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right to sue the state for injuries resulting from negligence of an officer or employee would necessarily create liability of the state for that negligence and therefore would fall exactly within the rule of the *Sirrine* and *Lucero* cases as being a special act where a general act would have been made applicable.

HAROLD L. MAI

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DISPOSITION OF PROPERTY HELD BY ENTIRETY  
WHERE ONE SPOUSE MURDERS THE OTHER

Recently, in the case of *Hogan v. Martin*, 52 So. (2d) 806 (Florida 1951), a question was raised which has caused a great deal of discussion and diversity of opinion among various jurisdictions and which has not, as yet, been decided in Wyoming. Husband and wife were seised of real property as tenants by the entirety. Husband murdered his wife and then purported to convey the entire property to attorneys in payment of legal services. A Florida statute<sup>1</sup> provides that "any person convicted of murder shall not be entitled to inherit from the decedent or take any portion of decedent's estate as a legatee or devisee." Attorneys filed a bill for a declaratory decree, naming the heirs of the deceased as defendants. *Held*, that the husband acquired but one-half interest in the real property since the husband by his wrongful act destroyed the marital status upon which the tenancy by the entirety was based.

Estates by the entirety became a part of Wyoming jurisprudence upon its adoption of the common law which has been expressly provided by statute<sup>2</sup> to be in force in Wyoming except where it has been modified by judicial decisions or statutes, and, as there has been no such modification of this principle, an estate by the entirety exists in Wyoming.<sup>3</sup> Where land is conveyed to both husband and wife an estate by the entirety was created by the common law and upon the death of one spouse the entire estate went to the other. The essential characteristic of an estate by entirety is that each is the owner of the entire estate; neither has any separate or joint interest but a unity or entirety of the whole.<sup>4</sup> If one spouse dies the survivor is said to be sole owner of the estate, not by reason of having taken anything from the deceased but because he has had ownership of the whole from the beginning.<sup>5</sup> The effect is merely to free the estate from participation by the deceased spouse.<sup>6</sup> This principle is generally accepted

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1. F.S.A. sec. 731.31.

2. "The common law of England as modified by judicial decisions . . . or statutes . . . shall be the rule of decision in this state when not inconsistent with the laws thereof, and shall be considered as of full force, until repealed by legislative authority." Wyo. Comp. Stat. 1945, sec. 16-301.

3. In Wyoming the common law rule is still in force and estates by entirety have not been abolished either expressly or inferentially by statute. *Peters v. Dona*, 49 Wyo. 306, 54 P. (2d) 817 (1936), 3 Wyo. L.J. 66 (1948).

4. *Ibid.*, 54 P. (2d) 820.

5. *Ibid.*

6. *Ibid.*

and followed without any difficulty in those situations in which the death of one tenant by the entirety is the result of natural causes. But, difficulty in accepting that principle does arise in those situations in which the death of one tenant by the entirety is the result of murder by the other. In such situations there is a marked conflict of the authorities. The conflict is between the above principle, that the surviving spouse does not take any new or additional interest by virtue of survivorship, descent, or intestate succession, but takes by virtue of the original grant or devise,<sup>7</sup> and the well established equitable principle, and in some jurisdictions the statutory provision, that no one shall be permitted to benefit by his own iniquity or to acquire property by his own crime.

The typical factual situation of the principal case with respect to the disposition of property held by entirety where one cotenant murders the other has arisen in thirteen<sup>8</sup> cases that could be discovered, resulting in varying solutions. However, the orthodox approach to this problem follows that suggested by Pomeroy:<sup>9</sup>

1. The wrongdoer, by reason of his crime, will not be allowed to take legal title.

2. The wrongdoer, in spite of his crime, takes indefeasible title.

3. The wrongdoer takes legal title, but is considered a constructive trustee in equity for varying amounts for those equitably entitled, because of the unconscionable mode of its acquisition.

The principal case and others<sup>10</sup> disclose a different and additional approach, namely,

4. The wrongdoer, by his wilfull, felonious act dissolves the marital relationship, and as a consequence there is a severance of the estate by entirety, and such property will be treated as held by tenants in common. The following discussion, then, will be focused on these four inconsistent approaches, all of which invoke the doctrine that no one shall profit by his own wrong.

