislation but are merely declaring the law as it previously existed unexpressed. It is foreign to the purpose of this paper to discuss whether or not this theory is fundamentally fictitious.

³ *Vidal v. Philadelphia*, 2 How. 127, 11 L. Ed. 205.

⁴ *Brooks v. Cooper*, 50 N. J. Eq. 761, 26 Atl. 978.

It is through their legislature that the people of a state express their will most formally. The argument is cogent that to legislation should be limited the declaration of public policy. This to a large extent would do away with the vagueness and retroactive operation of the principles and also with the scientific application of the term "public policy" to denominate rather unscientific principles.

However this may be, it must be recognized that there has been no abatement, especially in the United States Supreme Court, in the practice of deciding cases according to previously unexpressed public policy, according to the court's own notion of what is, or should be, public policy.

The subject naturally falls under two heads, property rights accruing under the laws of testamentary or intestate succession and those accruing under policies of life insurance. The first head is discussed in the present article; the second will be treated in a later one.

TESTAMENTARY AND INTESTATE SUCCESSION.

Professor Ames⁵ points out that there are three possible ways of disposing of the question whether the murderer of the ancestor can succeed to his property; first, to hold that the murderer can take nothing even though the statutes of succession are clear and unambiguous; second, to allow him to take the property and retain it; and, third, to allow him to take the legal title, but subject to an equitable decree of a constructive trust in favor of those who would take in the event of his disqualification.

The first view has found some support. In New York it was originally held⁶ that the transmission of property by will and its descent are creations of statute and governed thereby, and nothing remains for the courts but to enforce the statutes as they are, the old maxims of the common law being overruled thereby. This reasoning did not appeal to the higher

⁵ American Law Register and Review, April 1897.

⁶ Preston v. Palmer, 42 Hun. 388.

court,⁷ where it was held that even such statutes must be construed in the light of public policy. The action was to enjoin the administrator of the testator's estate from disposing of the personalty to the defendant, who was, under the will, practically the universal devisee and legatee, and to declare him not entitled to the real estate under the will, on the ground that he had murdered the testator to get immediate enjoyment of the property himself and to prevent a revocation of the will. It was argued by counsel for appellant that the courts must recognize that the law of God overrides human statutes and declare the latter void in case of conflict. While the court did not exactly accede to this argument, it adopted an "equitable construction" of the statute of wills. Speaking through Earl, J., it said, "It never could have been the intention that a donee who murdered the testator to make the will operative should have any benefit under it. If such a case had been present to their minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it. . . . If the law-makers could, as to this case be consulted, would they say that they intended by their general language that the property of a testator or of an ancestor should pass to one who has taken his life for the express purpose of getting his property? . . . There was a statute of Bologna that whoever drew blood in the streets should be severely punished, and yet it was held not to apply to the case of a barber who opened a vein in the street. . . . All laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law, dictated by public policy, having their foundation in universal law administered in all civilized countries and nowhere superseded by statutes." Two of the judges dissented. Gray, J., who wrote the minority opinion, said, "The matter does not lie within the domain of conscience. We are bound by the

⁷ *Riggs v. Palmer*, 115 N. Y. 506, 5 L. R. A. 340 and note regarding equitable construction of statutes. For a discussion of how far statutes will be regarded as having abrogated the maxim that one cannot profit by his own wrong, see note in 25 L. R. A. 564.

rigid rules of law, which have been established by the legislature, and within the limits of which the determination of this question is confined. The question we are dealing with is whether a testamentary disposition can be altered, or a will revoked after the testator's death, through an appeal to the courts, when the legislature has by its enactments prescribed exactly when and how wills may be made, altered and revoked, and apparently, as it seems to me, when they have been complied with, has left no room for an equitable jurisdiction by the courts over such matters. . . . The demands of public policy are satisfied by the proper execution of the laws, and the punishment of the crime." The doctrine of the case—that a devisee who has murdered the testator in order to take the property cannot take by the will or otherwise although the case is not excepted in the statute of wills—seems untenable. The court seems to have gone further than necessary as the suit was for equitable relief. There is a subsequent New York case⁸ which seems to modify the doctrine. This case will be examined under the third solution suggested by Professor Ames.

