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ACTS BARRING PROPERTY RIGHTS

W. BRYAN BOLICH*

The subject matter of this article is the North Carolina statute bearing this title which became operative as of October 1, 1961, and is contained in new chapter 31A of the General Statutes. This statute bars or modifies the benefits of certain types of property rights and interests otherwise accruing to one person by virtue of the death of another person against whom he has committed a specified type of wrong. Article 1 deals with marital property rights between husband and wife; article 2 covers parental rights as to the estate of a child; and article 3 is concerned with selected types of property or contract benefits otherwise accruing or resulting from a victim to one who has wilfully and unlawfully killed him. The first two articles in the main merely restate in one place the content of previously existing statutes with a few additions and modifications, some of which were necessitated by the Intestate Succession Act. Article 3 is new and is an attempt to govern by one general statute the succession or accrual of a number of important property rights or interests from a decedent to his slayer as defined by this chapter. This commentary is organized by articles, and by way of introduction to the content of each article there is some discussion of its background of common law and statutory precedent.

ARTICLE 1—HUSBAND AND WIFE

I. General Common Law

The marriage relation occupies a favored position in American society. It is generally felt that society should nurture this relation and protect it.¹ The value of this relationship has been implemented in part by conferring on husband and wife certain property rights or interests such as dower and curtesy and the right to administer on the other spouse's estate, which are dependent on the continuation of the marriage. When the marriage is terminated by an absolute divorce² or declared void *ab initio* by a marriage annulment³ the gen-

* Professor of Law, Duke University.

¹ Cf. cases cited in 55 C.J.S. *Marriage* § 1 n.26 (1948).

² 2 VERNIER, AMERICAN FAMILY LAWS § 96 (1932) [hereinafter cited as VERNIER]; 26 AM. JUR. *Husband and Wife* § 116 n.6 (1940).

³ 26 AM. JUR. *Husband and Wife* § 116 (1940).

eral rule is, in absence of a contrary statute, that the contingent marital property rights perish. Some courts have even held that a foreign divorce not valid under the laws of the state having jurisdiction over the decedent's spouse's estate will bar the spouse who obtained the divorce from his or her contingent marital rights in the estate of the decedent spouse.⁴

The cases are not harmonious, however, as to whether violations of marital obligations by a spouse will result in a forfeiture of the offending spouse's rights or interests in the estate of a decedent spouse in the absence of statute. Some American jurisdictions hold that where a wife leaves her husband and lives in adultery and this act is not condoned, her right to dower is barred.⁵ These jurisdictions have reached this result by holding that the Statute of Westminster II,⁶ which contained a provision barring a wife who elopes, was a part of the common law of the jurisdiction. Other American jurisdictions, however, have refused to follow the Statute of Westminster and do not bar a wife who is living in adultery at her husband's death.⁷ A husband who separates from his wife and commits adultery which is not condoned is generally not barred from his contingent marital property rights in the absence of statute.⁸ Furthermore, neither husband nor wife is barred from his or her intestate share in the deceased spouse's personal property.⁹

Where a spouse wilfully and without just cause abandons the other spouse and is not living with the other spouse at the time of his or her death the courts generally hold, in the absence of statute, that the offending spouse does not forfeit his or her contingent marital property rights.¹⁰ Some courts have held, however, even in the absence of statute, that a deserting spouse loses the right to homestead.¹¹ Where the separation of the spouses has resulted from a bed and board divorce obtained by one spouse, the general common law rule is that the offending spouse does not lose his or her contingent marital property rights.¹²

⁴ See, *e.g.*, *Starbuck v. Starbuck*, 173 N.Y. 503, 66 N.E. 193 (1903); *Monroe County Sav. Bank v. Yeoman*, 119 Misc. 226, 195 N.Y. Supp. 531 (Sup. Ct. 1922).

⁵ ATKINSON, WILLS § 37, at 148 n.5 (1953) [hereinafter cited as ATKINSON].

⁶ 1285, 13 Edw. 1., c. 34.

⁷ ATKINSON § 37, at 150.

⁸ *Id.* at 149.

⁹ *Id.* at 150.

¹⁰ *Id.* at 149.

¹¹ See, *e.g.*, *Dickman v. Birkhauser*, 16 Neb. 686, 21 N.W. 396 (1884); *Newland v. Holland*, 45 Tex. 588 (1876).

¹² 2 VERNIER § 127.

The cases are not in accord as to the effect of a subsequent bigamous marriage on the contingent marital property rights or interests of the offending spouse in the estate of his or her lawful spouse. Some courts have held that the bigamous marriage, if knowingly contracted, results in a forfeiture of the contingent marital property rights of the guilty spouse in the estate of the lawful spouse.¹³ In reaching this result some of the cases have relied on the dubious doctrine that the surviving spouse is estopped to assert his or her right of inheritance or marital property interest.¹⁴ Other courts have refused to bar a surviving spouse who has knowingly contracted a bigamous marriage.¹⁵ If the surviving spouse has innocently contracted a bigamous marriage he or she is generally not barred.¹⁶

In conclusion, it is seen that generally, in the absence of statute, an absolute divorce or a marriage annulment destroys contingent marital property rights or interests. The effect of violations of marital obligations on contingent marital property rights or interests is varied, depending on the jurisdiction and the type of misconduct involved.

II. General Statutory Solutions

State statutes which change the common law rules concerning the effect of an absolute divorce on the marital property rights or interests of spouses in each other's estate, which depend on a continuation of the marriage, are varied and fragmentary. Many statutes provide that the courts shall have broad discretion in disposing of the property held by spouses. In exercising this discretion the courts take into account the guilt or innocence of the spouses and the relative needs of husband, wife and children.¹⁷ Some statutes penalize a guilty wife or husband by preserving either dower or curtesy to the innocent spouse.¹⁸ Generally, however, contingent marital property rights or interests are governed by statutes giving the courts, upon divorce, discretion in disposing of the property of husband and wife.¹⁹

¹³ See, e.g., *Moore v. Robinson*, 139 S.C. 393, 137 S.E. 697 (1927); *Darough v. Davis*, 135 Okla. 263, 275 Pac. 309 (1929), discussed in Note, 43 HARV. L. REV. 140 (1929).

¹⁴ ATKINSON § 37, at 151.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ 2 VERNIER § 96, at 216.

¹⁸ See summary of statutes in *id.* at §§ 97, 99.

¹⁹ *Id.* at 216.

The effect of an invalid foreign divorce on the contingent marital property rights of the spouse who obtained the divorce is generally not covered by statute. One statute, however, which has a provision similar to that of the new North Carolina statute, is found in New York.²⁰

The common law rules relating to the effect of a bed and board divorce on the contingent marital property rights of the offending spouse have been changed by statute in only a small number of jurisdictions. A few statutes penalize the offending spouse. A handful of statutes treat the matter the same as in the case of an absolute divorce. Generally, however, the common law rules are in effect.²¹

Statutes in some twenty-four jurisdictions affect in various ways the contingent marital property rights of a wife who has committed serious violations of marital obligations. Forfeiture of dower and of other contingent marital property rights is imposed for various kinds of misconduct. Adultery and desertion are the most common violations of the marital obligations penalized.²²

A husband who is guilty of serious misconduct is barred from his contingent marital property rights in sixteen jurisdictions in addition to North Carolina. Adultery and desertion, as in the case of the wife, are the types of violations of marital obligations which most frequently bar a guilty husband.²³

III. North Carolina Statutes and Cases

Statutes in existence prior to this act provided that an absolute divorce destroyed the following contingent marital property rights or interests of husband and wife: (1) right to administer on each other's estate; (2) right to a distributive share in the personal property of the decedent spouse; (3) every right and estate in the personal estate of the other; (4) dower; (5) curtesy; and (6) every right and estate in the real or personal estate of the other party, which by settlement before or after marriage was settled upon such party in consideration of the marriage only.²⁴ Number six was probably initially included because prior to the constitution of 1868

²⁰ N.Y. DECEDENT ESTATE LAW § 87(b).

²¹ See summary of statutes in 2 VERNIER §§ 129, 130.

²² See statutes summarized in 3 *id.* at § 202.

²³ *Id.* at § 221.

²⁴ N.C. GEN. STAT. §§ 28-10, 52-19 (1950) [N.C. Pub. Laws 1871-72, ch. 193, § 42, as amended, N.C. Pub. Laws 1889, ch. 499; N.C. Pub. Laws 1871-72, ch. 193, § 42].

marriage settlements were common.²⁵ Since marriage settlements still occur, the provision forfeiting property rights which were acquired in consideration of marriage only is not anachronistic.

These prior statutes were in accord with the general common law rule that an absolute divorce destroys contingent marital property rights. These acts, however, were contrary to statutes found in many states which either preserved some such rights or interest for the innocent spouse or gave the court discretion in disposing of the property of husband and wife. The prior statutes did not mention annulment. And although the court in *Taylor v. White*²⁶ stated that on annulment the property rights of both parties were restored as if there had been no marriage, this statement was dictum and therefore the effect of an annulment on contingent marital property rights prior to this act was not authoritatively determined.

Provision was made, however, in the prior statutes as to the effect of a divorce from bed and board.²⁷ The offending spouse was on application deprived of the six designated property rights previously mentioned. During the separation the innocent party could convey his or her property freely and thus bar the offending spouse.

Where husband or wife separated from the other and lived in adultery which was not condoned, he or she lost the six designated marital property rights.²⁸ The same result followed when a husband or wife abandoned the other and was not living with the other at his or her death.²⁹ It was held in *High v. Bailey*³⁰ that refusing to feed a wife and thereby forcing her to leave was tantamount to

²⁵ 1 MORDECAI, LAW LECTURES 300 (2d ed. 1916).

²⁶ 160 N.C. 38, 41, 75 S.E. 941, 943 (1912) (dictum).

²⁷ N.C. GEN. STAT. §§ 28-12, 52-20 to -21 (1950) [N.C. Pub. Laws 1871-72, ch. 193, § 45; N.C. Pub. Laws 1871-72, ch. 193, § 44, as amended, N.C. Pub. Laws 1893, ch. 153, §§ 1-3; N.C. Pub. Laws 1871-72, ch. 193, § 45, as amended, N.C. Pub. Laws 1893, ch. 153, § 4].

²⁸ N.C. GEN. STAT. §§ 28-11 to -12, 52-20 to -21 (1950) [N.C. Pub. Laws 1871-72, ch. 193, § 44; N.C. Pub. Laws 1871-72, ch. 193, § 45; N.C. Pub. Laws 1871-72, ch. 193, § 44, as amended, N.C. Pub. Laws 1893, ch. 153, § 1-3; N.C. Pub. Laws 1871-72, ch. 193, § 45, as amended, N.C. Pub. Laws 1893, ch. 153, § 4].

²⁹ N.C. GEN. STAT. §§ 28-12, 52-20 to -21 (1950) [N.C. Pub. Laws 1871-72, ch. 193, § 45; N.C. Pub. Laws 1871-72, ch. 193, § 44, as amended, N.C. Pub. Laws 1893, ch. 153, §§ 1-3; N.C. Pub. Laws 1871-72, ch. 193, § 45, as amended, N.C. Pub. Laws 1893, ch. 153, § 4].

³⁰ 107 N.C. 70, 12 S.E. 45 (1890).

abandonment. During a period of abandonment or before an elopement had been condoned, the innocent party was free to convey his or her property and thereby bar the offending spouse.

The prior statutes did not cover the effect of contracting a bigamous marriage on the marital property rights of the guilty spouse, and there seems to be no North Carolina case on point. Of course, if a spouse voluntarily separated from the other spouse and lived in adultery via a bigamous marriage, other provisions would bar the guilty spouse.

Finally, the prior statutes did not determine the effect of an invalid foreign divorce on the marital property rights of the offending spouse. And although it was held in *Arrington v. Arrington*³¹ that a valid foreign divorce would terminate certain marital property rights, there seems to be no case dealing with the effect of a divorce not valid in North Carolina on the marital property rights of the spouse who obtained the divorce.

In conclusion the statutes in effect prior to this act provided for a forfeiture of certain designated marital property rights in the event of divorce or serious violations of marital obligations.

IV. North Carolina Statute, 1961, Provisions Barring Husband and Wife

§31A-1 (a) The following persons shall lose the rights specified in subsection (b) of this section: (1) A spouse from whom or by whom an absolute divorce or marriage annulment has been obtained or from whom a divorce from bed and board has been obtained; or (2) A spouse who voluntarily separates from the other spouse and lives in adultery and such has not been condoned; or (3) A spouse who wilfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of such spouse's death; or (4) A spouse who obtains a divorce the validity of which is not recognized under the laws of this State; or (5) A spouse who knowingly contracts a bigamous marriage.

(b) The rights lost as specified in subsection (a) of this section shall be as follows: (1) All rights of intestate succession in the estate of the other spouse; (2) All right to claim or succeed to a homestead in the real property of the other spouse; (3) All right to dissent from the will of the other spouse and take either the intestate share provided or the life interest in lieu thereof; (4) All right to any year's

³¹ 102 N.C. 491, 9 S.E. 200 (1889).

allowance in the personal property of the other spouse; (5) All right to administer the estate of the other spouse; and (6) Any rights or interests in the property of the other spouse which by a settlement before or after marriage were settled upon the offending spouse solely in consideration of the marriage.

(c) Any act specified in subsection (a) of this section may be pleaded in bar of any action or proceeding for the recovery of such rights, interests or estate as set forth in subsection (b) of this section.

(d) The spouse not at fault may sell and convey his or her real and personal property as if such person were unmarried, and thereby bar the other spouse of all right, title and interest therein in the following instances: (1) During the continuance of a separation arising from a divorce from bed and board as specified in subsection (a) (1) of this section, or (2) During the continuance of a separation arising from adultery as specified in subsection (a) (2) of this section, or during the continuance of a separation arising from an abandonment as specified in subsection (a) (3) of this section, or (3) When a divorce is granted as specified in subsection (a) (4) of this section, or a bigamous marriage contracted as specified in subsection (a) (5) of this section.

This section accomplishes three major purposes. First, it collects in one statute the various statutory provisions which bar a spouse, because of divorce or by virtue of certain misconduct, from participation in the administration or settlement of the other spouse's estate.