The first approach is predicated on the equitable maximum as announced in *Van Alstyne v. Tuffy*:<sup>11</sup> "For where the natural and probable

7. *Ibid.*

8. *Van Alstyne v. Tuffy*, 169 N.Y.S. 173, 103 Misc. 455 (1918); *Beddingfield v. Estill*, 118 Tenn. 39, 100 S.W. 108, 11 Ann. Cas. 904, 9 L.R.A. (N.S.) 640 (1907); *Hamer v. Kinnan*, 16 Pa. Dist. and Co. 395 (1931); *Wenker v. Landon*, 161 Ore. 265, 88 P. (2d) 971 (1939); *In re Eckardt's Estate*, 54 N.Y.S. (2d) 484, 184 Misc. 748 (1945); *Bryant v. Bryant*, 193 N.C. 372, 137 S.E. 188, 51 A.L.R. 1100 (1927); *Sherman v. Weber*, 113 N.J. Eq. 451, 167 A. 517 (1933); *Colton v. Wade*, 80 A. (2d) 923 (Del. 1951); *Neiman v. Hurff*, 14 N.J. Super. 479, 82 A. (2d) 471 (1951); *Barnett v. Couey*, 224 Mo. App. 913, 27 S.W. (2d) 757 (1930); *Grose v. Holland*, 211 S.W. (2d) 464 (Mo. 1948); *Ashwood v. Patterson*, 49 So. (2d) 848 (Fla. 1951); and *Hogan v. Martin*, 52 So. (2d) 806 (Fla. 1951).

9. Cf. Pomeroy's *Equity Jurisprudence*, Vol. 4 (5th Ed.), par. 1054 d.

10. *Hogan v. Martin*, *Ashwood v. Patterson*, *Grose v. Holland*, and *Barnett v. Couey*, see note 8 *supra*.

11. See note 8 *supra*.

consequence of the criminal act is to vest property in the criminal, whether he be a thief or a murderer, the thought of his being allowed to enjoy it is too abhorrent . . . to countenance, and this whether the crime was committed for that very purpose or with some other felonious design. And equity will restrain in such a case, though contract, testament, or statute is thereby nullified." The court reaches this result, in spite of the fact that, in legal contemplation, the death of the wife gave the husband no new interest in the property. The position is taken under this view that the strict common law principles of an estate by entirety are superseded by equitable principles, that the murderer is deemed to have acquired a substantial benefit by the elimination of the possibility that the deceased tenant would have survived the murderer, and that this amounts to a gaining or vesting of property by his own crime.<sup>12</sup> This result, therefore, rests wholly on the proposition that no one shall be permitted to profit by his own wrong, and that to hold otherwise would be to allow the murderer or his heirs to be benefitted by the former's wrongful act. No attention is given to the peculiar character of an estate by the entirety, but, on the contrary, the wrongful act is deemed to defeat the right to claim by the law of survivorship. Since the result rests upon equitable principles, it is unnecessary to determine whether the statute<sup>13</sup> in reference to felonious slaying precluding inheritance or insurance benefits embraces estates held by entirety.

Under the second approach, directly contrary to the first, the legal title passes to the murderer and may be retained by him in spite of his crime on the ground that the murdering spouse became vested of the entire estate under the conveyance, and not by inheritance from or through the deceased spouse; and hence the common law rule, that one cannot take or inherit property by descent, by distribution or by virtue of marital rights from one whose death is caused by or results from his felonious act, does not apply.<sup>14</sup> In view of the constitutional provision prevailing in some jurisdictions, prohibiting the enactment of a law making a conviction for crime work corruption of blood or forfeiture of estate, a statute similar to Wyoming's precluding inheritance through felonious slaying, does not apply to an estate by entirety so as to forfeit the estate vesting in the husband on the wife's death, even though he feloniously caused such death.<sup>15</sup> Obviously the greater emphasis on the peculiar nature of survivorship in

12. *Van Alstyne v. Tuffy*, 169 N.Y.S. 175.

13. "No person, who feloniously takes, . . . , the life of another, shall inherit from said person, or take by devise or legacy from such deceased person, any portion of his or her estate; and no beneficiary of any policy of . . . insurance . . . who in like manner takes . . . the life of another, shall take the proceeds of such policy, but in every instance mentioned in this section, all benefits . . . shall become subject to distribution among the other heirs of such deceased person according to the rules of descent and distribution; . . ." Wyo. Comp. Stat. 1945, sec. 6-2518.

What should be the result under the statute in the principal case if the murderer should die before he is convicted?