Practically the same state of facts was presented to the Nebraska Supreme Court a few years later,⁹ the only difference being that it was the heir, not the devisee, who did the felonious killing for the purpose of succeeding to the property. The heir was convicted, but was lynched before execution of the sentence. The action was brought by the heir's grantee with notice. The court denied the heir's right to inherit despite the plain language of the statute of descent, approved the New York case, and remarked, "Had he been allowed to take it at her death, caused as it was, he would have taken it by purchase, rather than by inheritance and at a price of such enormous iniquity, that the mind shudders at its mention—the murder of his own motherless daughter." The case was later reversed¹⁰. The holding on rehearing will be taken up under the second of Professor Ames' solutions.

⁸ Ellerson v. Westcott, 88 Hun. 389, 34 N. Y. Supp. 813, reversed in 148 N. Y. 149; 42 N. E. 540.

⁹ Shellenberger v. Ransom, 31 Neb. 61; 47 N. W. 700.

¹⁰ S. C. on rehearing, 41 Neb. 631, 59 N. W. 935.

A case very much in point¹¹ arose in the Chancery Division of the High Court of Justice for Ontario. The killing was by the devisee, not the heir. Two things about this case must be particularly noted, the devisee did not appear to have done the act for the purpose of realizing under the will, and, although indicted for murder, he was convicted only of manslaughter. Both of these facts tend materially to weaken the position of the court, otherwise hardly tenable, that public policy avails to deprive the devisee of his gift and extends to all cases where the criminal claims a benefit directly resulting from his crime. The case was appealed to the Court of Appeal¹² where it was held, (very properly, it is submitted), that manslaughter might involve only criminal negligence and that the rule of public policy should extend only to cases where the crime is of such a character as to show an intent to bring about the result and derive a benefit from it, that the legal title in any event, passed to the devisee. The case was further appealed to the Supreme Court of Canada¹³ where it was held that the reasoning of the Court of Appeal applies only to cases of justifiable or excusable homicide, not to manslaughter, and the principle of public policy, that no one can take advantage of his own wrong, was given full swing. Taschereau, J. in a very able dissenting opinion, held that the devisee does not derive or attempt to derive any benefit from the homicide, that from all that appeared in the record the testatrix might have lived for weeks or months after the wounding in a perfect state of ability to make a new will, that she did not revoke her will and the court cannot say that she would have revoked it had she been able to do so. The case, holding as it does that any felonious killing of the testator by the devisee will defeat the devise, undoubtedly is too broad.

The question was presented in a recent Minnesota case¹⁴

¹¹ McKinnon v. Lundy, 24 Ont. R. 132.

¹² S. C. 21 Ont. App. 560.

¹³ S. C. 24 Can. S. C. R. 560.

¹⁴ Wellner v. Eckstein, 105 Minn. 444, 117 N. W. 830.

but the court was unable to agree on its proper solution and the decision turned upon the equitable jurisdiction of the probate court. Three of the judges wrote rather elaborate opinions on the subject here involved, and, although extrajudicial, they will be considered. A wife murdered her husband and granted her statutory interest in his real property to the defendant with full notice. The action was to have a trust *ex maleficio* declared, the proper proceeding according to Professor Ames' view. The report does not mention whether or not the murder was committed for the purpose of acquiring the property. Lewis, J., was of the opinion that the widow never inherited any property at all, that it could not have been contemplated by the legislators, who framed and enacted the statute of descent, that any person should be permitted to realize the benefit of the statute by committing the most atrocious of all crimes; that the fact that such a principle was not written in the statute indicates that it never occurred to anyone that the construction suggested would ever be urged. Start, C. J., thought the matter of descent and distribution of the property of a decedent to be within the exclusive control of the legislature, that the statute being specific and clear it was not subject to implied exceptions founded on public policy, as are general statutes showing from their provisions the omission to be unintentional, that even equity cannot override the provisions of a positive statute and declare a trust *ex maleficio*. He distinguished inheritance from devise, it being a reasonable and permissible construction of the will to hold that the devise was upon the implied condition that the devisee should not murder the testator, such manifestly being the intention of the testator. Elliott, J., thought the statutes left such exceptional and extraordinary cases as the present to be governed by the fundamental principles of our jurisprudence, that the legal title passed to the widow, but subject to a constructive trust, that the distinction found by Start, C. J., between descent and devise is merely technical.