A second effect of the statute is its modification of the prior statutory provisions necessitated by the Intestate Succession Act. G.S. § 52-19, for example, provided that an absolute divorce terminated the rights of curtesy and dower in each spouse's estate. This act, however, abolishes curtesy and dower and substitutes different provisions for surviving spouses which this section takes into account in its listing of rights or interests forfeited by divorce or misconduct.

Finally, this section clarifies the effect on designated contingent marital property rights of certain situations not expressly determined under prior statutes or cases. One such question is the effect of a marriage annulment on the designated contingent marital property rights of husband and wife. This section provides that an annulment has the same effect on such property rights as an absolute divorce. Since an annulment terminates a marriage, it follows that marital property rights or interests dependent on a continuation of

the marriage should also be terminated. As stated previously, the general American common law rule is to this effect.

Another moot question was the effect of an unrecognized foreign divorce on the contingent marital property rights of the spouse who obtained the divorce. This section forfeits such rights. This provision is supported by sound policy reasons protecting marriage as an important social institution. This provision says in effect that if a spouse gets so "Reno-vated" he or she shall forfeit the specified rights or interests.

A third contingency not explicitly covered under former law was the effect on the contingent marital property rights or interests of a spouse who knowingly contracted a bigamous marriage. This section provides for their forfeiture in such case. It is true that under the former statutes a spouse who voluntarily separated from the other spouse and committed adultery was barred from certain contingent marital property rights and therefore, in most cases, a spouse who knowingly contracted a bigamous marriage would be barred by that provision. The new statutory provision, therefore, does increase the number of possible acts resulting in forfeiture. More important, however, is its effect in excluding, by implication, such forfeiture from the innocent contracting of a bigamous marriage. A spouse who believes the other spouse to be dead or validly divorced is not morally blameworthy when he or she marries again.

Subsection (c) of this section provides that a spouse may freely convey his or her property and thereby bar the other spouse during the designated periods. These provisions are the same as those under the former statutes with the addition of a provision for bigamous marriage and a provision for divorces not recognized under the laws of North Carolina.

In conclusion, the above section brings together in one statute all legislation which bars husband and wife from contingent marital property rights as a result of divorce or violations of marital obligations, modifies former statutory provisions to conform with the Intestate Succession Act, and makes a few additions to the prior statutes.

ARTICLE 2—PARENT AND CHILD

I. Common Law

The exclusion in English law of parents as heirs of deceased children dates back to the middle of the twelfth century.³² Bracton

³² 2 POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW* 294 (2d ed. 1923).

explained this result by using a metaphor: an inheritance is a heavy body which can only "descend" and therefore cannot fall upwards to ancestors.³³ This of course is no explanation. Powell has suggested that the rule had the practical purpose of removing unnecessary risks of death to offspring.³⁴ Whatever the explanation, the rule disappeared in the United States before 1825.³⁵ Moreover, since the English Statute of Distribution, 1670, parents take personal property as next of kin.³⁶

The question of whether abandonment of a child by a parent will bar the parent from taking under the intestate succession laws of the state has seldom come before the courts. Two courts facing the question, however, have held that when the intestate laws make no exception for abandonment, none will be implied.³⁷ Since inheritance is covered by statutes in all jurisdictions, there is no formulated body of common law covering the question of whether abandonment will bar a parent.³⁸

II. General Statutory Solutions

Despite the fact that it is highly inequitable to allow a parent who has abandoned the care and maintenance of a child to inherit from the deceased child, only a few states have passed statutes barring the parent.³⁹ One statute, similar to the new act's provision barring parents, is found in New York.⁴⁰ Section 87(e) of the New York statute provides in part that:

No distributive share of the estate of a decedent shall be allowed . . . in the estate of a child to a parent who has neglected or refused to provide for such child during infancy or who has abandoned such child during infancy whether or not such child dies during infancy, unless the parental rela-

³³ *Id.* at 286.

³⁴ 4 POWELL, REAL PROPERTY ¶ 632 n.25 (1958) [hereinafter cited as POWELL].

³⁵ *Id.* at ¶ 632.

³⁶ ATKINSON § 17.

³⁷ *In re Green's Estate*, 197 Iowa 1169, 196 N.W. 993 (1924), discussed in Note, 10 VA. L. REV. 650 (1924); *Avery v. Brantley*, 191 N.C. 396, 131 S.E. 721 (1926), discussed in Note, 5 N.C.L. REV. 72 (1926).

³⁸ 4 VERNIER § 239.

³⁹ ATKINSON § 37, at 148. Statutes concerning a parent's right to inherit from a deceased child are summarized in 4 VERNIER § 239.

⁴⁰ N.Y. DECEDENT ESTATE LAW §§ 87(e), 133-4(c).

tionship and duties are subsequently resumed and continue until the death of the child.

One question presented by the above statutory provision is when must a parent resume his obligations? It was held in *Matter of Daniel's Estate*⁴¹ that a parent is given a reasonable time within which to re-establish broken family relations and obligations. It will be seen that the new act makes explicit the time allowed a parent to make amends.

III. North Carolina Statutes and Cases

In *Avery v. Brantley*⁴² it was decided that the intestacy law did not bar a parent who had abandoned his child from participating in the child's estate. In response to this decision the legislature provided that:

If, in the lifetime of its father and mother, a child dies intestate, without leaving husband, wife or child, or the issue of a child, its estate shall be equally divided between the father and mother. . . . Provided, that a parent, or parents, who has wilfully abandoned the care, custody, nurture and maintenance of such child to its kindred, relatives or other person, shall forfeit all and every right to participate in any part of said child's estate under the provisions of this section.⁴³

The above statutory provision corrects an inequitable situation and expresses the policy that North Carolina has since adhered to, although few other states bar a parent who has neglected his or her parental obligations.

IV. The North Carolina Statute, 1961, Barring Parents

§ 31A-2. Any parent who has wilfully abandoned the care and maintenance of his or her child shall lose all right to intestate succession in any part of the child's estate and all right to administer the estate of the child, except (1) Where the abandoning parent resumed its care and maintenance at least one year prior to the death

⁴¹ 193 Misc. 862, 83 N.Y.S.2d 752 (Surr. Ct. 1948).

⁴² 191 N.C. 396, 131 S.E. 721 (1926).

⁴³ N.C. GEN. STAT. § 28-149(6) (1950) [N.C. Pub. Laws, ch. 231 (1927)].

of the child and continued the same until its death; or (2) Where a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child.

By the new Interstate Succession Act, G.S. § 28-149(6) was repealed. The above statutory provision was enacted to revise, broaden and reintroduce G.S. § 28-149(6).

This section reflects substantially the policy considerations of the former law and introduces some modifications. It provides that if the abandoning parent was deprived of custody by court order and the parent substantially complied with the order of the court requiring contribution to the support of the child, such parent may participate in the distribution of the estate. Moreover, if a parent who abandons his child resumes care and maintenance at least one year prior to the death of the child and continues the same until its death, he or she is not barred.

These modifications are worthwhile. It seems desirable to permit a parent deprived of custody of his or her child to participate in the child's estate if the parent has supported the child. Moreover, such a provision should encourage child care. An abandoning parent might also be induced to resume care of his or her child by the one-year provision. It seems desirable to encourage abandoning parents to make amends.

Finally, it should be noted that the new law specifies with reasonable certainty the conditions under which an abandoning parent may regain expectant rights or interests in his or her child's estate.

ARTICLE 3—SLAYER AND DECEDENT

I. General Common Law

When a person has been wilfully and unlawfully killed by his heir, his spouse, his legatee or devisee, his cotenant or insurance beneficiary, it is shocking for the law to permit such a slayer to acquire the decedent's property as a result of his death; and the age-old maxim of our common law that one should not be permitted to profit by his own wrong seems particularly applicable in case of such a heinous crime.⁴⁴ However, in the absence of a statutory

⁴⁴ See Reppy, *The Slayer's Bounty—History of Problem in Anglo-American Law*, 19 N.Y.U.L.Q. REV. 229 (1942).

provision barring such a criminal the majority of courts have ruled that he may not be so deprived of his ill-gotten gain.⁴⁵ These cases reason that statutes of intestate succession and of wills are exclusive and when they do not contain such an exception the courts should not legislate by implying one, while some mention constitutional or statutory provisions forbidding forfeiture for crime.⁴⁶ However, the legal trend, legislative and judicial, is to prevent the slayer from profiting by his own wrong. On the basis of public policy and in the light of common law principles some cases deny any title to the slayer by judicially writing such an exception into the wills and intestacy statutes by way of statutory interpretation.⁴⁷ More recent decisions preserve the property for the decedent's estate through the equitable device of impressing a constructive trust upon the legal title in the hands of the killer, the now generally approved nonstatutory method.⁴⁸ And though their details vary greatly, considerably more than half of the states have enacted statutes on the subject, which bar

⁴⁵ *Bird v. Plunkett*, 139 Conn. 491, 95 A.2d 71 (1953); *Crumley v. Hall*, 202 Ga. 588, 43 S.E.2d 646 (1947), discussed in Note, 26 N.C.L. Rev. 232 (1948); *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); *Wenker v. Landon*, 161 Ore. 265, 88 P.2d 971 (1939); *Wychoff v. Clark*, 77 Pa. D. & C. 249 (C.P. of Luzerne County 1951). See generally Annot., 39 A.L.R.2d 477 (1955).

⁴⁶ No statutory exception: *Wall v. Pfanschmidt*, *supra* note 45; *McAllister v. Fair*, *supra* note 45; *In re Duncan's Estate*, 40 Wash. 2d 850, 246 P.2d 445 (1952). Constitutional provision: *Crumley v. Hall*, *supra* note 45; *Owens v. Owens*, 100 N.C. 240, 6 S.E. 794 (1888). *Contra*, *Weaver v. Hollis*, 247 Ala. 57, 22 So. 2d 525 (1945); *Price v. Hitaffer*, 164 Md. 505, 165 Atl. 470 (1933); *Garwols v. Bankers' Trust Co.*, 251 Mich. 420, 232 N.W. 239 (1930); *Perry v. Strawbridge*, 209 Mo. 621, 108 S.W. 641 (1908).

⁴⁷ *Price v. Hitaffer*, *supra* note 46; *Garwols v. Bankers' Trust Co.*, *supra* note 46; *Perry v. Strawbridge*, *supra* note 46; *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889); *Smith v. Todd*, 155 S.C. 323, 152 S.E. 506 (1930); *Estate of Wilkins*, 192 Wis. 111, 211 N.W. 652 (1927); *Potter, The Acquisition of Property by Homicide*, 38 U. DET. L.J. 360 (1961).

⁴⁸ *Weaver v. Hollis*, 247 Ala. 57, 22 So. 2d 525 (1945); *Colton v. Wade*, 32 Del. Ch. 122, 80 A.2d 923 (Ct. Ch. 1951); *Neiman v. Hurff*, 11 N.J. 55, 93 A.2d 345 (1952); *Garner v. Phillips*, 229 N.C. 160, 47 S.E.2d 845 (1948); *Bryant v. Bryant*, 193 N.C. 372, 137 S.E. 188 (1927), discussed in Note, 5 N.C.L. Rev. 373 (1927); *Parks v. Dumas*, 321 S.W.2d 653 (Tex. Civ. App. 1959); *In re Wilson's Will*, 5 Wis. 2d 178, 92 N.W.2d 282 (1958); *BOGERT, TRUSTS AND TRUSTEES* § 478 (2d ed. 1960) [hereinafter cited as *BOGERT*]; *RESTATEMENT, RESTITUTION* § 187 (1937); 4 *SCOTT, TRUSTS* §§ 492-94 (2d ed. 1956) [hereinafter cited as *SCOTT*]; *Ames, Can a Murderer Acquire Title by His Crime and Keep It?*, 45 AM. L. REG. (n.s.) 225 (1897).

the slayer from acquiring his victim's property which would otherwise pass to him.⁴⁹

In the analogous cases of the life insurance beneficiary who unlawfully kills the insured, and of the co-owner of survivorship property who so slays his co-owner, statutes and insurance law always deprive the insurance beneficiary,⁵⁰ but as to co-owned property similar conflicting common law rules exist as in the wills and inheritance cases, with little statutory intervention.⁵¹

The principle of survivorship by homicide which actually creates or enlarges a property interest in the killer at the expense of his victim seems indefensible. In all of these cases, if the decedent had not been killed he might have outlived the slayer who thereby acquires property which but for the killing he might never have acquired. It seems but right to prevent such unjust enrichment by resolving all doubts against the slayer, under the assumption that the decedent survived, and thereby give the property to those persons who would have taken it if the slayer had predeceased his victim instead of allowing him to assure his own survival of the decedent by the killing which wrongfully deprives the decedent of his right of survivorship and partition in joint tenancy.⁵² And except

⁴⁹ ATKINSON § 37; BOGERT § 478; 4 POWELL ¶ 597; 4 SCOTT §§ 492-94; Bordwell, *Statute Law of Wills* (pt. 3), 14 IOWA L. REV. 283, 304-05 (1928); Rees, *American Wills Statutes: II*, 46 VA. L. REV. 856, 888-89 (1960); Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936); Note, *Disposition of Property Held in Joint Tenancy When One Cotenant Causes the Death of the Other*, 41 MINN. L. REV. 639, 645 (1957).

⁵⁰ Metropolitan Life Ins. Co. v. McDavid, 39 F. Supp. 228 (E.D. Mich. 1941); Protective Life Ins. Co. v. Linson, 245 Ala. 493, 17 So. 2d 761 (1944); Slocum v. Metropolitan Life Ins. Co., 245 Mass. 565, 139 N.E. 816 (1923); Bullock v. Expressmen's Mut. Life Ins. Co., 234 N.C. 254, 67 S.E.2d 71 (1951), discussed in Note, 30 N.C.L. REV. 175 (1952); see Annot., 26 A.L.R.2d 987 (1952); 4 SCOTT § 494.1; VANCE, INSURANCE § 117 (3d ed. 1951).

⁵¹ BOGERT § 478; 4 SCOTT § 493.2; Weiner, *Felonious Homicide and the Right of Survivorship Under Tenancy by the Entireties*, 17 MD. L. REV. 45 (1957); Note, *Acquisition of Property by the Murder of a Cotenant*, 37 IOWA L. REV. 582 (1952); Note, 41 MINN. L. REV. 639 (1957); Annot., 32 A.L.R.2d 1099 (1953).

