

one to conclude that in the eyes of the Ohio Supreme Court cash and cash items are equivalent. The significance of this dictum becomes apparent when it is considered in connection with the amended statute, since the combination seems to pave the way for the revival of the augmentation doctrine in Ohio to the extent that the cestui que trust has a preferred claim, regardless of whether his assets, which were commingled or misused, were in the form of cash or cash items.

Should a case in which it is claimed that augmentation had resulted from the receipt of cash items arise, the recent case of *Huntington National Bank v. Fulton*, 32 O. N. P. (N. S.) 141 (Ohio Law Bulletin and Reporter, May 21, 1934), decided under the amended statute, would be of interest. In this case the augmentation was in the form of a balance in the insolvent bank's favor after a clearing transaction. Bank clearings, mere bookkeeping entries, are even more distinguishable from cash than cash items, and it is more difficult to conceive of their augmenting "cash in vaults", nevertheless the court held that the plaintiff was entitled to a preference. This holding could serve as the basis for an a fortiori argument which might be instrumental in influencing the Ohio courts to transform the dictum of *Fulton v. University of Dayton* into law.

In the last analysis this whole problem resolves itself into a question of policy: should courts favor the general creditors, or should they increase the remedies of those occupying the position of cestui que trustent. Legislative policy, as evidenced by the amended statute, is in accord with the latter alternative. Judicial policy, as evidenced by the obiter dictum of the principal case, points toward an extension of that which the Legislature has initiated. These two afford a basis for augmentation by means of cash items.

HARRY BONAPARTE.

THE RIGHT OF A MURDERER TO ACQUIRE THE PROPERTY OF HIS VICTIM

The case of *Hodapp v. Olaff*, 17 Ohio Abs. 543, decided May 19, 1934, in Montgomery County raises the much controverted question of whether a murderer may acquire and retain the property of his victim. In this case, one, Apostol Milvanos, opened a joint account for himself and another, Tago Milvanos, as authorized under Sec. 9648, General Code. Later he went to Greece where at the instance of Tago, he was murdered. Tago was subsequently convicted under Greek law of being the "moral author of the crime." The question presented to the court was whether the murderer or the heirs of Apostol should take title to the account.

There are four situations in which this question may arise: first, where a legatee or devisee murders his testator; second, where an heir murders his ancestor; third, where a beneficiary in an insurance policy murders the insured, and, fourth, where one joint owner takes the life of the other. It would seem that the solution to the problem in each of these cases would be identical, but an examination of the cases reveals three distinct views.

The first solution is that a murderer may acquire nothing at all from

his victim. The foundation case is *Riggs v. Palmer et al.*, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340 (1889), which was cited and strongly disapproved by the principal case. In *Riggs v. Palmer*, a 16 year old boy, aware of the provisions of his grandfather's will constituting him a legatee, caused the latter's death by poison. The majority of the court adhered to the fundamental maxim of the common law—"No one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." The principle of the *Riggs case* has been adopted in numerous instances where a beneficiary under an insurance policy has taken the life of the insured. *N Y Mutual Life Ins. Co. v. Armstrong Adm.*, 117 U. S. 599, 29 L. Ed. 997 (1886), *Johnston v. Metrop. Life Ins. Co.*, 85 W. Va. 70 (1919), *Merritt v. Prudential Ins. Co.*, 110 N. J. Law 414 (1933), *Slocum v. Metrop. Life Ins. Co.*, 245 Mass. 565, 134 N. E. 245 (1922). In uxoricide cases, see *Van Alstyne v. Tuffey*, 103 Misc. 455, 169 N. Y. S. 173 (1918), and *Re Santourian*, 125 Misc. 668, 212 N. Y. S. 116 (1925), the court saying in the latter case, "We will not subscribe to any doctrine of law that will offer a premium to husbands to murder their wives." *Re Santourian* like the principal case, was one where a joint depositor murdered his wife, the co-depositor. Unlike the principal case, however, the court did not consider whether or not a joint depositor has a present vested interest. See also *Box v. Lamer*, 112 Tenn. 409, 79 S. W. 1045 (1904), *Perry v. Strawbridge*, 209 Mo. 621, 16 L. R. A. (N. S.) 249 (1908), *Hamblin v. Marchant*, 103 Kans. 508, 175 Pac. 678 (1918).

The second solution is to allow title to pass to the murderer; but because of the unconscionable method of obtaining it, to hold it as a constructive trustee for the other heirs or devisees of his victim. This is the small minority view but has received the favorable criticism of legal scholars. Ames, *Lectures on Legal History*, p. 310 et seq., 1 Perry, *Trusts* (7th Ed. 1929), Sec. 183a; 3 Pomeroy, *Equity Jurisprudence* (4th Ed. 1918), Sec. 1044, 1053, 1054. See also notes in 4 Harv. L. Rev. 394, 8 id 170; 27 id 28, 30 id 622, 33 id 423, 24 Amer. L. Rev. 141, 30 Amer. L. Rev. 130. The leading case representing the use of the constructive trust as a remedial device is *Bryant v. Bryant*, 193 N. C. 371, 137 S. E. 188 (1927). This solution is more fully discussed below.