The Minnesota Supreme Court again considered the question in 1910.¹⁵ The Probate Court had set aside the home-

¹⁵ In *re Gollnik's Estate*, 128 N. W. 292.

stead and certain personalty to the widow, notwithstanding the fact that she had been convicted of murder in the second degree because of the killing of decedent. It was held that public policy did not make this improper. O'Brien, J., disapproved of the opinion of Judge Elliott in the Wellner case and thought that the judiciary should not add an exception to a clear and unambiguous statute and that the conviction of murder in the second degree excluded the idea that the motive for the crime could have been the acquisition of the husband's property. Lewis, J., concurred in the result, holding that the rule of implied exceptions cannot apply where it does not appear that the murder was committed for the purpose of acquiring the property, but he was of opinion that the murderer should not succeed in case of murder in the first degree. Jaggard, J., dissented, supporting Judge Elliott's view.

The Missouri Supreme Court has held¹⁶ that the murderer or his heirs cannot inherit from the murdered ancestor although the murder was not for the purpose of realizing the property. The statute of descent makes no exception against an heir who has murdered the ancestor. The decision was partly based on the ground that the maxims of the common law (including "No one shall profit by his own wrong") are expressly adopted by statute in that state, but it is intimated that the decision would be the same without this statutory adoption. It is said, "Whilst the case may fall within the letter of the law, yet it does not fall within the spirit of reason or within the reasonable legislative intent."

It seems clear that public policy should not be effectual to put limitations on specific statutes containing no limitations any more than it would be effectual to override an enactment specially providing against such implied limitations. It is not for courts to find the spirit of statutes to be the exact opposite of their letter. The courts cannot inquire into the unexpressed intention of the legislature. It may well be that the legislators considered the provisions of the penal law sufficient punishment for the crime. If this shocks the sensibilities of

¹⁶ *Perry v. Strawbridge*, 209 Mo. 621, 108 S. W. 641.

mankind, the sensibilities of mankind should be directed to the legislature and require it to make amendatory enactment. It is not for the judiciary to amend the acts of the legislature. I place no stress on the argument which some of the courts have used that to hold otherwise would work a forfeiture of property within the prohibition of the constitutions. No one is heir of the living, and the expectancy of the heir like that of the devisee would not seem to be property within the meaning of the constitutions.

The second of Professor Ames' suggested solutions of the difficulty is the one supported by the weight of authority. In one of the insurance cases to be considered under the second division of this paper¹⁷ it is said, "This public policy" (that declared by the legislature) "is further manifested by our statute in regard to descent of property in case of intestacy and the general power of disposition of property by will, conferred by our statute of wills. In none of these statutes is the right conferred in respect to property made to depend on the manner or cause of death of the owner. . . . Statutes of descent and devise are legislative declarations of public policy of the state on the subjects to which they relate. The rules of the common law on these subjects have been wholly superseded by our statutes."

In North Carolina it has been held¹⁸ that the fact that a wife was accessory before the fact to the murder of her husband did not deprive her of her statutory right of dower. The court considered it repugnant to a sense of right and wrong that the widow should succeed to her dower under such circumstances, but admitted its incompetence to engraft a second exception into the statute which makes an exception only in the case of adultery and desertion. As is said in a Missouri case¹⁹, the right is not made to depend on the past or present good conduct of the wife and it ill becomes the

¹⁷ *Collins v. Metropolitan Life Ins. Co.*, 232 Ill. 37, 83 N. E. 542.

¹⁸ *Owens v. Owens*, 100 N. C. 240; 6 S. E. 794.