⁵² Colton v. Wade, 32 Del. Ch. 122, 80 A.2d 923 (Ct. Ch. 1951); Bradley v. Fox, 7 Ill. 2d 106, 129 N.E.2d 699 (1955); Cowan v. Pleasant, 263 S.W.2d 494 (Ky. 1954); Diamond v. Ganci, 328 Mass. 315, 103 N.E.2d 716 (1952); Vesey v. Vesey, 237 Minn. 295, 54 N.W.2d 385 (1952); Grose v. Holland, 357 Mo. 874, 21 S.W.2d 464 (1948); Perry v. Strawbridge, 209 Mo. 621, 108 S.W. 641 (1908); Barnett v. Couey, 224 Mo. App. 913, 27 S.W.2d 757 (1930); Neiman v. Hurff, 11 N.J. 55, 93 A.2d 345 (1952); Van Alstyne v. Tuffy, 109 Misc. 455, 169 N.Y. Supp. 173 (Sup. Ct. 1918); AMES,

for application of the historical concept of co-ownership that by the conveyance to them the whole title vests initially in each co-owner with its consequent fiction that nothing passes by survivorship as a result of the crime, there should be no taint of unconstitutionality on the ground of forfeiture for crime or taking property without due process of law in the cases and statutes which reach this result by denying him the benefits of survivorship because no property is *taken from* the slayer; he is merely *prevented from getting* property by killing someone—a salutary moral principle and crime deterrent.⁵³ Even though no new estate technically passes to the survivor his interest is certainly enlarged since he is now sole owner of the whole property and need no longer share its income or control or right of disposition with his cotenant.

II. General Statutory Solutions

There are statutes in most states, many of which have been enacted expressly to repeal case law favoring wrongdoers, or to fill the gaps in and eliminate the uncertainties from case law in order the better to effectuate the sound public policy that one shall not acquire property through the intentional and unlawful killing of the owner.⁵⁴ These statutes are far from uniform and vary in four principle respects: (1) types of property interests or succession covered; (2) character of the crime; (3) necessity of conviction; (4) disposition of the property involved. As to (1), three states, North Carolina, Pennsylvania, and South Dakota,⁵⁵ have adopted a complete scheme based upon a proposed model act covering most of the possibilities whereby a slayer benefits from his victim's death, including succession by testacy, intestacy, as surviving spouse or life insurance beneficiary, survivorship in co-ownership and bank accounts, acceleration of a future interest, removal of defeasibilities

LECTURES ON LEGAL HISTORY 321 (1913); RESTATEMENT, RESTITUTION § 188, comment *a* (1937); 4 SCOTT § 492.

⁵³ Colton v. Wade, *supra* note 52; Bradley v. Fox, *supra* note 52; Hamblin v. Marchant, 103 Kan. 508, 175 Pac. 678 (1918); Budwit v. Herr, 339 Mich. 265, 63 N.W.2d 841 (1954); Perry v. Strawbridge, *supra* note 52; Barnett v. Covey, *supra* note 52; Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889); cases and text cited notes 123-26 *infra*.

⁵⁴ Authorities cited note 49 *supra*; Note, *Effect Upon a Murderer's Estate of Statutes Precluding Murderer's Inheritance from Victim*, 44 YALE L.J. 164, 166-67 (1934).

⁵⁵ N.C. GEN. STAT. §§ 31A-1 to -15 (Adv. Leg. Serv. Supp. No. 2, 1961); PA. STAT. ANN. tit. 20, §§ 3445-3446 (Supp. 1960); S.D. CODE §§ 56.0501-.0505 (1939).

affecting property interests, and exercise or non-exercise of powers of appointment or of revocation.⁵⁶ The largest number of the other statutes prevent a killer from taking from his victim by testate or intestate succession, as surviving spouse, or as his life insurance beneficiary.⁵⁷ A few of these statutes are wider and also include interests received by deed or otherwise,⁵⁸ but only four statutes expressly include survivorship in joint ownership.⁵⁹

As to (2) a number of the statutes confine the crime to murder, but a majority specify a homicide committed feloniously or wilfully and unlawfully, and most statutes include an accessory or conspirator.⁶⁰ As to (3) sixteen of the statutes require a conviction while ten do not mention conviction, but specify a killing.⁶¹ As to (4) most of the statutes treat testate and intestate property alike by barring the slayer and providing that it shall pass as though he had predeceased the decedent, or that testate property shall be distributed as if the legacy or devise had been revoked; some merely disable the slayer from taking without specifying how it shall pass.⁶²

These statutes are generally construed strictly on the theory that they are penal in nature and have been held to apply only to conveyances made after a statute's effective date.⁶³ Unless the specific property relation, interest or event involved is precisely covered by the language of the statute it does not apply; for example, a statute which prohibits a killer from taking the estate of his victim by testate or intestate succession or otherwise has been held not to prevent a joint tenant who murders his co-tenant from benefitting by survivorship because technically he takes nothing thereby.⁶⁴ This

⁵⁶ Wade, *supra* note 49.

⁵⁷ BOGERT § 478; 4 SCOTT § 492.1; Wade, *supra* note 49, at 888; Note, 41 MINN. L. REV. 639, 646-47 (1957).

⁵⁸ BOGERT § 478.

⁵⁹ KY. REV. STAT. § 381.280 (1959); N.C. GEN. STAT. § 31A-5 to -6 (Adv. Leg. Serv. Supp. No. 2, 1961); PA. STAT. ANN. tit. 20, § 3441 (Supp. 1960); S.D. CODE § 56.0505 (1939); See Note, 41 MINN. L. REV. 639, 646 (1957).

⁶⁰ BOGERT § 478; 4 SCOTT § 493.2; Rees, *supra* note 49, at 888-89; Note, 41 MINN. L. REV. 639, 648-49 (1957).

⁶¹ BOGERT § 478; 4 SCOTT §§ 492.1-4; Rees, *supra* note 49, at 889; Note, 41 MINN. L. REV. 639, 652 (1957).

⁶² BOGERT § 478; Rees, *supra* note 49, at 890.

⁶³ Harrison v. Moncravie, 264 Fed. 776 (8th Cir.), *appeal dismissed*, 255 U.S. 562 (1920); Smith v. Greenburg, 121 Colo. 417, 218 P.2d 514 (1950); *In re Kuhn's Estate*, 135 Iowa 449, 101 N.W. 151 (1904); Wychoff v. Clark, 77 Pa. D. & C. 249 (C.P. of Luzerne County 1951); Beddingfield v. Estill, 118 Tenn. 39, 100 S.W. 108 (1906); Blanks v. Jiggetts, 192 Va. 337, 64 S.E.2d 809 (1951).

⁶⁴ *In re Forter's Estate*, 182 Kan. 315, 320 P.2d 855 (1958); *In re King's*.

literal or strict construction of a statute which bars a person who is "convicted" or "adjudged guilty" of murder permits a murderer to take his victim's property where his suicide prevents prosecution;⁶⁵ and conviction of a lesser or different offense than that specified by the statute will not suffice.⁶⁶ The result is the same where one kills in self-defense,⁶⁷ while insane,⁶⁸ or is acquitted.⁶⁹ But in these cases where the statute is technically inapplicable the killer may still be prevented from benefitting from the property by the utilization of common law concepts such as the constructive trust, if not deemed superseded by the statute.⁷⁰

III. North Carolina Cases and Statutes

North Carolina has the dubious distinction of having produced perhaps the first American case on the precise question whether a murderer could acquire title to the property of his victim by surviving him. This leading case, *Owens v. Owens*,⁷¹ sounded the keynote on the subject when it held that a wife who was convicted of being an accessory before the fact to her husband's murder could not be denied dower because it would involve a forfeiture of property for crime, and that only the legislature could change a statutory right of prop-

Estate, 261 Wis. 266, 52 N.W.2d 885 (1952). See *Blanks v. Jiggetts*, *supra* note 63.

⁶⁵ *Peeples v. Corbett*, 117 Fla. 213, 157 So. 510 (1926); *Shuman v. Schick*, 95 Ohio App. 413, 120 N.E.2d 530 (1953); *Estate of Tarlo*, 315 Pa. 321, 172 Atl. 139 (1934); *Smith v. Todd*, 155 S.C. 323, 152 S.E. 506 (1930). *Contra*, *Parker v. Potter*, 200 N.C. 348, 157 S.E. 68 (1931) (homicide admitted in the answer in a civil action).

⁶⁶ *Metropolitan Life Ins. Co. v. McDavid*, 39 F. Supp. 228 (E.D. Mich. 1941); *Estate of Kirby*, 162 Cal. 191, 121 Pac. 370 (1912); *Bird v. Plunkett*, 139 Conn. 491, 95 A.2d 71 (1953); *In re Sparks Estate*, 172 Misc. 642, 15 N.Y.S.2d 926 (Surr. Ct. 1939); *Metropolitan Life Ins. Co. v. Hill*, 115 W. Va. 515, 177 S.E. 188 (1934); *In re Houghton*, [1915] 2 Ch. 173.

⁶⁷ *Floyd v. Franklin*, 251 Ala. 15, 36 So. 2d 234 (1948); *Colton v. Wade*, 32 Del. Ch. 122, 80 A.2d 923 (Ct. Ch. 1951).

⁶⁸ *Anderson v. Grasberg*, 247 Minn. 538, 78 N.W.2d 450 (1956); *Eisenhardt v. Siegel*, 343 Mo. 22, 119 S.W.2d 810 (1938), discussed in Note, 37 MICH. L. REV. 965 (1939); *In re Eckhardt's Estate*, 184 Misc. 748, 54 N.Y.S.2d 484 (Surr. Ct. 1945); *Sobel v. National Bank & Trust Co.*, 71 Pa. D. & C. 321 (C.P. of Erie County 1950).

⁶⁹ *Harrison v. Moncravie*, 264 Fed. 776 (8th Cir. 1920); *Crouse v. Crouse*, 210 Iowa 508, 229 N.W. 850 (1930); *Legette v. Smith*, 226 S.C. 403, 85 S.E.2d 576 (1955), discussed in Note, 33 N.C.L. REV. 702 (1955).

⁷⁰ *Cowan v. Pleasant*, 263 S.W.2d 494 (Ky. 1954); *Anderson v. Grasberg*, 247 Minn. 538, 78 N.W.2d 450 (1956); *Estate of Tarlo*, 315 Pa. 321, 172 Atl. 139 (1934); *Smith v. Todd*, 155 S.C. 323, 152 S.E. 506 (1930); *Metropolitan Life Ins. Co. v. Hill*, 115 W. Va. 515, 177 S.E. 188 (1934). *Contra*, *Bird v. Plunkett*, 139 Conn. 491, 95 A.2d 71 (1953).

⁷¹ 100 N.C. 240, 6 S.E. 794 (1888).

erty. This shocking decision caused three statutes to be enacted in North Carolina providing that a spouse convicted of the felonious slaying or as an accessory before the fact of such slaying of the other spouse thereby loses all rights in the other's personal estate including distributive share, year's allowance, right of administration, dower or curtesy, and all rights of property settled on the decedent solely by reason of the marriage.⁷² In subsequent cases not within this legislation, convicted murderers were permitted to take legal title, in *Bryant v. Bryant*⁷³ by survivorship as tenant by the entirety with the decedent, and in *Garner v. Phillips*⁷⁴ as heir and distributee of the decedent, but upon constructive trust for the persons who would have been entitled if the murderer had predeceased his victim. This was upon the principle that a wrongdoer shall not be permitted to profit from his crime. Upon similar principles, the beneficiary of a life insurance policy who killed the insured was not permitted to collect the proceeds.⁷⁵

Since the three statutes are largely confined to depriving a guilty spouse of intestate rights in his victim's estate and require conviction of a felonious slaying or of being an accessory before the fact thereto, any other persons, types of wrong or rights of property are not covered. And suicide of the slayer before conviction would allow him to take his victim's property, unless otherwise barred.⁷⁶ Also, these statutes only prevent the slayer from taking and do not specify what shall happen to the property.

The common law judicial decisions involve only murder of the victim by a tenant by the entirety, by an heir, and by an insurance beneficiary. And though these decisions establish the principle that such a wrongdoer may not so profit by his crime, confinement to these particular instances could occur in future cases. Obviously, these North Carolina statutes and common law decisions leave significant gaps and uncertainties in the law which might require many cases and many years to remove; and this the 1961 legislation seeks

⁷² N.C. GEN. STAT. §§ 28-10, 30-14, 52-19 (1950) [N.C. Pub. Laws 1871-72, ch. 193, § 42, as amended, N.C. Pub. Laws 1889, ch. 499; N.C. Pub. Laws 1868-69, ch. 93, § 43; N.C. Pub. Laws 1871-72, ch. 193, § 42].

⁷³ 193 N.C. 372, 137 S.E. 188 (1927).

⁷⁴ 229 N.C. 160, 47 S.E.2d 845 (1948).

⁷⁵ *Bullock v. Expressmen's Mut. Life Ins. Co.*, 234 N.C. 254, 67 S.E.2d 71 (1951); *Parker v. Potter*, 200 N.C. 348, 157 S.E. 68 (1931).

⁷⁶ *Parker v. Potter*, *supra* note 75.

to correct by broadening and settling the law now and making its application more certain.

IV. North Carolina Statute, 1961, Provisions Barring Slayers

Article 3 of this chapter concerns the wilful and unlawful killing of a decedent whose death affects certain property relations, particularly those between slayer and decedent, and seeks to effectuate by comprehensive legislation the broad public policy of preventing unjust enrichment by homicide by denying to the slayer of the decedent the profits of his crime.

The first section of this article, G.S. § 31A-3, defines the terms slayer, decedent and property. The subsequent sections prevent the slayer from acquiring the property of the decedent or otherwise deriving a proprietary benefit through his death in the following ways: by testate or intestate succession as heir, legatee, devisee or surviving spouse (G.S. § 31A-4); by survivorship as tenant by the entirety (G.S. § 31A-5); by survivorship as joint tenant or joint obligee (G.S. § 31A-6); by acceleration of a reversion or vested remainder following a life estate in the decedent or measured by his life (G.S. § 31A-7); by the vesting or increase of interest in a contingent or other future interest on the death of the decedent (G.S. § 31A-8); by the removal of a defeasibility as to any property interest benefitting the slayer by the death of the decedent prior to the slayer's death (G.S. § 31A-9); by the exercise or non-exercise of a power of appointment or revocation by the decedent (G.S. § 31A-10); by the payment to the slayer of the proceeds of an insurance policy or an annuity upon the death of the decedent as insured or beneficiary (G.S. § 31A-11); and the last section protects a bona fide purchaser who has paid to the slayer adequate consideration for property divested by this chapter and impresses a constructive trust upon any funds so received by the slayer for the benefit of the persons entitled (G.S. § 31A-12).

