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How Does the Common Law Forfeiture Rule Work?

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1. INTRODUCTION

The common law forfeiture rule prevents unlawful killers from benefiting from their crimes, ruling out a convenient plot device in crime fiction, but otherwise serving an important public purpose. The operation of the rule has been the subject of considerable interest in the wider common law world in the past two decades, perhaps more so than any other individual part of succession law. Law reform bodies in Australia,[1] England and Wales,[2] Ireland[3] and New Zealand[4] have all considered the rule. Only the Scottish Law Commission concluded that no reform of the law is required.[5] While this paper is concerned with the common law forfeiture

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[1] Tasmania Law Reform Institute, *The Forfeiture Rule* (Issues Paper No 5, 2003); Victorian Law Reform Commission, *The Forfeiture Rule* (2014).

[2] Law Commission, *The Forfeiture Rule and the Law of Succession* (Law Com No 295, 2005).

[3] Irish Law Reform Commission, *Issues Paper on Review of section 120 of the Succession Act 1965 and Admissibility of criminal convictions in civil proceedings* (LRC IP 7-2014, 2014).

[4] New Zealand Law Commission, *Succession Law: Homicidal Heirs* (Report 38, 1997).

[5] Scottish Law Commission, *Report on Succession* (Scot Law Com No 215, 2009) para 7.2.

rule, some common law jurisdictions have enacted statutory forfeiture rules.[6] These statutory rules tend to be very similar to the common law rule, but show greater precision in explaining the operation of the rule.

In 2012, legislation about the operation of the forfeiture rule came into effect in England and Wales.[7] The forfeiture rule now operates by deeming that an unlawful killer has predeceased her victim. The killer will consequently be unable to inherit from the victim. However, the legislation was not comprehensive. It applies only to testate and intestate succession, ignoring other circumstances in which the forfeiture rule applies. The coverage of testate succession is also limited. According to the new section 33A that has been inserted into the Wills Act 1837, the statutory deemed predecease rule only applies 'for the purposes of this Act'.[8] As the Wills Act 1837 is not a statute which gives general force to wills, but merely sets out various rules in relation to wills, their validity and effect, this leaves gaps.[9]

Predecease is only relevant in the Wills Act in relation to the operation of section 33, a section which modifies the operation of the doctrine of lapse when gifts are made to children or other lineal descendants of the deceased, and so the new section 33A can only

[6] Ireland's forfeiture rule is contained in the Irish Succession Act 1965, s 120. Most US states have a legislated 'slayer rule': American Law Institute, *Restatement of the Law, Third, Property (Wills and Other Donative Transfers)* (2003), §8.4 Comment i, Reporter's Note 1.

[7] Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011, inserting new sections into the Wills Act 1837 and Administration of Estates Act 1925.

[8] This point is also made in F Barlow, R Wallington, S Meadway, J MacDougald, *Williams on Wills, vol 1, The Law of Wills*, 10th edn (London, Lexis Nexis, 2014) para 9-17.

[9] Failing to appreciate this point seems to explain why the Law Commission believed that the new legislation provided comprehensively for forfeiture in relation to testate succession: Law Com No 295 (n 2) paras 4.11, 4.13 and 5.3, pp 41 and 43.

have effect in relation to section 33. In other circumstances where predecease may be relevant, such as the situation where a gift is made to anyone who is not a lineal descendant of the deceased, section 33A is irrelevant. Similarly, section 33A seems to have no effect in relation to gift overs in a will, when property is left to a person with an explicit provision about what is to occur if that person predeceases the testator. As that gift over does not take effect through the Wills Act, it is not covered by section 33A. At common law, if the donee unlawfully kills the testator, the killer will not be deemed to have predeceased the testator, and the gift over will not take effect.[10] Section 33A does not change this. The common law of forfeiture therefore continues to be relevant for testate succession in England and Wales.

The forfeiture rule is one of public policy, concerned with criminals not benefiting from their crime. This may be directed to removing an incentive for criminal behaviour, but the common law rule applies regardless of motive. A better explanation for the policy is the broader moral intuition that it is simply inappropriate for unlawful killers to receive a benefit from killing.

Basing the rule on public policy means that it is different to the civilian model, which addresses the problem of a donee unlawfully killing a testator through rules about unworthiness to inherit.[11] The civilian model is based on presumptions about the intentions of the testator or about protecting freedom of testation and it covers a wider range of situations

[10] *Re Jones (Deceased)* [1998] 1 FLR 246 (CA).