¹⁹ *King v. Ex'r of King*, 64 Mo. App. 301.

courts, under the guise of construing a statute, to qualify its plain provisions. In a recent Iowa case²⁰ it was held that a widow takes her distributive share in her deceased husband's estate provided for by the code as a matter of contract and right and that therefore a statute providing that an heir who murders his ancestor shall not inherit does not apply to a wife who murders her husband. The Iowa legislature has since amended the statute to bring the surviving spouse within its express terms.

The Nebraska case which we have previously discussed, was reversed on rehearing²¹. Ryan, C., who wrote the opinion, said, "The necessity of resorting to what is denominated 'rational interpretation' is a confession that our statute in that respect falls short of what it is deemed proper it should have provided. Indeed, there are expressions in the former opinion which in terms very nearly confess that the result reached was by judicial legislation. . . . The rule is . . . cardinal and universal that if the statute is plain and unambiguous, there is no room for construction and interpretation." If this holding,—that the murderer for the purpose of realizing the property can inherit and retain it,—is not quite satisfactory, it is at any event better than the original holding of the case—that there was an exception to the statute implied by public policy.

Such is also the Ohio rule.²² The crime in this case was also unusually revolting—the murder of a mother by her son and sole heir for the purpose of succeeding to the property. It was held that as there was neither condition nor exception in the statute of descents there was no warrant for the addition by the courts of an important exception, that the statute of descents is a legislative declaration of public policy, that "when the legislature, not transcending the limits of its power, speaks in clear language upon a question of policy, it becomes the judicial tribunals to remain silent."

²⁰ Kuhn v. Kuhn, 125 Ia. 449, 101 N. W. 151. See note in 53 American Law Register 175.

²¹ Shellenberger v. Ransom, 41 Neb. 631; 59 N. W. 935.

²² Deem v. Millikin, 6 Ohio C. C. 357. Affirmed without further comment in 53 Ohio St. 668, 44 N. E. 1134.

The same view prevails in Pennsylvania. In *Carpenter's Estate*²³ an heir who had murdered the ancestor for the purpose of securing the estate was allowed to take and retain it. The court (per Green, J.) said, "The penalty for murder in the first degree in Pennsylvania is death by hanging. . . . The intestate law in the plainest words designates the persons who shall succeed to the estates of deceased intestates. It is impossible for the courts to designate any different persons to take such estates without violating the law. . . . How can there be a public policy leading to one conclusion when there is a positive statute directing a precisely opposite conclusion? When the imperative language of a statute prescribes that upon the death of a person his estate shall vest in his children, in the absence of a will, how can any doctrine or principle, or any other thing called 'public policy' take away the estate of a child and give it to some other person? . . . There can be no public policy which contravenes the positive language of a statute." The rule of this case was followed ten years later.²⁴ The facts of this later case make the application of the rule clearer, as the murder was not for the purpose of succeeding to the ancestor's property.

On November 10, 1904 an atrocious murder occurred in California. A youth named Weber murdered his whole family for the purpose of succeeding to the property. The facts of the case are set forth in the report of the criminal prosecution for the crime.²⁵ The people of the state were greatly incensed that he should be allowed to take the property, and the press heaped reproaches upon a system of law which would permit such injustice. So far as I have been able to discover, the devolution of the property was not contested, at least in the appellate courts, and the property was used in paying the attorneys who unsuccessfully defended the murderer in the criminal trial. Popular indignation led to the adoption in 1905, of a statute²⁶ which provides that no person who has

²³ 170 Pa. St. 203.

²⁴ *Johnson's Estate*, 29 Pa. Super. Ct. 255.

²⁵ *People v. Weber*, 149 Cal. 325; 86 Pac 671.

²⁶ Cal. Civil Code Sec. 1409.

been convicted for the murder of the decedent shall be entitled to succeed to any portion of his estate. The section is very unscientifically drafted as the heir succeeds if at all from the moment of the death of the ancestor and as the act makes the conviction, not the fact, of murder the test, it is open to suspicion of unconstitutionality as imposing a forfeiture of property as the conviction cannot, *natura rerum*, take place until the heir has or has not succeeded. The statute would probably be construed to refer to the fact of the murder and simply require the fact to be established by a conviction. This would require evidence convincing the jury beyond a reasonable doubt. Facts required for the determination of heirship are ordinarily established by a mere preponderance of evidence. Another criticism to which the act is open is that it in terms refers only to succession, leaving the matter of devise still in doubt, but the provision would probably be construed to include taking by will in the word "succeed."