§ 31A-3. As used in this article, unless the context otherwise requires, the term (1) "Slayer" means (a) Any person who by a court of competent jurisdiction shall have been convicted as a principal or accessory before the fact of the wilful and unlawful killing of another person; or (b) Any person who shall have entered a plea of guilty in open court as a principal or accessory before the fact of the wilful and unlawful killing of another person; or (c) Any person who, upon indictment or information as a principal or accessory before the

fact of the wilful and unlawful killing of another person, shall have tendered a plea of *nolo contendere* which was accepted by the court and judgment entered thereon; or (d) Any person who shall have been found in a civil action or proceeding brought within one year after the death of the decedent to have wilfully and unlawfully killed the decedent or procured his killing, and who shall have died or committed suicide before having been tried for the offense and before the settlement of the estate.

"Decedent" is defined in subdivision (2) as the person whose life is taken by the slayer as defined in subdivision (1). "Property" is defined in subdivision (3) as any real or personal property and any right or interest therein.

This, the principle definitorial section of the chapter, adopts the term "slayer" instead of "felon" or "murderer" which occurs in a number of the statutes, and limits the bar of the chapter to a "wilful and unlawful killing." The object of the statute is to prevent profit through wrong, and any degree of wrong from murder down to misdemeanor might have been adopted as the basis of the disqualification.

In selecting this degree of wrong as the one which disables a slayer from profiting by his crime through the acquisition of a proprietary benefit as a result of his victim's death, this section utilizes the criterion adopted by a majority of the statutes and common law decisions on the subject—an intentional criminal homicide.⁷⁷ As an expression of public policy it seems a fair standard which requires the killing to be both unlawful and wilful.⁷⁸ This duality of requirement excludes any killing by a noncriminal act such as mere negligence, a homicide which was justifiable or excusable or one committed while the slayer was insane, and by any non-wilful crime, including involuntary manslaughter.⁷⁹ As used, "wilful" would seem to mean such an act or omission entailing criminal responsi-

⁷⁷ *Metropolitan Life Ins. Co. v. McDavid*, 39 F. Supp. 228 (E.D. Mich. 1941); *Mutual Benefit Health & Acc. Ass'n v. Tilley*, 176 Ark. 525, 3 S.W.2d 320 (1928); *Shreiner v. High Court of I.C.O. of F.*, 35 Ill. App. 576 (1890); *Minasiam v. Aetna Life Ins. Co.*, 295 Mass. 1, 3 N.E.2d 17 (1936). See authorities cited note 60 *supra*.

⁷⁸ See 4 SCOTT § 492.3; cases cited note 77 *supra*.

⁷⁹ *State v. Horner*, 248 N.C. 342, 352, 103 S.E.2d 694, 701 (1958); *State v. Williams*, 214 N.C. 682, 200 S.E.2d 399 (1939). See cases cited notes 66-69 *supra*; *Minasiam v. Aetna Life Ins. Co.*, 295 Mass. 1, 3 N.E.2d 17 (1936); PERKINS, CRIMINAL LAW 28-29 (1957) [hereinafter cited as PERKINS]. But see *Prudential Ins. Co. v. Harrison*, 106 F. Supp. 419 (S.D. Cal. 1952).

bility on the part of the actor. This should include all cases of murder and of manslaughter when the killing was intentional and unlawful.⁸⁰ When the decedent is so killed the niceties of distinction between murder and manslaughter seem out of place in the determination of property rights, however appropriate to questions of life and liberty.

This section bars a "principal or an accessory before the fact" to the crime.⁸¹ This language utilizes the traditional terminology and concepts of the common law of parties to the felony of homicide generally found in case and statute law.⁸² As to the degree of culpability, this section preserves the fundamental difference between accessories before and after the fact by excluding the latter whose only connection with the crime occurs subsequent to its commission and is confined to helping the criminal escape punishment.⁸³ By including all principals it disregards the generally artificial distinction between principals of the first and second degree whose guilt is the same.⁸⁴ By expressing the statute's bar in the technical terms of principals and accessories before the fact, it provides a wide coverage and also supplies well-known legal criteria for decision of cases. It qualifies as accessories before the fact those not legally present at the commission who aided, counseled, procured or commanded the commission of the homicide, and as principals, those who were legally present and actually perpetrated the act or omission causing the death.⁸⁵ Subject to language variations, most other statutes on the

⁸⁰ *Mutual Benefit Health & Acc. Ass'n v. Tilley*, 176 Ark. 525, 3 S.W.2d 320 (1928); *Throop v. Western Indemnity Co.*, 49 Cal. App. 322, 193 Pac. 263 (Dist. Ct. App. 1920); PERKINS 5-6, 687-688. See also *Matter of Sparks*, 172 Misc. 642, 15 N.Y.S.2d 926 (Surr. Ct. 1939), discussed in Note, 40 COLUM. L. REV. 327 (1940); cases cited note 77 *supra*.

⁸¹ See for a similar provision PA. STAT. ANN. tit. 20, § 180.7(5) (1950).

⁸² N.C. GEN. STAT. § 14-5. (1953); *State v. Powell*, 168 N.C. 134, 138, 135 S.E. 310, 313 (1914); *In re Houghton*, [1915] 2 Ch. 173; PERKINS 555-580.

⁸³ Accessory before the fact: N.C. GEN. STAT. § 14-56 (1953); *State v. Mzingo*, 207 N.C. 247, 176 S.E. 582 (1934); *State v. Bryson*, 173 N.C. 803, 92 S.E. 698 (1917); PERKINS 575-78. Accessory after the fact: N.C. GEN. STAT. § 14-59 (1953); *State v. Williams*, 229 N.C. 348, 49 S.E.2d 617 (1948); *State v. Potter*, 221 N.C. 153, 19 S.E.2d 257 (1942); PERKINS 578-580.

⁸⁴ *State v. Holland*, 211 N.C. 284, 189 S.E. 761 (1937); *State v. Whitt*, 113 N.C. 716, 720, 18 S.E. 715, 716 (1893); PERKINS 568-575.

⁸⁵ See cases and text cited notes 83-84 *supra*.

subject are similar in their inclusiveness,⁸⁶ but some do not distinguish between accessories before and after the fact.⁸⁷

In legislation of this kind two important problems depending upon the statutory language are whether a conviction in a criminal proceeding is necessary to bar the slayer and whether such a conviction is conclusive. As heretofore stated, most American statutes which disqualify a slayer from acquiring his victim's property as a result of his death disqualify him only if he is convicted of the crime, but a substantial number do not specifically require a conviction and thereby leave to a civil proceeding involving title to the property the determination whether the slayer was for that purpose guilty of the crime as specified by the statute.⁸⁸

Section 31A-3 specifies four alternative methods of establishing the fact that one is a "slayer" within its terms: (a) is convicted; (b) pleads guilty; (c) is sentenced under a plea of *nolo contendere* in a criminal proceeding; (d) in case of death before being tried criminally, guilt may be established in a specified civil action. These alternatives provide both a desirable elasticity and explicitness of inclusion. The first three thereof specify the pleas of criminal procedure upon which a judgment or guilt may be based,⁸⁹ and in effect this section requires a conviction or its equivalent. (a) Conviction is by necessary implication premised upon a trial after a plea of not guilty which results in a finding of the defendant's guilt with judgment and sentence based thereon.⁹⁰ (b) A plea of guilty is a confession in open court and waiver of trial by the defendant. The equivalent of a conviction, it is surrounded by due process safeguards including the court's duty to see that the defendant understands its consequences, the requirement in felony cases that he personally make the plea, and a liberal privilege of withdrawal of the plea.⁹¹ The importance of its express inclusion by this section is apparent

⁸⁶ Rees, *supra* note 49, at 889; authorities cited note 60 *supra*.

⁸⁷ ALASKA COMP. LAWS ANN. § 60-1-15 (1948); COLO. REV. STAT. ANN. § 152-2-13 (1954); CONN. GEN. STAT. REV. § 45-279 (1958); OHIO REV. CODE ANN. § 2105.19 (1954).

⁸⁸ 4 SCOTT § 492.4; Rees, *supra* note 49, at 888, 889.

⁸⁹ ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 290-292 (1947).

⁹⁰ State v. Cunningham, 94 N.C. 824 (1886). See N.C. GEN. STAT. § 15-162 (1953); 2 JEROME, CRIMINAL CODE & DIGEST OF NORTH CAROLINA § 2249 (7th ed. 1958); ORFIELD, *op. cit. supra* note 89.

⁹¹ State v. Branner, 149 N.C. 559, 63 S.E. 169 (1908); ORFIELD, *op. cit. supra* note 89, at 293-303; Annot., 6 A.L.R. 696 (1920).

when it is remembered that about eighty-five per cent of all convictions of serious crimes are on a plea of guilty which usually results from acceptance by the prosecution of such plea to a lesser offense than that originally charged.⁹² A 1953 North Carolina statute⁹³ expressly sanctions this procedure as to capital cases, including murder in the first degree, by permitting the court to accept such plea when in writing signed by the defendant and his counsel, with the effect of a verdict of guilty and recommendation of life imprisonment. Prior to this statute the plea was not allowed as to murder in the first degree.⁹⁴ (c) The plea of *nolo contendere* is a matter of grace requiring the court's consent, and although not an explicit admission of guilt, it is treated as a plea of guilty for purposes of the particular case.⁹⁵ Thus its inclusion here. (d) The final alternative which permits the status of "slayer" to be established in a specified civil action is applicable only when the alleged "slayer" dies or commits suicide before he is tried criminally. It plugs a loophole that might otherwise exist under such a statute which by its terms bars only a person who is tried in a criminal proceeding and is convicted or adjudged guilty of the specified crime, an impossibility as to a decedent,⁹⁶ unless such requirement is judicially dispensed with as by admission of the crime in the pleadings of a civil action concerning title to the property affected.⁹⁷

Establishment of disqualifying guilt in a civil proceeding is no anomaly because under statutes not requiring a conviction to bar the killer a civil action trying title to the property involved determines for its purposes whether or not he was guilty of the crime,⁹⁸ but this does permit guilt of the crime to be proved in such case by the

⁹² HALL, THEFT, LAW AND SOCIETY 113-15 (1935).

⁹³ N.C. GEN. STAT. § 15-162.1 (Supp. 1959), discussed in 31 N.C.L. REV. 407 (1952).

⁹⁴ State v. Simmons, 236 N.C. 340, 72 S.E.2d 743 (1952).

⁹⁵ State v. Barbour, 243 N.C. 265, 90 S.E.2d 388 (1955); State v. Burnett, 174 N.C. 796, 93 S.E. 473 (1917); 2 JEROME, *op. cit. supra* note 90, at § 2103.5; ORFIELD, *op. cit. supra* note 89, at 292.

⁹⁶ Peeples v. Corbett, 117 Fla. 213, 147 So. 510 (1934); Bruns v. Cope, 182 Ind. 289, 105 N.E. 471 (1914); Hogg v. Whithan, 120 Kan. 341, 242 Pac. 1021 (1926); Shuman v. Schick, 95 Ohio App. 413, 120 N.E.2d 530 (1953); Estate of Tarlo, 315 Pa. 321, 172 Atl. 139 (1934); Smith v. Todd, 155 S.C. 323, 152 S.E. 506 (1930).

⁹⁷ Parker v. Potter, 200 N.C. 348, 157 S.E. 68 (1930).

⁹⁸ Harrison v. Moncravie, 264 Fed. 776 (8th Cir. 1920); Sovereign Camp W.O.W. v. Gunn, 227 Ala. 400, 150 So. 491 (1933); *In re* Estate of Johnston, 220 Iowa 328, 261 N.W. 908 (1935); Metropolitan Life Ins. Co. v. Hill, 115 W. Va. 515, 177 S.E. 188 (1934), discussed in Note, 41 W. VA. L.Q. 287 (1935); BOGERT § 478; 4 SCOTT § 492.4.

weight of the evidence rather than beyond a reasonable doubt as required in a criminal proceeding.⁹⁹ However, when only property rights between persons are at stake this distinction appears desirable. And to whatever extent the act's conviction requirement is tantamount to compelling proof beyond a reasonable doubt in a civil action as to the property involved it may be unnecessarily strict.

The statutory requisites of the alternative civil action or proceeding are that it shall be brought within a year of decedent's death, must establish that the alleged slayer wilfully and unlawfully killed the decedent or procured his killing, and that he died or committed suicide both before trial for the offense and settlement of the decedent's estate. The precise nature of this action is not disclosed by the statute. Civil actions readily suggesting themselves are the above mentioned types of action affecting title to the property involved, or a wrongful death action in behalf of the decedent's estate brought by his personal representative.¹⁰⁰ That the action be "brought within one year after the death of the decedent," and the requirement that the suicide or other death of the alleged slayer occur before "settlement of the estate" point to a wrongful death action: because one year was the applicable statute of limitations as to such actions until changed in 1951 to two years;¹⁰¹ and since only the personal representative can bring this action this could not normally occur after his discharge upon settlement of the decedent's estate.¹⁰²

As to actions involving title to property covered by this act, unless it be an asset of the decedent's estate, the date when his estate was closed would seem immaterial, and in all such cases the current one-year statute of limitations would seem irrelevant.¹⁰³ Since both the wrongful death action and the action involving title to the affected property seem equally appropriate for establishment of the status of "slayer" under this fourth alternative, these statutory requirements may be unduly restrictive and sometimes arbitrary.

⁹⁹ *Peeples v. Corbett*, 117 Fla. 213, 157 So. 510 (1934); *McCORMICK, EVIDENCE* §§ 318, 321 (1954); *In re Pollock*, [1941] Ch. 219; and see N.C. GEN. STAT. §§ 31A-13 to -15 (Adv. Leg. Serv. Supp. No. 2, 1961). For additional discussion of aspects of this problem, see ARTICLE 4, *infra*.