14. *Beddingfield v. Estill*, *Hamer v. Kinnan*, *Wenker v. Landon*, cf. *In re Eckardt's Estate*, see note 8 supra.

15. *Beddingfield v. Estill*, *Wenker v. Landon*, see note 8 supra.

estates by entirety is the controlling principle in the decisions following this approach; and hence there is a refusal to permit the estate to be broken up by murder, so that the murderer is deemed to have complete title after the murder just as he had complete title before the murder. This on the ground that "if any change in the established rules relating to estates by entirety is to be made with respect to the rights of the surviving spouse, such change lies within the province of the Legislature and not the courts."<sup>16</sup>

The third approach to be considered is the view taken by the Restatement of Restitution,<sup>17</sup> which sets forth the general proposition that "Where two 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. This rule is based upon the equitable principle that although the murderer will not be deprived of property to which he would otherwise be entitled, he will not be entitled to profit by the murder; and where it is doubtful whether or not he would have had an interest if he had not committed the murder, the chances are resolved against him. Thus, if the murderer had an interest in property contingent upon his surviving his victim, he is not entitled to keep the property, since although he survives the victim he does so as a result of the murder, and but for the murder he might have predeceased the victim, in which case he would not have been entitled to the property. 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. Therefore, where husband and wife hold as tenants by the entirety and the one murders the other, the murderer takes by survivorship the whole legal interest in the property, but he can be compelled to hold the entire interest upon a constructive trust for the estate of his victim, except that he is entitled to one-half of the income for life,<sup>18</sup> or except that if the husband is entitled to the control and income of the property during his lifetime, and he murders his wife, he is entitled to continue to receive the whole of the income as long as he lives, but subject thereto he holds the entire interest upon a constructive trust for the estate of his wife excluding himself."<sup>19</sup> This procedure has been employed in at least four cases.<sup>20</sup> The position here taken is that even though in legal theory the death of one tenant vests no new interest in the other, there is, in practical effect, an acquisition of substantial benefits by the survivor which justifies the application of equitable principles to prevent his unjust enrichment. Attention must be drawn to the fact that this approach is not inconsistent with the common law principles of estates by entirety, since the murderer is permitted to take legal title and to enjoy the property for his own life, but he is denied the

16. *Wenker v. Landon*, see note 8 *supra* at 975.

17. *Restatement, Restitution*, sec. 188 (1937).

18. *Colton v. Wade*, see note 8 *supra*.

19. *Bryant v. Bryant*, see note 8 *supra*.

20. *Bryant v. Bryant*, *Sherman v. Weber*, *Colton v. Wade*, and *Neiman v. Hurff* (Decision in interim), see note 8 *supra*.

ultimate interest, and it is conclusively presumed against him that the victim would have survived him but for the murder. In those jurisdictions having a statute similar to that in Wyoming, preventing a party from inheriting from him whom he feloniously kills, it is more often than not held that such statute does not embrace a tenancy by entirety. Two<sup>21</sup> of the four cases proceeding under this theory have accepted the view of the Restatement with respect to the amount of the estate that should be held on constructive trust for the benefit of the murdered tenant's heirs; the other two experienced some difficulty in determining that amount.<sup>22</sup> And here, also, it is unnecessary to decide whether the statute relating to non-inheritance for felonious slaying includes estates by entirety, since the theory rests on equitable principles.

The fourth approach is that which is invoked in the principal case, which is in accord with three earlier cases,<sup>23</sup> basing its holding upon the idea that the title is vested in the union created by the marriage with the whole estate being in the legal survivor, but since the murderer cannot qualify as a survivor in legal contemplation he never acquired the whole estate and, consequently, the property descends as if it were held by tenants in common. Under this view "merely outliving the wife does not satisfy the conditions imposed by the common law relative to estates by entirety so that the survivor may take all. One must not only be a survivor in fact but also a survivor in contemplation of law. Just as the fiction of unity of estate is destroyed, and the estate severed, when the parties are divorced, since it would be inequitable to allow one or the other to take all, similarly where the husband by his felonious act dissolves the marital relationship, and as a consequence there is a severance of the estate by entirety, such property may well be treated as held by tenants in common."<sup>24</sup> Since the surviving tenant never acquires the whole estate there is nothing upon which the constitutional or statutory provisions relating to forfeiture can operate.