[11] J MacLeod and R Zimmermann, 'Unworthiness to Inherit, Public Policy, Forfeiture: The Scottish Story' (2012-13) 87 *Tulane Law Review* 741, especially 742-744. This is not to say that the civilian rule does not have clear policy undertones, but that the doctrinal principle (taken from Roman law) is one of unworthiness to inherit, an idea which can encompass behaviour which is not even criminal.

than killings.[12] It is not based on the idea that criminals should not benefit from their crime.[13] The same approach has been taken by some American scholars.[14] In contrast, English judges stress that the underlying basis for the forfeiture rule is the rule of public policy that criminals should not benefit from crime.[15]

In many respects, this difference in underlying explanation may not affect the operation of the rule. Ireland's statutory forfeiture rule is based upon civilian code provisions about unworthiness to inherit, albeit limited solely to killings of the testator, but it has raised similar questions in relation to joint tenancies as those encountered under the common law forfeiture rule.[16] However, this similarity will not always exist. For example, a rule based upon presumed intentions might allow a killer who was forgiven by a testator before her

[12] MacLeod and Zimmermann (n 11) 742-43 summarising the Austrian, French and German positions.

[13] MacLeod and Zimmermann (n 11) 745.

[14] I Ehrlich and RA Posner justify the slayer rule as a form of presumed revocation: 'An Economic Analysis of Legal Rulemaking' (1974) 3 *Journal of Legal Studies* 257, 259. Building on this, the Reporter for the American Law Institute has described the slayer rule as being based upon the 'wrongful prevention of revocation' by the killer: *Restatement (Wills)* (n 6), §8.4, Reporter's Note 7.

[15] eg *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 (CA) 156 (Fry LJ). This distinction between the common and civil law traditions is noted in J Chadwick, 'A Testator's Bounty to his Slayer' (1914) 30 *LQR* 211, 211-12.

[16] LRC IP 7-2014 (n 3) 2-6. The Irish case *Re Celine Cawley* [2011] IEHC 515 contains an excellent discussion of the problems associated with forfeiture and the common law concept of joint tenancy, a problem not addressed by civilian code provisions.

death to receive an inheritance, but the policy based common law rule would not.[17] In *Beresford v Royal Insurance Co Ltd*, a life insurance policy which was payable on the suicide of the insured was subject to the forfeiture rule.[18] The term of the policy covering payment on suicide was contrary to public policy (as suicide was a crime at the time). Hence a claim under the policy failed. If an explicit contract term cannot overcome the forfeiture rule, it seems unlikely that mere 'forgiveness' will do so.

As a principle of public policy, the forfeiture rule is not always concerned with the overall justice of the outcomes in particular cases. Forfeiture cases are almost always hard cases and so they almost always create a risk of producing what seems to be bad law.[19] Judges have been refreshingly candid about this possibility. In one of the early cases, Lord Esher MR noted that the rule 'ought not to be stretched beyond what is necessary for the protection of the public', suggesting that outcomes beyond the killer not benefiting were not of concern.[20] Ungoed-Thomas J commented that the rule is 'clumsy, crude ... and ... somewhat uncivilised' in its operation in some cases,[21] while Mummery LJ stated simply that

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[17] The New Zealand Law Commission rejected a forgiveness rule (NZLC Report 38 (n 4) para 14). Taschereau J seems to have thought that a forgiveness rule should operate in the forfeiture context (*Lundy v Lundy* (1895) 24 SCR 650 (SC of Canada) 653). Taschereau J's dissent also included reference to the civilian tradition, which may explain his position.

[18] *Beresford v Royal Insurance Co Ltd* [1938] AC 586 (HL).

[19] Especially in the testate succession context; strangely, very few testators seem to consider the possibility of being killed by family and friends, and so wills rarely make provision for this event.

[20] *Cleaver* (n 15) at 153.

[21] *Re Dellow's Will Trusts* [1964] 1 All ER 771 (Ch) 775.

the rule 'is not the statement of a principle of justice designed to produce a fair result', indeed that as a principle of public policy it 'may produce unfair consequences in some cases'.[22]

Public policy has the potential to generate considerable uncertainty. As Burrough J observed, 'it is a very unruly horse, and when once you get astride it you never know where it will carry you'.[23] Nevertheless, analysing the forfeiture rule from a policy perspective can be helpful. For example, it can illuminate the differences between cases concerning the transmission of wealth on death and those concerning motor indemnity insurance. Simply put, in motor insurance cases, unlawful killers are entitled to payments from their insurers for causing death to their victims, that payment being used to pay compensation to the victims' families. Contrast traditional forfeiture cases and cases where the forfeiture rule prevents a killer from receiving a benefit under a life insurance policy, where the killer is prevented from receiving a benefit from the victim's death. Once the policy of the rule is taken into consideration it become clear why there is a seeming exception to the forfeiture rule in cases of motor indemnity insurance. In such cases there are two public policy concerns: preventing the killer from benefiting and ensuring adequate compensation for the families of victims of traffic accidents. The policy of compensating victims' families outweighs that behind the forfeiture rule, perhaps because the compensation policy has been specifically endorsed, even mandated, by Parliament.[24]

However, the introduction of the forfeiture rule to implement a particular policy concern has caused problems. The public policy principle is a broadly (perhaps poorly) defined one which prescribes an outcome, but does not require any particular method for

[22] *Dunbar v Plant* [1998] Ch 412 (CA) 422.