¹⁰⁰ N.C. GEN. STAT. § 28-173 (Supp. 1959); Note, 25 N.C.L. REV. 84 (1946). And the slayer should be ineligible to receive any of the award. *Pearson v. National Manufacture & Stores Corp.*, 219 N.C. 717, 14 S.E.2d 811 (1941).

¹⁰¹ N.C. GEN. STAT. § 1-53 (1955).

¹⁰² *McCoy v. Atlantic Coast Line R.R.*, 229 N.C. 57, 47 S.E.2d 532 (1948).

¹⁰³ N.C. GEN. STAT. § 1-54 (1953).

Subdivisions (2) and (3) seem to require but limited comment. Subdivision (2) defines the term "decedent" in terms of subdivision (1), and seems to be self-explanatory. Subdivision (3) gives the term "property" a broad meaning because, as heretofore pointed out, similar statutes have been strictly construed, and unless the specific interest or property relation is clearly within the terms of the statute the slayer may not be disqualified by the statute from its receipt or retention.¹⁰⁴

§ 31A-4. The slayer shall be deemed to have died immediately prior to the death of the decedent and the following rules shall apply: (1) The slayer shall not acquire any property or receive any benefit from the estate of the decedent by testate or intestate succession or by common law or statutory right as surviving spouse of the decedent.

(2) Where the decedent dies intestate as to property which would have passed to the slayer by intestate succession, such property shall pass to others next in succession in accordance with the applicable provision of the Intestate Succession Act.

(3) Where the decedent dies testate as to property which would have passed to the slayer pursuant to the will, such property shall pass as if the decedent had died intestate with respect thereto, unless otherwise disposed of by the will.

This section prevents a slayer from acquiring any property or receiving any benefits from the decedent's estate as his heir, his legatee or devisee, and by common law or statutory right as his surviving spouse, by its provision that a slayer shall be deemed "to have died immediately prior to" his victim. Rights as surviving spouse simply do not accrue and subsections (2) and (3) specify what happens to property which would otherwise pass from the decedent to the slayer by testate or intestate succession. Intestate property goes to the other heirs of the decedent next in succession. Testate property passes to the decedent's heirs other than the slayer unless otherwise disposed of by the will—for example, to an alternative beneficiary or by way of residuary disposition to others than the slayer. These provisions exclude the slayer and should prevent possible application of an anti-lapse statute giving the decedent's property to a person not his heir—for example, to issue of decedent's slayer-spouse by a prior marriage.¹⁰⁵

¹⁰⁴ See cases cited note 64 *supra*.

¹⁰⁵ N.C. GEN. STAT. § 31-42 to -42.2 (Supp. 1959); and see Wade, *Ac-*

The other American statutes almost uniformly preclude a slayer from acquiring the victim's property by testacy or intestacy; some include marital property, rights, and several list cotenancy with survivorship.¹⁰⁶ Its disposition varies. Most of them treat testate and intestate property alike by giving it to the other heirs as if the slayer had predeceased the decedent; some treat legacies and devises to the slayer as revoked; while others merely prevent the slayer from taking the property without providing what shall happen to it.¹⁰⁷

Common law dower and curtesy were abolished as to persons dying on or after July 1, 1960, by the Intestate Succession Act.¹⁰⁸ In their stead this act makes husband and wife preferred heirs of each other and gives the surviving spouse a forced absolute share in the decedent's estate,¹⁰⁹ or an optional life estate in one-third of the real property of which decedent was seised in fee simple during the coverture,¹¹⁰ both of which are protected by the survivor's right to dissent from decedent's will if he has not received at least the amount of his intestate share.¹¹¹ Other such property rights of the surviving spouse include homestead and year's allowance.^{111a} Except for these rights of the surviving spouse, no testate or intestate successor as such has more than a mere expectancy as to the decedent's property and estate,¹¹² and the establishment of law as to such successions is a legislative prerogative.^{112a}

Fundamental to this area of law which seeks to prevent a killer from profiting by his crime is the distinction between taking a slayer's property because of his crime, and preventing him from so acquiring property. Whereas a slayer may not be deprived of his property because of his crime, he may be constitutionally prevented by statute from acquiring property thereby. Thus, this statute, which prevents unjust enrichment by providing that a slayer shall not thereby inherit from his victim or take by his will, takes nothing

quisition of Property by Wilfully Killing Another—A Statutory Solution, 49 HARV. L. REV. 715 (1936).

¹⁰⁶ See authorities cited notes 56-59 *supra*.

¹⁰⁷ Rees, *American Will Statutes: II*, 46 VA. L. REV. 856 (1960); Wade, *supra* note 105.

¹⁰⁸ N.C. GEN. STAT. § 29-4 (Supp. 1959). See generally Bolich, *Election, Dissent and Renunciation*, 39 N.C.L. REV. 17 (1960).

¹⁰⁹ N.C. GEN. STAT. § 29-41 (Supp. 1959).

¹¹⁰ N.C. GEN. STAT. § 29-30 (Supp. 1959).

¹¹¹ N.C. GEN. STAT. § 30-1 to -3 (Supp. 1959).

^{111a} N.C. GEN. STAT. § 30-15 (Adv. Leg. Serv. Supp. No. 5, 1961).

¹¹² 3 RESTATEMENT, PROPERTY § 316 (1940).

^{112a} See Pullen v. Commissioners, 66 N.C. 361 (1872).

already owned but constitutionally prevents a wrongful acquisition.¹¹³ Its provision that such property when not otherwise willed by the decedent, shall pass to his other heirs next in succession prevents "corruption of the blood" because the slayer's issue will generally take in their own right by representation of their "deceased" parent the share he would have taken.¹¹⁴ And by specifying that he is deemed to have died immediately prior to the decedent it fixes a date of "death."¹¹⁵

As to the slayer's property rights as surviving spouse, since the forced share is a fraction of the decedent's probate estate, there is no inter vivos interest in the other's property to be taken, but the elective life estate is an inter vivos interest, analogous to common law inchoate dower.¹¹⁶ It might be contended that the act's preventing this right from becoming consummate by survival as the result of the slayer's killing his spouse is unconstitutional legislation. However, since such a nonvested marital property right and its statutory substitute, the forced absolute share of decedent's estate, may by the great weight of authority be statutorily abridged or abolished prior to the death of the other spouse,¹¹⁷ this statutory prevention of the profits of survivorship through crime seems valid.¹¹⁸ And the same would seem true as to homestead^{118a} and year's allowance.

Sections 31A-5 and 31A-6 are concerned with the same basic question of providing a solution for the problem which occurs when

¹¹³ *Hamblin v. Marchant*, 103 Kan. 508, 175 Pac. 678 (1918); *Henry v. Toney*, 217 Miss. 716, 64 So. 2d 904 (1953); *Legette v. Smith*, 226 S.C. 403, 85 S.E.2d 576 (1955); RESTATEMENT, RESTITUTION §187, comment c (1937); Annot., 6 A.L.R. 1408 (1920); cases and text cited note 53 *supra*.

¹¹⁴ N.C. GEN. STAT. §29-15(1)-(2) (Supp. 1959); *Wilson v. Bates*, 313 Ky. 592, 231 S.W.2d 39 (1950).

¹¹⁵ See *Re Peacock*, [1957] 2 S.A. Eng. R. 98.

¹¹⁶ *Bolich*, *supra* note 108, at 26, 34-36.

¹¹⁷ *Randall v. Kreiger*, 90 U.S. (23 Wall.) 137 (1874); *Griswold v. McGee*, 102 Minn. 114, 112 N.W. 1020 (1907); *Walker v. Long*, 109 N.C. 510, 14 S.E. 299 (1891); *Alexander v. Alexander*, 85 Va. 353, 7 S.E. 335 (1888); Annot., 20 A.L.R. 1330 (1922). *Contra*, *O'Kelly v. Williams*, 84 N.C. 281 (1881). See generally SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 285 (1953).

¹¹⁸ *Weaver v. Hollis*, 247 Ala. 57, 22 So. 2d 525 (1945); *In re Spark's Estate*, 172 Misc. 642, 15 N.Y.S.2d 926 (Surr. Ct. 1939); *Pinder's Estate*, 61 Pa. D. & C. 193 (Orphan's Ct. 1947) (*semble*); 4 Scott §492.2. *Contra*, *Crumley v. Hall*, 202 Ga. 588, 43 S.E.2d 646 (1957), discussed in Note, 26 N.C.L. REV. 232 (1948).

^{118a} *Bushnell v. Loomis*, 234 Mo. 371, 137 S.W. 257 (1911); SCURLOCK, *op. cit. supra* note 117.

one concurrent owner of property subject to the incident of survivorship wrongfully kills another and thereby assures his own survival and the benefits of the incident of survivorship with its resulting unjust enrichment at the expense of his victim. Common law joint tenancy, tenancy by the entireties and other property and contract concurrent interests with a common law or conventional right of survivorship, including joint bank accounts, will therefore be treated together.

§ 31A-5. Where the slayer and decedent hold property as tenants by the entirety: (1) If the wife is the slayer, one-half of the property shall pass upon the death of the husband to his estate, and the other one-half shall be held by the wife during her life, subject to pass upon her death to the estate of the husband; and (2) If the husband is the slayer, he shall hold all of the property during his life subject to pass upon his death to the estate of the wife.

This section covers cases in which the slayer is tenant by the entireties with the decedent, and provides different solutions depending upon whether husband or wife is the slayer.

By subsection (1), if the wife is the slayer, one-half passes forthwith to the decedent's estate and the other half is held by the slayer for her life and passes at her death to the decedent's estate, *i.e.*, the whole property goes to the decedent's estate subject to a life estate in the slayer in one-half thereof. By subsection (2) if the husband is the slayer, he holds all of the property for his life subject to pass at his death to the decedent's estate, *i.e.*, the whole property goes to the decedent's estate subject to a life estate in the slayer.

At first one might think that such discrimination against the slayer-wife is an unconstitutional denial of equal protection of the laws. To the contrary, it is deemed necessary in order to prevent the slayer-husband from perhaps having his vested property right unconstitutionally forfeited for crime or taken from him without due process of law, because North Carolina still clings to the anachronistic common law rule that where husband and wife are tenants by the entireties "the husband has the control and use of the property, and is entitled to the possession, income, and usufruct thereof during their joint lives."¹¹⁹

¹¹⁹ *Bryant v. Bryant*, 193 N.C. 372, 378, 137 S.E. 188, 191 (1927); *Diamond v. Ganci*, 328 Mass. 315, 103 N.E.2d 716 (1952); 4 POWELL ¶¶ 623-24.

One of the two other states observing this rule has indulged no such qualms of constitutionality for the protection of the slayer-husband's usufruct.¹²⁰ Thus, by the act the slayer-husband keeps the whole income or property for his life after which the whole corpus passes to the decedent's estate, while the slayer-wife is given half the income or property for her life after which the whole corpus passes to the decedent's estate.

At common law the conveyance of a freehold to two persons was deemed to create a joint tenancy, unless it was to husband and wife, when it created a tenancy by the entirety. They took as one fictitious entity having one and the same interest and held by one and the same undivided possession. Thus by orthodox common law property theory each cotenant in joint tenancy and tenancy by the entirety owns the whole estate, is seised *per tout*, and holds subject to a mutual right of survivorship whereby when one tenant dies his interest ceases and leaves complete ownership in the survivor.¹²¹ In ordinary joint tenancy each has equal rights of possession and enjoyment during their joint lives and the right to sever the joint cotenancy and destroy the mutual right of survivorship by partition or conveying his interest, but in tenancy by the entirety this right of severance by conveyance or partition does not exist, and husband and wife have equal rights of possession and enjoyment in most of the twenty-one states still recognizing tenancy by the entirety.¹²²

In case one joint tenant or tenant by the entirety unlawfully kills the other and thereby severs the cotenancy, strict construction of general slayer statutes and paucity of express statutory coverage has caused the courts to evolve at least four principal solutions: (a) slayer gets absolute title to the whole property by survivorship through the medieval common law theory that he has gained nothing by his crime because he already owned the whole estate of which he cannot be legally deprived for crime;¹²³ (b) slayer gets nothing and

¹²⁰ *Dombrowski v. Gorecki*, 291 Mich. 678, 289 N.W. 293 (1939).

¹²¹ 1 AMERICAN LAW OF PROPERTY §§ 6.1-2, 6.6 (Casner ed. 1952); TIFFANY, REAL PROPERTY §§ 418, 430 (3d ed. 1939).

¹²² 4 POWELL ¶¶ 617-18, 623-24.

¹²³ *Welsh v. James*, 408 Ill. 18, 95 N.E.2d 872 (1950) (joint tenancy). Doctrine modified: *Bradley v. Fox*, 7 Ill. 2d 106, 129 N.E.2d 699 (1955); *Oleff v. Hodapp*, 129 Ohio St. 432, 195 N.E. 838 (1935) (joint bank account); *Wenker v. Landon*, 161 Ore. 265, 88 P.2d 971 (1939) (tenancy by the entirety); *Hamner v. Kinnan*, 16 Pa. D. & C. 395 (C.P. of Indiana County 1931) (tenancy by the entirety); see Note, 29 CHI.-KENT L. REV. 260 (1951), for this view.

absolute title to the whole property belongs to the victim's estate because the right of survivorship is subject to the rule that one shall not profit by his own wrong; in other words the killer is not allowed to destroy his victim's right of survivorship and profit by his crime by making himself the survivor and sole absolute owner of the whole property in defiance of the equitable principle against unjust enrichment by crime;¹²⁴ (c) slayer takes legal title to the whole property subject to a constructive trust as to all or a part of the property for the victim's estate depending upon the respective life expectancies of the parties in some jurisdictions.¹²⁵

Based upon arguments from both theories (a) and (b), solution (c) is technically unobjectionable because the slayer holds the legal title while decedent's estate has beneficial enjoyment of the property. In reality, however, the slayer's vested property right in his share of its income is thereby taken from him in some jurisdictions.