It is submitted that the most logical and equitable approach is that suggested by the Restatement, namely, the third approach. The first is bad because not only does it do unnecessary violence to the ancient theory of survivorship in estates by entirety, by refusing to acknowledge the peculiar character of such estates, but also it takes away from the murdering tenant that interest (a life estate in one-half the net income of the property, or, as in North Carolina, a life estate in the entire net income of the property, plus a possible survivorship in the whole) which is already existing in him. In a jurisdiction like Wyoming, where the statute relating to forfeiture of inheritance for felonious slaying does not specifically provide for the contingency presented by the principal case, it may well be

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21. See notes 18 and 19 *supra*.

22. For a treatment on the subject of the amount of constructive trust imposed where one tenant by the entirety kills the other, see 82 U. Pa. L. Rev. 183-5 (1933).

23. *Barnett v. Couey*, *Grose v. Holland*, *Ashwood v. Patterson*, see note 8 *supra*.

24. *Barnett v. Couey*, see note 8 *supra* at 761.

argued that the statute is unambiguous, that the public policy of the state and the intent of the legislature have already been fixed in the statute, and that it would be an unwarranted interference on the part of the courts to extend it further by judicial legislation.<sup>25</sup> Furthermore, if, as the court states in *Beddingfield v. Estill*, the murdering tenant is not allowed to take any of the legal title, although a contract, will or statute be thereby nullified, much confusion and uncertainty would undoubtedly result.

The second approach is clearly inequitable since it gives to the wrongdoer a surviving interest in property which it is by no means certain he would have received but for his crime and which would seem to be a sufficient transfer to justify the application of the equitable doctrine of preventing unjust enrichment by crime. Nor is strict adherence to the legal theory that in an estate by entirety the surviving spouse does not take by inheritance but as survivor by virtue of the original grant adequate reason for refusing to apply the equitable principles that a wrongdoer shall not profit by his wrong. The common law rule relating to estates by entirety has been varied to a greater or less extent in many jurisdictions, and a breaking up in the estate allowed, by laws on divorce, taxation, joint conveyances by husband and wife, partition, acts providing for the separate property of married women, and in some states directly by statutes abolishing such estates.<sup>26</sup> Here the rights of the murderer are made to depend upon whether he inherits property from the victim. Justice requires that the operation of equitable rules should not be restricted to such cases. The real test should be whether the murder derives any pecuniary benefit from the death. In principle there seems to be no real difference between one who by his crime accelerates the maturity of an insurance policy and one who by his crime converts his precarious interest as tenant by entirety in an estate which is subject to a concurrent interest, into an estate which becomes absolutely his own.<sup>27</sup>

The fourth approach solves the problem but half way and is based on rather arbitrary and artificial grounds. To say that one tenant takes the entire property under the original grant upon the natural death of the other tenant, and to say that the tenancy by entirety is severed upon the felonious slaying of one tenant by the other so that the property is to be treated as if held as a tenancy in common is too inconsistent and illogical, for in both situations the change brought about by death was in the person and not in the estate. It completely ignores the nature of an estate held by entirety. Prior to the murder the murderer had a life estate in one-half the property in addition to the possibility of enjoying the whole as survivor; but now, after his own wrongful conduct, he takes one-half of the proper absolutely. This constitutes giving the wrongdoer more than he was or is justly entitled to. But for the murder he may have predeceased the victim, and his estate would have taken nothing. By his crime he has made absolute one-half

25. *Sherman v. Weber*, see note 8 supra.

26. 11 B.U.L. Rev. 130 (1931); 3 Wyo. L.J. 66 (1948).

27. *Beddingfield v. Estill*, 11 Ann. Cas. 908.

of that which was merely contingent. Every doubt should be resolved against the wrongdoer who created the doubt. Moreover, this result does violence to another concept of an estate by entirety, that is, the concept that during their joint lives one tenant alone cannot sever the estate so held. Yet, to follow the above approach is to concede that one tenant acting alone may sever the estate held by entirety.

The best argument in favor of the constructive trust approach is that stated by the court in *Colton v. Wade*:<sup>28</sup> "The conclusion that a trust should be impressed gives powerful recognition to the deeply imbedded equitable principle that a person shall not be permitted to profit by his own wrong." It is pointed out that the imposition of a trust does not, realistically, constitute a forfeiture of the murderer's estate since it only prevents him from obtaining more "rights in fact" than he had prior to the murder. Prior to the murder the wrongdoer had only a concurrent life estate with the victim. That the murderer would have had the exclusive interest in the whole by survivorship was a mere possibility and no more; and that to resolve against the murderer the doubt concerning that possibility does not work any forfeiture. The common law rule relating to estates by entirety should not be overpowered by other equally important common law or equitable principles. "To say that such a surviving spouse does not actually profit from his wrong is to divorce the law from the realities of life." Such a result does not take from the survivor that which he had prior to the murder except that the pre-existing doubt as to survivorship is resolved against him. By permitting legal title to pass to the murderer, no harm is done to the concept of survivorship in estates by entirety; and by means of the trust he is not permitted to acquire any additional interest as a result of his wrongful act.