The section has been interpreted as not including manslaughter.²⁷ The court adopted the rule that where the statute of succession is unambiguous, nothing is left to construction, that the right of inheritance does not depend upon the ideas of court or counsel as to justice and natural right.

The reach of public policy in determining the right of succession was also involved in a case which arose in Kansas in 1906.²⁸ A man killed his wife for the purpose of obtaining her property and was convicted of murder in the first degree and sentenced to death. The action was by the brothers and sisters of the murdered wife against the attorney to whom the husband had transferred his interest in the property for defending him in the trial. The court held for the defendant, remarking that it is not the province of the court to settle the policy of the state with respect to the descent of property or as to the character and extent of the punishment which should be inflicted for the commission of crime; that the ab-

²⁷ *In re Kirby's Estate*, 162 Cal. 91; 121 Pac. 370.

²⁸ *McAlister v. Fair*, 72 Kan. 533; 84 Pac. 112; 3 L. R. A. N. S. 726 and note.

horrence of giving anyone property as the result of his crime is undoubtedly a strong reason why the law makers should make an exception in the statute of descent, but that the courts cannot assume that they have a wisdom superior to that of the legislature and inject into a statute a clause which, in their opinion, would be more in consonance with good morals, or better accomplish justice than the rule established by the legislature.

The third possible solution is the one approved by Professor Ames. It is to allow the heir or devisee to take the legal title to the property, but to declare, by equitable decree, a constructive trust in favor of the heirs who would take on the exclusion of the guilty person, or the residuary legatee, depending upon the circumstances of the case. Professor Ames admits that public policy cannot override the plain words of a statute. It is submitted that neither can equity except in the exercise of its jurisdiction over the matter of fraud. Fraud is a deceitful and wilful practice resorted to with the intent to deprive another of his right or otherwise injure him. The very idea of a constructive trust is one raised by construction or operation of law to prevent a person who has fraudulently obtained the legal title from enjoying the beneficial interest. This theory of Professor Ames, therefore, would seem to be sound only as applied to cases where the crime has been committed for the purpose of acquiring the property. Professor Ames leaves the matter somewhat in doubt as to whether or not he intends so to limit his theory. In an early part of his article he says that an excellent illustration of the importance of discriminating between legal and equitable relief is to be found in the cases in which one person killed another in order to acquire, by descent or devise, the property of his victim. Later on in his disquisition he omits all mention of this important factor and treats the subject as if freed from this limitation. He applies his rule to the Canadian case where it was clear that the homicide was not for the purpose of acquiring the property under the will.

It would seem that without this limitation Professor Ames' theory cannot be maintained. It is no more within the province of equity than it is within that of public policy to

supersede clear statutes. But all statutes are enacted with the intention that they shall not be allowed to promote fraud, and equity in declaring a constructive trust where there is fraud, where the murder was committed for the express purpose of inheriting the property or realizing under the will, is not, technically, overriding the statute, as it recognizes the legal title to be in the heir or devisee. For this reason I think Professor Ames' theory with the addition of the limitation I have suggested, is sound.

This seems to be the rule in New York. It was there decided in a case²⁹ which arose before Professor Ames wrote his article that where a devisee murdered the testator for the purpose of realizing the devise, equity will intervene and deprive the donee of the benefit of the devise, thus defeating the fraud. It was said that the devise took effect on the death of the testator and that equity will not set aside the will but will simply deprive the devisee of the use of the property. The case is unsatisfactory, because the language, like that in Professor Ames' article, is broad enough to cover all cases whether or not the crime was committed for the purpose of obtaining the property, and because a prior New York case³⁰ is in terms approved, although the holding there was that the devisee could not take the legal title.