The third solution and weight of authority, is to permit a murderer to acquire the property of his victim and to retain it in spite of his crime. The leading case in Ohio and followed by the principal case is *Deem v. Millikin*, 6 O. C. C. 357 (1892), affirmed without opinion in 53 Ohio St. 668 (1895), where a sole heir murdered his ancestor. The court allowed the murderer to retain the property acquired from such ancestor. The determination of the case was based upon Sec. 12 of the Bill of Rights of the Ohio Constitution which provides that "No conviction shall work a corruption of blood, or forfeiture of estate." The court said that the statute of descent provided who should take in these cases and did not stipulate any exceptions; and for a court to say that a murderer should not acquire the property of his victim would effectually forfeit that estate which the statute gives him. That no exceptions may be read into the statute by the courts is a doctrine to which there is tenacious adherence. *Hill v. Noland*, 149 S. W. (Tex. Civ. App.)

288 (1912), *Holloway v. McCormick*, 41 Okla. 1, 136 Pac. 1111 (1913), *Owens v. Owens*, 100 N. C. 240, 6 N. E. 794 (1883), *Shellenberger v. Ransom*, 41 Neb. 631, 59 N. W. 935 (1894), *McAllister v. Fair*, 72 Kans. 533, 84 Pac. 112 (1906), *Hagan v. Cone*, 21 Ga. App. 416, 94 S. E. 602 (1917), *In re Kirby's Estate*, 612 Calif. 91, 121 Pac. 370 (1912), *In re Carpenter's Estate*, 170 Pa. 203, 32 Atl. 637 (1895), *Kuhn v. Kuhn*, 125 Iowa 449, 101 N. W. 437 (1904).

In cases where the murderer is possessed of a vested interest, some courts have permitted him to retain this on the ground that to deprive him of it would violate the constitutional prohibition against forfeiture. In *Beddingfield v. Estill*, 118 Tenn. 39, 100 S. E. 108 (1907) where an uxoricide was committed, the husband and wife holding an estate by entirety, the husband was deemed to have had a vested interest prior to the death of the wife. The court said at p. 49, "The husband was vested with title previous to the wife's death (p. 50) and vested rights of this character should not be forfeited by the murderous act of the owner." See *Owens v. Owens* 100 N. S. 240, determining that dower is an interest vested by statute to which the wife was entitled despite her murder of the husband. The court at p. 242 said, "We do not see how any legal obstacle can be in the way of her seeking to get what the law in unqualified terms gives her." The following cases discuss the forfeiture of estate doctrine, *Deem v. Millikin*, 6 O. C. C. 357, (1892), *Hagan v. Cone*, 21 Ga. App. 416, 94 S. E. 602 (1917), *Wall v. Pfamschmidt*, 265 Ill. 180, 106 N. E. 85 (1914), *McAllister v. Fair*, 72 Kans. 533 (1906).

In view of the courts' attitude in permitting a murderer to benefit by his crime, statutes have been enacted in at least 18 states attempting to preclude such a result. The Ohio Probate Code Sec. 10503-17, forbids a person finally adjudged guilty of murder in the first or second degree from inheriting the property of his victim. For a list of states having similar statutes, see 2 Wash. L. Rev. 123 (1927), also see Bordwell, 283, 304 (1929), 29 Mich. L. Rev. 745 (1931). An examination of the cases reveals that the intent of the legislature by such statutes has not been given full effect in view of their strict construction by the courts. The statutes have been made but a form under the illusion of a remedy. They have not obliterated, to the desired extent the traditional strict common law attitude of the courts. For instance in *Harrison v. Moncravia*, 264 F. 776 (1920) a statute prohibiting a convicted murderer from inheriting from his victim did not prevent the inheritance, because, the statute, being a penal provision of a foreign jurisdiction was deemed not to have any extra-territorial effect. In *In Re Kuhn's Estate*, 125 Iowa 443, 101 N. W. 151 (1904) a wife was permitted to take her statutory share despite the murder of her husband because, the court held, it was hers as a matter of contract and right; in *Beddingfield v. Estill*, 118 Tenn. 39, 100 S. W. 108 (1906), a statute prohibiting a murderer from taking by devise or descent from his victim was held not to apply to an estate by entirety because the survivor took by the murder no new interest of which he could be deprived. See also, *In re Kirby*, 162 Calif. 91, *Mertes Estate*, 181 Ind. 478, 104 N. E. 753 (1914). The principal case allowed the murderer to acquire property from his victim despite Sec. 10503-17 because (1) the conviction as the "moral author of the crime" did not satisfy the

statutory phrase, "Adjudged guilty of murder in the first or second degree," (2) the statute was inapplicable to vested interests and (3) it could have no extra-territorial effect. The Ohio court even ventured the opinion that Sec. 10503-17 would be held constitutional only in so far as it applied to contingent interests. The foregoing cases indicate how narrowly the statutes have been applied.