Therefore, to obtain the best result, the court in the principal case should have applied the rule of the Restatement, should have resolved all doubt in favor of the victim's heirs, and should have allowed them to take half of the property immediately and the other half on the death of the murderer. The majority of the judges in the principal case do not mention the Restatement. Under that rule, a wrongdoer holds the entire property on a constructive trust and is entitled to continue to receive the whole of the income during his life if he were entitled to the control and income from all the property during their joint lives, or to receive one-half of the net income of the property during his life. In both Florida<sup>29</sup> and in Wyoming, by inference,<sup>30</sup> the wife would have been entitled to share in the income during their joint lives. Therefore, had the Restatement rule been applied to the principal case, or had the facts of the principal case arisen in Wyoming, the most equitable result would be to hold the murderer a

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28. *Colton v. Wade*, see note 8 supra at 925-927.

29. *English v. English*, 66 Fla. 427, 63 So. 823.

30. *Peters v. Dona*, see note 3 supra.



constructive trustee of the entire estate for the benefit of the victim's heirs, subject to a life estate in one-half the net income of the property in the murderer.

GEORGE M. APOSTOLOS.

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### SELECTING THE PARAMOUNT DUTY OF A DIRECTOR-MANAGER COMMON TO TWO CORPORATIONS

Defendant, with the acquiescence of the directors of plaintiff corporation, acted as director-manager of plaintiff corporation while holding the same position in a corporation owned wholly by him. The corporations were engaged in business of a similar nature. Defendant gave his corporation a valuable patent right and plaintiff corporation brought a bill in equity seeking damages for breach of fiduciary duty. *Held*, that the failure to offer the business opportunity to plaintiff corporation was a breach of fiduciary duty. *Production Machine Company v. Howe*, 99 N.E. (2d) 32 (Mass. 1951).

Thompson<sup>1</sup> says the rule is thoroughly embedded in the general jurisprudence of both America and England that the status of directors is such that they occupy a fiduciary relation toward the corporation and its stockholders and are treated by courts of equity as trustees. If there is presented to a corporate officer or director a business opportunity in the line of the corporation's business, of practical advantage to the corporation, and one the corporation is financially able to undertake, the law will not allow the officer to alienate that opportunity from the corporation.<sup>2</sup> The fiduciary obligation of directors may be ground for recovery of profits realized by a director in transactions with third persons, the benefit or opportunity of which director was equitably bound to give his corporation.<sup>3</sup>

In the instant case, the court was not troubled with a determination of the paramount duty of defendant. Rather, the court found a duty to plaintiff only, pointing out that defendant wholly owned the other corporation. The corporate entity will be disregarded, and accordingly there will be no fiduciary obligation, when the corporation is the mere alter ego or business conduit of one person.<sup>4</sup> Fiduciary relation cannot be urged where the corporation is a mere shadow organized and maintained by a person as a cloak under which to conduct his own business.<sup>5</sup> Sole owners of a corporation are not under a fiduciary obligation to that corporation; though directors in name, they are principals in fact.<sup>6</sup>

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1. Thompson, *Corporations*, sec. 1320 (3d ed. 1927).
  2. *Loft, Inc. v. Guth*, 23 Del. Ch. 138, 2 A. (2d) 225 Del. 1938; *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. (1928); *Turner v. American Metal Co.*, 268 App. Div. 239, 50 N.Y.S. (2d) 800, 1st Dep't 1944, appeal dismissed, 295 N.Y. 822.
  3. *Ballantine, Corporations*, sec. 66 (Rev. ed. 1946).
  4. *Fletcher, Cyclopaedia Corporations*, secs. 41-46 (Rev. & Perm. ed., 1931).
  5. *Hanson Sheep Co. v. Farmers' and Traders' State Bank*, 53 Mont. 324, 163 Pac. 1151 (1917).
  6. *McCracken v. Robinson*, 57 Fed. 375 (2d Cir. 1893).