[23] *Richardson v Mellish* (1824) 2 Bing 229, 252; 130 ER 294, 303.

[24] See *Charlton v Fisher* [2001] EWCA Civ 112, [2002] QB 578 [33] (Laws LJ) and JG Fleming 'Insurance of the Criminal' (1971) 34 *MLR* 176.

reaching it. As Kirby P observed, the forfeiture rule was developed judicially 'to solve the necessities of particular cases. It developed without a great deal of consideration, either of its scope, or of its exceptions, or of its fundamental underlying rationale.'[25] Much of the debate has been about the types of killings to which the rule applies, where there is a marked discrepancy between the American approach and the approach taken in the rest of the common law world.[26] However, there is also disagreement and uncertainty about how the rule works. It is this latter issue which is addressed in this chapter.

The forfeiture rule operates in a variety of circumstances, stretching beyond testate and intestate succession. The rule takes effect in relation to survivorship and joint tenancies,[27] and as homicide can cause the acceleration of life interests and trigger payments under life insurance policies or from pensions and State benefits, the rule can also apply to all such situations.[28] Ideally, the forfeiture rule will work in a coherent fashion across this wide range

[25] *Troja v Troja* (1994) 33 NSWLR 269 (Court of Appeal of New South Wales) 278.

[26] The American slayer rule applies only to intentional killings: *Restatement (Wills)* (n 6) §8.4(a); American Law Institute, *Restatement of the Law, Third, Restitution and Unjust Enrichment* (2011), §45(1); Uniform Law Commission, *Uniform Probate Code* (2010) § 2-803). The English and Australian courts have rejected the idea that the forfeiture rule distinguishes between types of homicide on the basis of culpability: *Dunbar* (n 22) and *Troja* (n 25).

[27] Although there is still no authoritative determination as to quite how the forfeiture rule works in this context. See text to nn 113-117.

[28] For life insurance: *Amicable Society for a Perpetual Life Assurance Office v Bolland* (1830) 4 Bli NS 194, 5 ER 70; for pensions: *Glover v Staffordshire Police Authority* [2006] EWHC 2414 (Admin), [2007] ICR 661; and for benefits: *R v Chief National Insurance Commissioner, ex p Connor* [1981] QB 758 (QB).

of contexts, perhaps even with a single mechanism for its operation. This may not be possible, but finding a position which works well for most of them, with a cogent explanation for the exceptions, should be the ambition.[29]

There are divergent views about how the forfeiture rule does, and should, operate. *Parry and Kerridge* strongly asserts that the rule operates by way of a constructive trust, albeit that the courts have not appreciated this.[30] As the leading English succession textbook, the constructive trust view appears as a starting point for discussions of the English rule.[31] In the field of restitution, Virgo admits that the rule generally operates as a bar to the killer receiving any benefit, but argues that the forfeiture rule should operate through a constructive trust.[32] Trusts scholars typically take the view that the forfeiture rule prevents the killer

[29] In this sense, the approach is somewhat American. Modern US succession law is often at least, if not more, concerned with non-probate methods of transmitting wealth across generations, at least in part due to deficiencies in the probate system. The classic article is JH Langbein, 'The Nonprobate Revolution and the Future of the Law of Succession' (1983-4) 97 *Harvard Law Review* 1108; see now MB Leslie and SE Sterk, 'Revisiting the Revolution: Reintegrating the Wealth Transmission System' (2015) 56 *Boston College Law Review* 61).

[30] R Kerridge and AHR Brierley, *Parry and Kerridge: The Law of Succession*, 12th edn (London, Sweet and Maxwell, 2009) paras 14-81 – 14-82, following R Kerridge, 'Visiting the Sins of the Fathers on their Children' (2001) 117 *LQR* 371.

[31] For example, in MacLeod and Zimmermann (n 11) 746, *Parry and Kerridge* (n 30) is cited for the proposition that the forfeiture rule 'operates by way of creating a constructive trust', which is at least contestable.

[32] Graham Virgo, *The Principles of the Law of Restitution*, 3rd edn (Oxford, Oxford University Press, 2015) 543-52 (a similar position is taken in Graham Virgo, *The Principles of Equity and Trusts* (Oxford, Oxford University Press, 2012) 309).

acquiring title, but that a constructive trust may have a role in situations where this does not occur.[33]

The argument of this chapter is that, in general, the forfeiture rule operates as a bar to unlawful killers, or those claiming through them, obtaining property rights at all. By killing the victim, a killer simply acquires nothing on the death of the deceased. Unlike various suggestions in the academic literature, a constructive trust is not normally imposed to achieve the outcome demanded by public policy. However, there are some difficult situations in which a constructive trust may be appropriate. This integrates the forfeiture rule neatly into the structure of private law more generally. Typically, the forfeiture rule operates as part of the law of property, of which succession law is a part. There are instances in which other branches of private law are involved when property law fails to achieve the prescribed policy outcome, with gains-based remedies concerned with restitution for the killer's wrongdoing playing a significant role in some situations. As a general principle, the forfeiture rule cuts across the traditional taxonomies of private law, but is adequately served within the existing structure.