Professor Ames' theory has received no judicial sanction, as is admitted in the *Harvard Law Review*,³¹ and very little judicial consideration. Judge Elliott approved it extra-judicially in a case where the facts were too broad for its proper application,³² if the limitation to cases where the crime was committed to acquire the property as here suggested, be tenable.

There are many advantages which the rule would have if adopted with proper limitations. Justice would be done, the functions of the legislative department of government would not be usurped, and a bona fide purchaser from the constructive trustee without notice would be protected according to the familiar rule of trusts.

²⁹ *Ellerson v. Westcott*, 148 N. Y. 149, 42 N. E. 540, reversing 34 N. Y. Supp. 813.

³⁰ *Riggs v. Palmer*, 115 N. Y. 506; 5 L. R. A. 340.

³¹ *Harvard Law Review* for January, 1911, p. 227.

³² *Wellner v. Eckstein*, 105 Minn. 444, 117 N. W. 830.

Another question which requires an answer is whether there is any valid distinction between devise and descent as related to the matter under discussion. An heir takes by operation of law, and a devisee by purchase. Property acquired by purchase may be regarded as more subject to public policy than property acquired by operation of law. But even so, the distinction would not seem to be controlling, in view of the fact that the testamentary right is not one given by the common law but is granted and everywhere regulated by statute. Public policy can interfere with a contractual right in certain cases, but the courts cannot, under the guise of public policy, declare revoked a devise not revoked in the manner provided for revocation in the statutes. In many cases it would not be unreasonable to find that there would have been an intention to revoke if the testator had known, but the nature of the situation precludes the idea of his actually having this intention; at most there is only a presumption that he would have had this intention had he not been dead and so beyond harboring any intention at all in legal contemplation. But waiving this objection to finding an intention to revoke, it is clear that a mere intention to revoke is not sufficient to effect a revocation. The law is well settled that to work a revocation there must be some act done by the testator *animo revocandi*.³³ The doctrine of revocation by circumstances does not apply. It has never been extended to circumstances like those under consideration, but only to cases where by marrying and by becoming a father after the execution of the will, there are persons unprovided for to whom the testator owed a moral duty of support. It is not a case of looking to the testator's probable intention, but of benefiting those for whom the testator ought, in conscience, to provide. As such it is an anomalous doctrine anyway. That situation and the one under discussion differ widely. The argument of tacit condition in the will is more difficult to answer, be-

³³ Under the statute of Henry VIII, it seems to have been enough to work a revocation that the testator entertained a declared intention to revoke and the devisee, knowing this, murdered him before he carried his intention into effect. *Brooke v. Warde*, Dyer 310 b. 73 Eng. Reprint Rep. 702.

cause less tangible. It seems, however, contrary to the fact. The devise not having been revoked by the testator, the court cannot revoke it for him, and the matter is just as much controlled by statute as is that of intestate succession.

To summarize the results of a discussion which has been rather discursive. The rule should be the same both as regards succession and devise. The constitutional inhibitions against forfeiture, attainder and corruption of blood do not apply. Public policy is not paramount to the express declarations of legislative intent contained in clear and unconditioned statutes of descent and devise, and to allow it efficacy to insert implied exceptions into the statutes is subversive of the established distinction between the judicial and the legislative functions of state. This distinction does not prevent equity from declaring a trust *ex maleficio* where the murder is shown to have been for the express purpose of acquiring the property, but for equity to declare a constructive trust where this actual fraud is not present is just as objectionable as for the courts to rely on public policy to accomplish the same result by refusing to permit the wrongdoer to take, and for the same reasons. If the result is to excite public indignation, the popular clamor should be crystalized into an appeal to the legislature, not to the courts, to amend the law.³⁴

The second part of this paper will be devoted to a discussion of public policy as affecting rights accruing under life insurance policies where the death of the insured has been caused by the wrongful act of the insured, of the beneficiary or of a third person.

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³⁴ Attention is called to certain notes in the *Harvard Law Review*, Vol. 4, p. 394; Vol. 8, p. 170, Vol. 24, p. 227.