A fourth theory (d) is the relatively recent tenancy in common theory by which decedent's wrongful death severs the joint tenancy or tenancy by the entireties and converts it into a tenancy in common with the slayer owning one-half beneficially and the decedent's estate the other half. This theory divides the property evenly, and does not make the innocent heirs of the slayer pay for their ancestor's crime; it is therefore approved by some writers.¹²⁶

Theory (a), by giving the slayer his bounty on the basis of the fiction that he gains nothing by survivorship, puts a premium on technicality and rewards crime; theory (b) is too harsh on the slayer and may unconstitutionally take a vested property right from him; theory (c) does obeisance to property orthodoxy but also produces

¹²⁴ *Van Alstyne v. Tuffy*, 103 Misc. 455, 169 N.Y. Supp. 173 (Sup. Ct. 1918) (tenancy by the entireties); *Bierbrauer v. Moran*, 244 App. Div. 87, 279 N.Y. Supp. 176 (1935) (joint bank account); *In re King's Estate*, 261 Wis. 266, 52 N.W.2d 885 (1952) (joint tenancy).

¹²⁵ *Colton v. Wade*, 32 Del. Ch. 122, 80 A.2d 923 (Ct. Ch. 1951) (tenancy by entireties, all, expectancies immaterial); *Vesey v. Vesey*, 237 Minn. 295, 54 N.W.2d 385 (1952) (joint bank account, all, expectancies immaterial); *Bryant v. Bryant*, 193 N.C. 372, 137 S.E. 188 (1927) (tenancy by entireties, all, victim younger); *Sherman v. Weber*, 113 N.J. Eq. 451, 167 Atl. 517 (Ct. Ch. 1933) (tenancy by entireties, part, victim older).

¹²⁶ *Ashwood v. Patterson*, 49 So. 2d 848 (Fla. 1951) (tenancy by the entireties); *Cowan v. Pleasant*, 263 S.W.2d 494 (Ky. 1954) (tenancy by the entireties); *Goldsmith v. Pearce*, 345 Mich. 146, 75 N.W.2d 810 (1956) (tenancy by the entireties); *Grose v. Holland*, 357 Mo. 874, 211 S.W.2d 464 (1948) (tenancy by the entireties); *Barnett v. Couey*, 224 Mo. App. 913, 27 S.W.2d 757 (1930); see also text note 8 *supra* as to all four theories.

a result akin to theory (b) except when the slayer is allowed a life income as to part of the property; and (d) is basically partition by homicide and except for the veil of tenancy in common achieves practically the same result as if a joint tenant had forced a partition or a tenant by the entirety had secured a divorce, and seems to reward the slayer too much by leaving him the owner of half of the property in order to protect his innocent heirs against forfeiture of their expectancy. However, in connection with this solicitude for the slayer's heirs, it should be remembered that in all of the entirety cases slayer and decedent are husband and wife and where their only issue is of their marriage, the heirs of both parties are normally the same.¹²⁷ Moreover, in almost all of the killings affecting property rights under this chapter if the homicide does not involve husband-wife it is probably intra-family so that the heirs of both parties are likely to be the same persons. Also, unless the slayer has already died intestate there is no certainty that his innocent heirs will get the benefit of the property. On the contrary, the chances of their getting it through the decedent may be greater.

However and whenever one of two cotenants dies the joint tenancy or tenancy by the entirety technically ends, and the legislative task is to work out a fair disposition of the property in the light of public policy, property concepts and constitutional mandates. While the remedy provided by this section does not adopt in its entirety any single one of the above mentioned judicial solutions it establishes a fair and definite rule which respects property concepts as constitutionally required by protection of the slayer's vested rights. It effectuates public policy by preserving the whole property for the innocent victim's estate by preventing the slayer's unjust enrichment. This is accomplished as to the incident of survivorship by deeming him to have predeceased the decedent as in the analogous cases of testate and intestate succession.¹²⁸ In so doing it disregards the statistical life expectancies of slayer and decedent and assumes

¹²⁷ See *Cowan v. Pleasant*, 263 S.W.2d 494 (Ky. 1954), where each had issue by a prior marriage.

¹²⁸ See the cases and authorities notes 9 and 10 *supra*. See also *Wyckoff v. Clark*, 77 Pa. D. & C. 249 (C.P. of Luzerne County 1951). For endorsements of this solution, see Ames, *Can a Murderer Acquire Title by His Crime and Keep It?*, 36 AM. L. REG. (n.s.) 225, 310, 320-21 (1897), and *A Striking Omission in the New York Statute of Devolution*, 2 FIDUCIARY L. CHR. 15, 16 (1931).

that the latter would have survived. This seems justified because it prevents an unjust gain and the slayer has wrongfully prevented the natural determination of survivorship by killing the decedent.¹²⁹ A possible objection to the rule of this section is the fact that when the slayer dies the whole property goes to the decedent's estate instead of one share passing to the slayer or to his estate, and thereby frustrates the expectancy of his innocent heirs. As previously pointed out, since it seems more desirable that the whole property belong to the decedent's estate, the validity of this objection is questionable.

§ 31A-6. (a) Where the slayer and the decedent hold property with right of survivorship as joint tenants, joint owners, joint obligees or otherwise, the decedent's share thereof shall pass immediately upon the death of the decedent to his estate, and the slayer's share shall be held by the slayer during his lifetime and at his death shall pass to the estate of the decedent. During his lifetime, the slayer shall have the right to the income from his share of the property subject to the rights of creditors of the slayer.

(b) Where three or more persons, including the slayer and the decedent, hold property with right of survivorship as joint tenants, joint owners, joint obligees or otherwise, the portion of the decedent's share which would have accrued to the slayer as a result of the death of the decedent shall pass to the estate of the decedent. If the slayer becomes the final survivor, one-half of the property then held by the slayer shall pass immediately to the estate of the decedent, and upon the death of the slayer the remaining interest of the slayer shall pass to the estate of the decedent. During his lifetime the slayer shall have the right to the income from his share of the property subject to the rights of creditors of the slayer.

Whereas the prior section is confined to the problem of survivorship in tenancy by the entireties when one spouse is slayer and the other is decedent, this section covers the other cases involving two or more co-owners of property or co-obligees of contract subject to a common law or conventional incident of survivorship, including such joint bank accounts.

In these cases each person is a joint tenant or other co-owner

¹²⁹ See *Colton v. Wade*, 32 Del. Ch. 122, 80 A.2d 923 (Ct. Ch. 1951); *Neiman v. Hurff*, 11 N.J. 55, 93 A.2d 345 (1952); *Bryant v. Bryant*, 193 N.C. 372, 137 S.E. 188 (1927); *RESTATEMENT, RESTITUTION* § 187, comment *b* (1937).

with the right to convey his interest and compel partition;¹³⁰ is a co-obligee of a joint bank account with a total or partial right of withdrawal;¹³¹ or is an obligee or payee of an instrument such as a bond or note which may be payable to either or both of its obligees or payees,¹³² coupled in each case with the possibility of absolute ownership of the whole by survivorship. As indicated by the references, courts in other states have solved the killer-survivor problem in these situations in a variety of ways, but to date no North Carolina decision seems to exist.

The common law incident of survivorship in ordinary joint tenancy has been abolished in this state as to estates in fee simple,¹³³ but it seems that a conventional right of survivorship may be created by contract as to some joint tenancies, bank accounts and other types of concurrent property and contract interests.¹³⁴ And since tenancy by the entireties is inapplicable to personal property in this state, a transfer of such property to husband and wife which would otherwise constitute a tenancy by the entireties creates a joint tenancy.¹³⁵

The solution of this section is the same in principle as that of the prior section, *i.e.*, where a slayer's interest in property would, in fact, be enlarged by his survivorship of the decedent he is not permitted so to enrich himself by homicide at the expense of his victim. This is accomplished by deeming the slayer to have predeceased the

¹³⁰ *In re King's Estate*, 261 Wis. 266, 52 N.W.2d 885 (1952); *Neiman v. Hurff*, *supra* note 129.

¹³¹ *Vesey v. Vesey*, 237 Minn. 295, 54 N.W.2d 385 (1952); *Bierbrauer v. Moran*, 244 App. Div. 87, 279 N.Y. Supp. 176 (1935); *Wade*, *supra* note 105, at 733-34; see *Oleff v. Hodapp*, 129 Ohio St. 432, 195 N.E. 838 (1935).

¹³² See *Ervin v. Conn*, 225 N.C. 267, 34 S.E.2d 402 (1945); *Note*, 95 U. PA. L. REV. 799 (1947).

¹³³ N.C. GEN. STAT. § 44-2 (1950); *Burton v. Cahill*, 192 N.C. 505, 135 S.E. 332 (1926).

¹³⁴ N.C. GEN. STAT. § 41-2.1 (Supp. 1959) (husband and wife joint account); *Bowling v. Bowling*, 243 N.C. 515, 91 S.E.2d 176 (1956) (joint savings accounts); *Ervin v. Conn*, 225 N.C. 267, 34 S.E.2d 402 (1945) (U.S. saving bonds); *Jones v. Waldroup*, 217 N.C. 178, 7 S.E.2d 366 (1940) (savings and loan certificate); *Taylor v. Smith*, 116 N.C. 531, 21 S.E. 202 (1895) (promissory note); *McCall*, *Some Problems in Administration of Estates*, 35 N.C.L. REV. 341-42, 354 (1957). See *Buffaloe v. Barnes*, 226 N.C. 313, 38 S.E.2d 222 (1946) (stock certificate); *Note*, 25 N.C.L. REV. 90 (1946).

¹³⁵ *Turlington v. Lucas*, 186 N.C. 283, 119 S.E. 366 (1923); *Note*, 6 N.C.L. REV. 342 (1928). As to partition, see N.C. GEN. STAT. § 46-42 (1950).

decedent for purposes of survivorship and partition. Thus, subsection (a) provides that where two persons hold a property or contract interest with right of survivorship and one kills the other the decedent's share of the property belongs absolutely to his estate and the slayer retains a life estate in his share of the property which at his death belongs absolutely to the decedent's estate.¹³⁶ By killing the decedent the slayer assures himself of survival, prevents a natural determination of who would have survived, and criminally deprives the decedent of both his life and his chance of surviving and thereby owning the whole property absolutely.

In case of a conventional right of survivorship, survival by homicide could never have been within the contemplation of the grantor or grantees to the creation of such a cotenancy. Certainly, a provision for survivorship if one co-owner wilfully and unlawfully killed the other would be violative of public policy and void. During the joint lives of the slayer and the decedent each has a mutual right to partition or to convey his interest. A partition severs the cotenancy and each thereafter owns his share in severalty. If after the death of the decedent the slayer is permitted to partition the property and thereby acquire an absolute interest he is unjustly enriched at the expense of the decedent. By treating the decedent as the survivor, such a partition is prevented. As to a joint bank account the interests of the parties are presumed to be equal,¹³⁷ and, as between themselves, one party's rightful withdrawal of the whole is generally held not to terminate the other's interest in the account.¹³⁸

Subsection (b) covers the situation where there are more than two co-owners or co-obligees. When the slayer kills the decedent, because of the interests of the other co-owners, it is not possible to say that any particular portion of the property then vests finally in the estate of the decedent. But whatever enrichment the slayer would have acquired eventually as a result of the death of the decedent will go to the decedent's estate.

If *S* (slayer), *D* (decedent) and *A* own as joint tenants with right of survivorship and *D* dies naturally, this would change the thirds to halves in *A* and *S*. If on the other hand, *S* kills *D* and

¹³⁶ RESTATEMENT, RESTITUTION § 188 (1937); 4 SCOTT § 493.2.

¹³⁷ *Murphy v. Michigan Trust Co.*, 221 Mich. 243, 190 N.W. 698 (1922).

¹³⁸ *Waters v. Nevis*, 31 Cal. App. 511, 160 Pac. 1081 (Dist. Ct. App. 1916).

there is no rule of law preventing *S* from acquiring his portion of *D*'s share, then *A* and *S* would own one-half each; but if *S* is prevented by law from benefitting by killing *D*, *A* would get his pro rata part of *D*'s share (one-half of one-third, or one-sixth) and *D*'s estate would retain whatever gain would otherwise have gone to *S* (one-sixth). *A* then has one-third plus one-sixth, or one-half, and *S* continues the owner of one-third of the property plus a part of *D*'s share, one-half of one-third, which one-sixth *S* in effect holds on constructive trust for *D*'s estate. If *A* now predeceases *S* the property will be treated as though *S* and *D* had been the only persons originally entitled and *D* the survivor, thereby making *D*'s estate the absolute owner subject to a life estate in *S* as to his share.

§ 31A-7. (a) Where the slayer holds a reversion or vested remainder in property subject to a life estate in the decedent and the slayer would have obtained the right of present possession upon the death of the decedent, such property shall pass to the estate of the decedent during the period of the life expectancy of the decedent.

(b) Where the slayer holds a reversion or vested remainder in property subject to a life estate in a third person which is measured by the life of the decedent, such property shall remain in the possession of the third person during the period of the life expectancy of the decedent.

In this and the two succeeding sections, this chapter deals with survivorship between slayer and decedent where future interests are involved and they are successive owners of property subject to a condition precedent of survival or a defeasance by non-survival, as distinguished from concurrent owners of property subject to a common law or conventional incident of survivorship. Regarding ownership as of potentially infinite duration, an owner is permitted within limits to divide it between persons by conveying it to them in the form of chronologically successive time segments, each having a duration of its own. This occurs in family settlements of property with their life estates and remainders or defeasible fees and executory interests, and their frequency usually results from an effort to gratify the vanity of the dead hand or to lessen the impact of the taxman's axe.

Since the rules stated in these sections use the common law terminology of reversions, remainders and executory interests with their distinctions, it seems desirable at this juncture to mention

certain of these classifications. All reversions are vested and remainders are either vested or contingent. A remainder is vested if it is certain to take effect in possession and enjoyment whenever and however the particular estate ends, and it is contingent if some condition precedent other than the determination of the particular estate is necessary.¹³⁹ Reversions and vested remainders may be indefeasibly vested (to *A* for life remainder to *B* in fee), vested subject to partial defeasance (to *A* for life remainder to the children of *A* in fee), or vested subject to total defeasance (to *A* for life remainder to *B* in fee, but if *B* predeceases *A*, to *C* in fee);¹⁴⁰ and so may certain executory interests be vested in fact, if not in legal theory.¹⁴¹

This section covers the situation where the slayer owns a vested future interest in property in the form of a reversion or vested remainder, his possession and enjoyment thereof being postponed only by the existence of a prior life estate in the decedent, or an estate *pur autre vie* in another person which is measured by the life of the decedent.¹⁴² Since the only impediment to the slayer's possession and enjoyment is the particular estate, its removal accelerates the reversion or remainder which thereby becomes a possessory interest, and the slayer is unjustly enriched by such acceleration of his future interest to whatever extent it is permitted to occur. It is not possible to measure this gain by acceleration exactly because of the impossibility of determining when the life tenant would have died, naturally or unnaturally, had he not been killed by the slayer. The only feasible and legally acceptable approximation of decedent's expectancy is furnished by the mortality tables.¹⁴³

As an equitable solution, subsection (a) prevents the slayer from benefitting by such a wrongfully induced acceleration by giving the property to the decedent's estate for the period of his expectancy, after which it vests in possession in the slayer or his estate.