It is suggested that the best solution of the principal problem is found in the use of equity's flexible remedial device—the constructive trust. This solution was adopted in the following cases: *Bryant v. Bryant*, 193 N. C. 372, *Barrett v. Couey*, 224 Mo. App. 913, 27 S. W. 2d 757 (1930), *Sherman v. Weber*, 167 Atl. 517 (N. P. Eq. 1933). In all of these cases the murderer and victim held property by entirety. See also *Ellerson v. Wescott*, 14 N. Y. 149, 42 N. E. 540 (1896). Here the murderer was the devisee of his victim.

Mr. Justice Cordozo defines a constructive trust as a "formula through which the conscience of equity finds expression." *Beatty v. Guggenheim etc.*, 225 N. Y. 380, 386, 122 N. E. 378 (1919). This "formula" is used when the property has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest. *Moore v. Crawford*, 130 U. S. 122, 128, 3 Pomeroy Equity Jurisprudence, Sec. 1053. Equity will not permit unjust enrichment. The application of the constructive trust is found principally in cases where the murderer and his victim held property by entirety or as joint depositors. But these seem to be no reason why it cannot be applicable to cases where a devisee kills his testator or a beneficiary kills the insured, or an heir, his ancestor. This disposition is a salutary and efficient solution in that it does not read any exceptions into the statute of descent nor operate to cause a forfeiture, since bare legal title is permitted to vest in the murderer. The statutory and constitutional obstacles thus satisfied, it remains for equity to invoke its powers to prevent such an unconscionable result and decree the beneficial interest in those equitably entitled.

In cases involving entireties and joint depositors, the use of constructive trust gives rise to the problem of whether the whole or part, and if the latter, how much, of the joint property shall be held in trust. The court in *Bryant v. Bryant*, *supra*, imposed a trust upon the murderer only to the extent of one half the property held in entirety. In *Barnett v. Couey*, *supra*, the estate was divided equally. In *Sherman v. Weber*, *supra*, the court gave the heirs of the victim the income of one half of the estate for her life expectancy, determined according to mortality tables. The problem, being in equity, the proper solution as to how much of the estate the trust should cover, must depend largely on the equities of the particular case. The factors that the court might consider are: the life expectancies of the joint holders, their state of health and their habits. But every doubt should be resolved against the wrongdoer who has created the doubt. See, Ames, Lectures on Legal Hist. p. 321.

It is submitted that the court in the principal case, by use of the constructive trust, might have easily avoided all the legal difficulties that it encountered, and could still have effected a more desirable result. The holding that Sec. 1053-17 was inapplicable to this situation left nothing but the

common law to guide the court. And the common law of Ohio was *Deem v. Millikin* to which authority the court unfortunately felt bound. In view of the holding, we must agree with Dean Ames, Op. Cit. 6. 322, and say, "It is to be regretted that the courts of Nebraska, North Carolina, Ohio [referring to *Deem v. Millikin*] and Pennsylvania did not apply . . . the sound principle of equity that a murderer or other wrongdoer shall not enrich himself by his iniquity at the expense of an innocent person."

B. BERNARD WOLSON.

THE UNOFFICIALLY REPORTED CASE AS AUTHORITY

The important question, whether unofficially reported cases of the several courts of appeals should be recognized by and receive the official sanction of any court within the state, is raised once again in the recent case, *Central Greyhound Lines, Inc., v. State Automobile Mutual Life Ins. Co.*, 17 Abs. 419, Miami County, Second District of the Ohio Court of Appeals, decided June 12, 1934. In that case the judge stated, "The question presented is no longer an open one with us and was decided adversely to the claim of the defendant in the case of *North River Ins. Co. v. Redman*, 16 Abs. 516, Miami County, Second District of the Ohio Court of Appeals, decided December 15, 1933, unreported opinion by this court." This unofficially reported opinion was cited notwithstanding Section 1483, General Code, which provides that, "No case in the courts of appeals shall be reported for publication except such as may be selected by the several courts of appeals or by a majority of the judges thereof * * * Only such cases as are hereafter reported in accordance with the provisions of this section shall be recognized by and receive the official sanction of any court within the state."

Statements such as this by the judge have not been infrequent. The use of unofficially reported cases is a widespread and constantly recurring practice which has developed into a usage that is firmly imbedded in the tradition of both bench and bar. This practice naturally varies with the personnel of the various courts, but during a representative periods from January through June 1933, in the eighth appellate district alone, 77 opinions were written in which unofficial reported decisions were cited as authority in 12 instances.

Conceding the fact that unofficially reported decisions are often used, are they available to the average practitioner? In the sixth district, which includes Toledo, each case is digested and filed by the court reporter and is available for use at the court. Several law firms have private arrangements with the court reporter whereby they receive a copy of every decision handed down by the court and the digest service of the court reporter. A few law offices also receive a copy of all decisions from the court reporter in the eighth district. This necessarily involves great expense, which is of course an obstacle to the majority of practicing attorneys. The result is that opinions are accessible only to those financially able to pay for them.

In the second district, in which Columbus is located, a copy of every decision rendered is filed only by name and available only at the court house.