And upon similar principle, subsection (b) provides that when the particular estate is an estate *pur autre vie* with the decedent as

¹³⁹ GRAY, *THE RULE AGAINST PERPETUITIES* §§ 101, 113 (4th ed. 1942); 2 POWELL ¶¶ 274, 278.

¹⁴⁰ 2 POWELL ¶¶ 274-76; 2 RESTATEMENT, PROPERTY § 157 (1936).

¹⁴¹ See *Lee v. Oates*, 171 N.C. 717, 88 S.E. 889 (1916); SIMES, *FUTURE INTERESTS* § 11 (1951).

¹⁴² *Cooper v. Cooper*, 220 N.C. 490, 17 S.E.2d 655 (1941); 2 POWELL ¶ 312; 2 RESTATEMENT, PROPERTY § 238 (1936).

¹⁴³ RESTATEMENT, RESTITUTION § 188, comment *c* (1937); 4 SCOTT § 493.1; Annot., 24 A.L.R.2d 1120 (1952).

cestui que vie the property shall remain with the tenant *pur autre vie* for the period of the life expectancy of the decedent before passing to the slayer or his estate.¹⁴⁴

This section preserves to the slayer his vested future interest which comes to him from the transferor and not from his victim, but prevents any unjust enrichment which would otherwise result to him by his killing the life tenant and thereby accelerating his possession and enjoyment of the property. In the absence of specific statutory prevention it has been held that such a remainderman is so entitled.¹⁴⁵

§ 31A-8. As to any contingent remainder or executory or other future interest held by the slayer subject to become vested in him or increased in any way for him upon the condition of the death of the decedent: (1) If the interest would not have become vested or increased if he had predeceased the decedent, he shall be deemed to have so predeceased the decedent; but (2) In any case, the interest shall not be vested or increased during the period of the life expectancy of the decedent.

This general section purports to include all types of future interests subject to become vested in the slayer or to be beneficially enlarged as to him in any way as a condition of the decedent's death. Subsection (1) provides that if the slayer's interest is a contingent one which is subject to the condition precedent of his surviving the decedent, or is a contingent or vested one which will be beneficially enlarged upon the condition of his surviving the decedent, in both cases the slayer will be deemed to have predeceased the decedent. The same basic principle of prevention of unjust enrichment from survivorship by homicide that was involved in the concurrent ownership cases recurs here.

When the slayer's interest is contingent upon his surviving the decedent it is impossible to say that he would have received anything but for his crime because he might have predeceased the decedent and taken nothing. In such case the interest should pass as though the slayer had predeceased the decedent; for example, where property is conveyed "to D for life remainder to S (slayer) in fee if he

¹⁴⁴ AMES, LECTURES ON LEGAL HISTORY 320-21 (1913), suggests this solution.

¹⁴⁵ Wall v. Pfanschmidt, 265 Ill. 180, 106 N.E. 785 (1914); *In re Emerson's Estate*, 191 Iowa 900, 183 N.W. 327 (1921); Blanks v. Jiggetts, 192 Va. 337, 64 S.E.2d 809 (1951).

survives *D* (decedent) but if *S* does not survive *D*, to *A* in fee" (contingent remainder); or "to *D* for life remainder to *S* in fee, but if he predeceases *D*, to *A* in fee" (vested remainder subject to defeasance); or "to *D* in fee but if he predecease *S* to *A* in fee" (shifting executory interest). In all of these cases where *S* kills *D* he is deemed to have predeceased him and the property should pass to *A*.¹⁴⁶ Of course, if some third person kills the life tenant an innocent remainderman is not prejudiced, and either a contingent remainder dependent upon his survival or a vested remainder will not thereby be prevented from vesting forthwith in possession and enjoyment.¹⁴⁷

Subsection (b) provides that in any case where the slayer's future interest would be benefitted by the decedent's death, although his interest is not contingent upon his survival of the decedent, nevertheless any benefit the slayer would have received by reason of the decedent's death shall be postponed for the period of the life expectancy of the decedent and thereby prevent the slayer from gaining by the decedent's death. For example, if property is conveyed "to *D* (decedent) for life, remainder to *S* (slayer) in fee" this remainder is indefeasibly vested and *S* or his estate will receive the benefit of it whether or not the slayer survives decedent. To assume that the slayer predeceased his victim, as provided in subsection (a), would not prevent his getting the property. Therefore his enjoyment of the property is postponed for the period of decedent's expectancy, the property or its income meanwhile remaining in the decedent's estate for that period of time, which prevents the slayer's unjust enrichment by wrongful acceleration of his future interest.¹⁴⁸

§ 31A-9. Where the slayer holds any interest in property, whether vested or not, subject to be divested, diminished in any way or extinguished if the decedent survives him or lives to a certain age, such interest shall be held by the slayer during his lifetime or until the decedent would have reached such age but shall then pass as if the decedent had died immediately after the death of the slayer or the reaching of such age.

¹⁴⁶ *In re Emerson's Estate*, *supra* note 145; See *Eisenhardt v. Siegel*, 343 Mo. 22, 119 S.W.2d 810 (1938), discussed in Note, 37 MICH. L. REV. 965 (1939); RESTATEMENT, RESTITUTION § 188, comment *c* (1937).

¹⁴⁷ 4 SCOTT § 492.5.

¹⁴⁸ RESTATEMENT, RESTITUTION § 188, comment *c* (1937). See 4 SCOTT §§ 493-493.1.

This section covers the miscellaneous situations where the slayer holds a present or future interest in property subject to divestiture or diminution if he predeceases the decedent, or if the decedent lives to some named age. Where the slayer already owns such a vested interest it cannot be legally taken from him because of his crime, and the available procedure is to allow the slayer to retain his interest but to make it remain subject to the chance of being divested by the decedent's survival. Since it cannot be known whether the decedent would have lived to survive the slayer or to reach a named age, all doubt is resolved against the slayer in order to prevent his unjust enrichment, and it is presumed that the decedent survived him. This assumption having divested the slayer of the interest at the proper time, the property will then pass as if the decedent had died immediately thereafter. For example, if property is conveyed "to *S* (slayer) in fee but if *D* (decedent) survives *S*, then to *D* in fee," if *S* kills *D*, *S* holds the property for his own life only and then it passes to *D*'s estate; or, if property is conveyed "to *S* in fee but if *D* attains age twenty-five, then to *D* in fee," if *S* kills *D* who is then eighteen years of age, *S* holds the property until *D* would have attained age twenty-five, and then it passes to *D*'s estate.

If it were not for the implication of the word "holds," this section might possibly be interpreted to cover the oft-occurring type of situation where property is bequeathed or devised to alternative beneficiaries, for example, "to *D* (decedent) but if he fail to survive me (testator), then to *S* (slayer) if he survive me." If *S* kills *D* and thereby makes himself survivor he should not under the policy of this act be permitted to reap the harvest of his crime, but since this situation involves substitutionary rather than successive taking of property, it does not seem to be covered.

§ 31A-10. (a) As to any exercise in the will of the decedent of a power of appointment in favor of the slayer, the slayer shall be deemed to have predeceased the decedent and the slayer shall not acquire any property or receive any benefit by virtue of such appointment and the appointed property shall pass in accordance with the applicable lapse statute, if any.

(b) Property held either presently or in remainder by the slayer subject to be divested by the exercise by the decedent of a power of revocation or a general power of appointment shall pass to the estate of the decedent; and property so held by the slayer subject to be divested by the exercise by the decedent of a power of appointment

to a particular person or persons or to a class of persons shall pass to such person or persons or in equal shares to the members of such class of persons, exclusive of the slayer.

This section deals with the power of appointment, one of today's most widely used dispositive devices. In many cases the elasticity it affords in the hands of a family survivor or corporate trustee dictates its use, but in sizeable estates it is often an estate planning must. In such cases a life estate in the surviving spouse coupled with a taxable ("general") power is generally utilized to qualify one-half of the adjusted gross estate for the federal estate tax saving afforded by the marital deduction, while a similar life interest as to the residue of the estate coupled with a non-taxable ("special") power permits that part of the estate to pass in remainder free of a second federal estate tax levy.¹⁴⁹ While such a life tenant donee is not technically the owner of the appointive property, and by common law dogma exercise of the power is merely the event upon which title shifts from the donor to the appointee, nevertheless, a general power presently exercisable is tantamount to ownership by the donee, and so is a general testamentary power in some respects, but not a special power.¹⁵⁰ It is felt that the current frequency of their use and the parallel between owner-transferor and donee-transferor in the disposition and control of property warrants their coverage by this act to prevent wrongful gain by homicidally induced survivorship at the expense of a donee-victim.

Subsection (a) deals with testate succession by the use of powers. It makes no distinction between general and special powers and provides that where the decedent-donor exercises the power by making an appointment to the slayer-appointee, the slayer shall be deemed to have predeceased the donee and the property shall pass in accordance with the applicable lapse statute. This state's anti-lapse statute applies in the absence of a contrary intent, where a testamentary beneficiary predeceases the testator, is his child or would have been his heir had he died intestate, and leaves issue who survive the testator.¹⁵¹ In most cases where the statutory requisites are met as

¹⁴⁹ LOWNDES & KRAMER, *FEDERAL ESTATE AND GIFT TAXES* 31, 245 (1956); 3 POWELL ¶ 392; Horack, *Estate Taxation of Powers of Appointment*, 27 N.C.L. REV. 58 (1948).

¹⁵⁰ 3 POWELL ¶ 388.

¹⁵¹ See note 62 *supra*. See also 3 POWELL ¶ 399, as to powers and anti-lapse statutes.

to the relation of the donee and the slayer and absence of contrary intent such as a requirement of the appointee's survival of the testator the effect is to keep the property in the family of the donee and also to prevent the slayer from benefitting directly by his crime. The donee-testator not being the owner of the appointive property, the provision of G.S. § 31A-4(3) that property willed to the slayer shall pass as if the decedent died intestate thereto would simply result in the nonexercise of the power and carry it to the takers in default as named by the donor, unless the doctrine of capture by the donee might be applied as the result of a lapsed appointment.¹⁵²

Subsection (b) covers two situations: the first is where the slayer holds property subject to be divested by the decedent's exercise of a power of revocation or of general appointment; the second covers the situation where the slayer holds property subject to defeasance by the exercise of a special power of appointment to a named person or class of persons. In the first case, the slayer's killing of the decedent before he exercises either power causes the property to pass to the decedent's estate, and in the second it passes to the named person or to the group exclusive of the slayer, as the case may be.

In the case of the power of revocation or of general appointment the donee is in effect owner of the property under the general power, if presently exercisable, and may be under the power of revocation if by its exercise the property reverts to him.¹⁵³ In both cases the property passes to the decedent's estate to prevent the slayer's wrongful retention of it by killing the decedent and thereby preventing the decedent's divesting him of the property by exercising the power in favor of himself or of his estate as he could have done but for his wrongful death. As to the special power, giving it to the objects of the power exclusive of the slayer carries out the donor's intent as in the case of a power in trust;¹⁵⁴ and as to the general power the property passes to the decedent's estate as the donee could have appointed it but for his wrongful death at the hands of the slayer.¹⁵⁵

§ 31A-11. (a) Insurance and annuity proceeds payable to the

¹⁵² See 3 POWELL ¶¶ 399-400.

¹⁵³ 3 POWELL ¶¶ 389-392.

¹⁵⁴ 3 POWELL ¶ 402; see *Henderson v. Western Carolina Power Co.*, 200 N.C. 443, 157 S.E. 425 (1931).

¹⁵⁵ 3 POWELL ¶¶ 385-86.

slayer: (1) As the beneficiary or assignee of any policy or certificate of insurance on the life of the decedent, or (2) In any other manner payable to the slayer by virtue of his surviving the decedent, shall be paid to the person or persons who would have been entitled thereto as if the slayer had predeceased the decedent.

(b) If the decedent is beneficiary or assignee of any policy or certificate of insurance on the life of the slayer, the proceeds shall be paid to the estate of the decedent upon the death of the slayer, unless the policy names some person other than the slayer or his estate as alternative beneficiary.

(c) Any insurance or annuity company making payment according to the terms of its policy or contract shall not be subjected to additional liability by the terms of this chapter if such payment or performance is made without notice of circumstances tending to bring it within the provisions of this chapter.

Legion are the cases which hold that the beneficiary of an insurance policy who feloniously murders the insured cannot recover the proceeds. While various grounds are utilized, probably most courts so hold on the principle that such a wrongdoer is not permitted to come into court and with bloody hands take the profit of the crime which insured his survivorship.¹⁵⁶ Where the slayer-beneficiary is not the heir or next of kin it is the great weight of authority that the proceeds belong to the insured's estate and pass to his intestate successors or residuary legatees,¹⁵⁷ but even where the slayer is the heir or next of kin he is usually treated as if he had predeceased the decedent and the persons next in succession are held entitled to the proceeds.¹⁵⁸ If there is a contingent beneficiary in such cases he is generally held entitled to the proceeds,¹⁵⁹ but

¹⁵⁶ *New York Mut. Life Ins. Co. v. Armstrong*, 117 U.S. 591 (1886); *Protective Life Ins. Co. v. Linson*, 245 Ala. 493, 17 So. 2d 761 (1944); *Slocum v. Metropolitan Life Ins. Co.*, 245 Mass. 565, 139 N.E. 816 (1923); *Anderson v. Life Ins. Co.*, 152 N.C. 1, 67 S.E. 53 (1910); *Smith v. Todd*, 155 S.C. 323, 152 S.E. 506 (1930); *De Zotell v. Mutual Life Ins. Co.*, 60 S.D. 532, 245 N.W. 58 (1932). See generally *RESTATEMENT, RESTITUTION* § 189 (1937); *VANCE, INSURANCE* § 117 (2d ed. 1951); *Grossman, Liability and Rights of the Insurer When the Death of the Insured is Caused by the Beneficiary or an Assignee*, 10 B.U.L. REV. 281 (1930).

¹⁵⁷ *Protective Life Ins. Co. v. Linson*, *supra* note 156.

¹⁵⁸ *Slocum v. Metropolitan Life Ins. Co.*, 245 Mass. 565, 139 N.E. 816 (1923); *De Zotell v. Mutual Life Ins. Co.*, 60 S.D. 532, 245 N.W. 58 (1932). *Contra*, *National Benefit Life Ins. Co. v. Davis*, 38 Ohio App. 454, 176 N.E. 490 (1929).

¹⁵⁹ *E.g.*, *Parker v. Potter*, 200 N.C. 348, 157 S.E. 68 (1931).

some courts have held the decedent's estate entitled.¹⁰⁰ It is generally held that such a felonious killing does not relieve the insurance company of liability¹⁰¹ unless the killing was an excepted risk, the insurance was fraudulently procured, or no person except the slayer-beneficiary or one claiming under him has an interest in the policy.¹⁰² A joint life insurance policy on two people payable to the survivor is paid, not to the slayer-beneficiary who assures his survival by killing the decedent, but to the latter's estate,¹⁰³ and the same occurs in some cases where the insured is slayer and the decedent is beneficiary.¹⁰⁴

There are statutes in about ten states which expressly disqualify the slayer from recovering proceeds of insurance on the decedent's life and provide how they shall be paid,¹⁰⁵ but most of them bar him indirectly as heir or legatee of the decedent.

The provisions of this section reflect the basic common law principles of insurance law above set forth. Subsection (a) prevents a slayer who is a beneficiary, an assignee or one otherwise entitled as survivor of insurance or annuity policy proceeds from receiving them and directs their payment to the persons entitled as if the slayer predeceased the decedent. This provision is wide as to the persons who are included as policy "beneficiaries" and barred, and should include joint life policies, and carry the proceeds to the alternative beneficiary if there is one, otherwise to the estate of the insured if he owned a reversionary interest in the policy. If there had been a complete assignment of the policy to the slayer, the proceeds should go to his estate at the expiration of the decedent's life expectancy because his interest in the policy cannot be legally forfeited for his crime, and he should not benefit by his wrongful acceleration of payment.

Subsection (b) provides for the case where the insured is the

¹⁰⁰ *E.g.*, *Bullock v. Expressmen's Mut. Life Ins. Co.*, 234 N.C. 254, 67 S.E.2d 71 (1951).

¹⁰¹ *Slocum v. Metropolitan Life Ins. Co.*, 245 Mass. 565, 139 N.E. 816 (1923); *Anderson v. Life Ins. Co.*, 152 N.C. 1, 67 S.E. 53 (1910).

¹⁰² *E.g.*, *Anderson v. Life Ins. Co.*, *supra* note 161; 4 SCOTT § 494.2.

¹⁰³ *Merrity v. Prudential Ins. Co. of America*, 110 N.J.L. 414, 166 Atl. 335 (Ct. Err. & App. 1933).

¹⁰⁴ *Parker v. Potter*, 200 N.C. 348, 157 S.E. 68 (1931); *Union Central Life Ins. Co. v. Elizabeth Trust Co.*, 119 N.J. Eq. 505, 183 Atl. 181 (Ct. Ch. 1936); RESTATEMENT, RESTITUTION § 189(2), comment c (1937); VANCE, *op. cit. supra* note 156, at § 117.

¹⁰⁵ See Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936).

slayer and the beneficiary or policy assignee is the decedent. By his crime the slayer has assured his own survival and should not be allowed to enrich himself at the expense of his victim. The proceeds are therefore made payable to the decedent's estate unless there is a named alternative beneficiary other than "the slayer or his estate." Some cases embody the principle of this statutory solution but they generally so rule only where the insured does not have the right to change the beneficiary.¹⁶⁶

Subsection (c) protects the insurance company or another against added liability under this chapter when payment or its equivalent in accordance with the policy's terms is made without notice of facts or circumstances tending to bring such beneficial payment or performance within the provisions of this chapter. If the insurance company does have such notice it would probably resort to interpleader to protect itself.

§ 31A-12. The provisions of this chapter shall not affect the rights of any person who, before the interests of the slayer have been adjudicated, acquires from the slayer for adequate consideration property or an interest therein which the slayer would have received except for the terms of this chapter, provided the same is acquired without notice of circumstances tending to bring it within the provisions of this chapter; but all consideration received by the slayer shall be held by him in trust for the persons entitled to the property under the provisions of this chapter, and the slayer shall also be liable both for any portion of such consideration which he may have dissipated, and for any difference between the actual value of the property and the amount of such consideration.

This section protects a bona fide purchaser for adequate consideration and without notice who before adjudication of the question, buys property from the slayer which he would have received except for the provisions of this chapter. Such a purchaser takes free of these provisions. The slayer is required to hold all proceeds so received for the persons entitled under this section, and is liable for both the consideration received and for any difference between the actual value of the property and the consideration paid to him.

Since this chapter prevents title passing to the slayer, this section achieves the anomalous result of permitting one without title to

¹⁶⁶ See cases and text cited in note 164 *supra*.

convey title. As between the protected innocent purchaser and the decedent's heirs who are volunteers the result seems desirable. Also, the land title records would normally show the survivor to be the sole owner, and therefore title examiners and bona fide purchasers need protection. The same or similar statutory solutions exist in several other states.¹⁸⁷

ARTICLE 4—GENERAL PROVISIONS

This article consists of four sections, three of which contain modifying provisions applicable to one or more of the prior sections of this chapter which are as follows: G.S. § 31A-13 makes the record of the slayer's trial admissible in evidence in a civil action concerning property rights under this chapter; G.S. § 31A-14 negatives application of the Uniform Simultaneous Death Act¹⁸⁸ in cases governed by this act; G.S. § 31A-15 declares affirmatively against construction of this chapter as penal, and also provides that the chapter shall govern as to all matters specifically provided for in it, but negatives its application in all other cases.

§ 31A-13. The record of the judicial proceeding in which the slayer was determined to be such, pursuant to § 31A-3 of this chapter, shall be admissible in evidence for or against a claimant of property in any civil action arising under this chapter.

This section settles the question of admission in evidence of the record in the proceeding which established the slayer's guilt. It is admissible for or against the claimant of property in any civil action arising under this chapter. But the section does not so provide in case of an alleged slayer's acquittal. This distinction may be justifiable on the theory that a jury will fail to understand the difference in burden of proof between criminal and civil proceedings to the prejudice of the decedent's estate.

In some states this type of statute which prevents a slayer from acquiring property from or through his victim provides merely that "the term 'slayer' shall mean any person who wilfully and unlawfully takes or procures to be taken the life of another." Under such a statute the court in a civil action involving title to the

¹⁸⁷ See Wade, *supra* note 165, at 750. As to notice, see Exchange Trust Co. v. Godfrey, 128 Okla. 108, 261 Pac. 197 (1927).

¹⁸⁸ N.C. GEN. STAT. §§ 28-161.1 to -161.7 (1950).

property must determine for its purposes whether or not the alleged slayer was guilty of this crime.¹⁶⁹

In the absence of a controlling statute to the contrary, neither a conviction nor an acquittal will control civil litigation to determine ensuing property rights.¹⁷⁰ By the great weight of authority the record of a conviction in a criminal proceeding is not admissible in such a civil action to prove the guilt or innocence of the person tried because the parties to the two proceedings are not the same and the rules as to competency of witnesses and weight of testimony are different.¹⁷¹ However, there is growing criticism of this general rule of exclusion and departure from it.¹⁷²

The new act takes a different form which should and is intended to avoid both this problem of evidence and retrial of the question of guilt in the civil action. In G.S. § 31A-3 it defines the terms slayer, decedent, and property, and by other sections legally disables the slayer of the decedent from acquiring or retaining certain property rights which accrue as a result of the decedent's death. Slayer is defined as one who is by a court of competent jurisdiction adjudged guilty as a principal or accessory before the fact of the wilful and unlawful killing of the decedent by one of the following four methods: (a) upon a plea of not guilty; (b) upon a plea of guilty; (c) upon a plea of *nolo contendere*; (d) by a specified civil action where the one who kills another dies or commits suicide before trial for the crime.

In a civil action as to the property, a principal fact in issue is simply whether plaintiff or defendant or the one through whom he claims title has been so adjudged to be the slayer of the decedent. Thus in such civil action the record of one's conviction, or a finding in the civil action under subsection (d), that one was the decedent's slayer, would be introduced and admissible in evidence, not to prove guilt, but to establish one's status as slayer as a separate relevant fact which would of itself bar him from acquiring or retaining the

¹⁶⁹ *United States v. Kwasniewski*, 91 F. Supp. 847 (E.D. Mich. 1950); *Sovereign Camp W.O.W. v. Gunn*, 227 Ala. 400, 151 So. 491 (1933).

¹⁷⁰ *McDuffie v. Aetna Life Ins. Co.*, 160 F. Supp. 541 (E.D. Mich. 1957).

¹⁷¹ *Interstate Dry Goods Stores v. Williamson*, 91 W. Va. 156, 112 S.E. 301 (1922); 4 SCOTT § 494.4; 4 WIGMORE, EVIDENCE § 1617a (3d ed. 1940); Annot., 31 A.L.R. 261 (1924).

¹⁷² *Eagle Star & British Dominions Ins. Co. v. Heller*, 149 Va. 82, 140 S.E. 314 (1927); 4 WIGMORE, *op. cit. supra* note 171.

property.¹⁷³ Thus no other evidence of the crime than the specified court record would seem necessary, and evidence in the civil action that one was not in fact guilty of the crime would seem both immaterial and inadmissible.

This type of statute seems preferable by so simplifying the procedure in the civil action. Where an issue of guilt has been determined in a criminal case with its more extensive procedural safeguards and greater burden of proof, retrial of the same issue in a civil action seems wasteful of judicial administration. And the evidential effect accorded to the civil procedure of subsection (d), which is so often necessary to forestall the slayer's bounty, seems reasonable. Perhaps this section is merely confirmatory of existing common law on the subject, but it does settle the question in advance as to such proceedings under this chapter.

§ 31A-14. The Uniform Simultaneous Death Act, G.S. 28-161.1 through 28-161.7, shall not apply to cases governed by this chapter.

In certain cases where the title to property or its devolution depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the Uniform Simultaneous Death Act makes statutory dispositions thereof which might otherwise conflict with the dispositions made by this chapter when one of such persons is the slayer of the other. For example, G.S. § 28-161.3 provides that where two persons who are joint tenants or tenants by the entirety so die the property shall be distributed one-half as if one had survived and one-half as if the other had survived. This is not in accordance with the disposition made by G.S. §§ 31A-5 and 31A-6 of this chapter when one co-owner wilfully and unlawfully kills the other—a fact which might be readily established even though the order of deaths could not be.

§ 31A-15. This chapter shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by his own wrong. As to all acts specifically provided for in this chapter, the rules, remedies, and procedures herein specified shall be exclusive, and as to all acts not specifically provided for in this chapter, all rules, remedies, and procedures, if any, which now exist or hereafter may exist either by

¹⁷³ *Metropolitan Life Ins. Co. v. Hill*, 115 W. Va. 515, 177 S.E. 188 (1934), discussed in Note, 41 W. VA. L.Q. 287 (1935).

virtue of statute, or by virtue of the inherent powers of any court of competent jurisdiction, or otherwise, shall be applicable.

This section negatives the penal nature of this chapter, and provides that as to all acts specifically provided for the rules, remedies and procedure shall be exclusive, but as to all acts not so specifically included all existing rules, remedies and procedures and those hereafter created or existing by statute, judicial power or otherwise shall apply.

There is a doctrine that if legislation undertakes to provide for the regulation of human conduct in regard to a specific matter or thing already covered by the common law, and parts of which are omitted from the statute, such omissions must be taken generally as evidence of the legislative intent to repeal or abrogate the same.¹⁷⁴ And while a court might not construe this chapter to be all-embracing and thus to supplant completely the common law on the subject,¹⁷⁵ this section affirmatively preserves the common law, substantive and procedural, as to all acts not explicitly provided for in this chapter.

While this chapter seeks to provide for the usual situations in which the slayer may benefit from the decedent's death, some cases of wrong will inevitably arise which are not so covered but should be in accordance with the stated policy to prevent one from profiting by his own wrong. Thus the fact that this chapter covers only wilful and unlawful homicide does not necessarily preclude other wrongful killings from barring property rights by common law, such as an unintentional killing resulting from reckless disregard for human life or during the commission of a felony. Possibly an acquitted killer might be so barred in some cases since this chapter is silent as to the effect of an acquittal; and the same is true of failure to prosecute, except in the one case covered by G.S. § 31A-3(i)(d).

As heretofore stated, certain cases of wrongful death are not covered by this chapter, for example, by an insane person who could not have the requisite intent, but this should not prevent the court in a civil proceeding as to title to the property from determining whether the killer was insane at the time of the killing.¹⁷⁶ In such

¹⁷⁴ *Bird v. Plunkett*, 139 Conn. 491, 95 A.2d 71 (1953); *In re Lord & Polk Chem. Co.*, 7 Del. Ch. 248, 44 Atl. 775 (Ct. Ch. 1895).

¹⁷⁵ *Cowan v. Pleasant*, 263 S.W.2d 494 (Ky. 1954); *Smith v. Todd*, 155 S.C. 323, 152 S.E. 506 (1930).

¹⁷⁶ *Goldsmith v. Pearce*, 345 Mich. 146, 75 N.W.2d 810 (1950); *Anderson v. Grasberg*, 247 Minn. 538, 78 N.W.2d 450 (1956).

instances the malleable constructive trust concept and other non-statutory remedies remain available under the terms of this chapter.¹⁷⁷

¹⁷⁷ *Metropolitan Life Ins. Co. v. Hill*, 115 W. Va. 515, 177 S.E. 188 (1934); 4 SCOTT § 492.4.