2. THE CONSTRUCTIVE TRUST MODEL

2.1. Introduction

[33] G Virgo and EH Burn, *Maudsley and Burn's, Trusts and Trustees: Cases and Materials*, 7th edn (Oxford, Oxford University Press, 2008) 303; AJ Oakley, *Parker and Mellows: The Modern Law of Trusts*, 9th edn (London, Sweet and Maxwell, 2008) 444 (although the discussion of *Re Sigsworth* is misleading, as there is no mention of a constructive trust in the case itself); J McGhee (ed), *Snell's Equity*, 33rd edn (London, Sweet and Maxwell, 2014) para 26-007.

Under the constructive trust model, an unlawful killer receives all of the benefits to which she is entitled upon the death of her victim. The killer holds any assets received on trust, to prevent the killer benefiting from them. Supporters of this approach identify several justifications for the use of constructive trusts.

2.2. Flexibility

The constructive trust can be applied flexibly, and for many writers the key feature here is the culpability of the killer.[34] Even with the flexibility granted to the English courts by the Forfeiture Act 1982, this flexibility may still be considered desirable.[35] The Forfeiture Act 1982 has no application to cases of murder.[36] There may be some murders where it is considered inappropriate to deprive the killer of all benefits to be received from the deceased.[37] Similarly, the strict time limits under the Forfeiture Act 1982 could be avoided if the forfeiture rule did not operate in a uniform manner.[38]

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[34] A good example is the dissent of Kirby P in *Troja* (n 25) 278-86. American law does not use a constructive trust to achieve flexibility in relation to culpability, presumably because the slayer rule applies only to intentional homicide (see n 26).

[35] The Law Commission was sceptical about the benefits of flexibility: Law Com No 295 (n 2) para 3.25.

[36] Forfeiture Act 1982, s 5.

[37] 'Mercy killings' seem to be the only obvious category, although it was observed by Lord Hope in *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345 [25] that some acts which constitute assisting suicide might also amount to murder, although they are not prosecuted as such.

[38] For the problem with time limits, see *Re Land* [2006] EWHC 2069 (Ch), [2007] 1 All ER 324. This is certainly preferable to the constitutionally problematic suggestion in *Parry and*

Evidently a major difficulty with arguing that the constructive trust model represents current English law is that the law is not flexible, although there is a hint by Phillips LJ in *Dunbar v Plant* that had the Forfeiture Act 1982 not been created, some flexibility would have been introduced.[39] However, even the suggestions of flexibility in *Dunbar* and other cases are all limited to a single question – how culpability would affect whether the forfeiture rule applied at all. The constructive trust model introduces flexibility beyond this issue, also affecting how the rule applies and assets are distributed.

2.3. Testamentary Intentions

The forfeiture rule can operate to produce results which seem unlikely to represent the wishes of the deceased. *Re DWS* is a good example: a son killed his parents, who were intestate, and the forfeiture rule operated to prevent the son benefiting from their intestacy.[40] It consequently also prevented the killer's son from benefiting. Instead, the estate passed to siblings of the deceased, who were probably not the people the victims would have wished to benefit. Similarly, in *Re Callaway*, a daughter was the sole beneficiary of her mother's will. She killed her mother and the property passed to the victim's son on intestacy. As Vaisey J noted, the forfeiture rule here operated to the 'frustration of [the victim's] testamentary intentions'.[41] A constructive trust imposed over the estate requires the killer to hold the property on terms determined by the court. Kerridge has argued that the court is to 'arrive at an equitable solution which reflects the likely wishes of the [deceased] in circumstances

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Kerridge (n 30) para 14-68 that 'the court has an inherent power to override the draconian effects of section 2(3) of the 1982 Act'.

[39] *Dunbar* (n 22) 435.

[40] *Re DWS (deceased)* [2001] Ch 568 (CA).

[41] *Re Callaway* [1956] Ch 559 (Ch) 565.

which he would never have contemplated as occurring'.[42] In this, Kerridge echoes the approach taken in the American Law Institute's *Restatement (Third) of Restitution and Unjust Enrichment*.[43]

There are several difficulties with the Kerridge approach. Even if one accepts that it should be taken, ascertainment of the deceased's intention will often be at best an 'attempt to guess' what she would have wanted.[44] The same sort of problems which arise in imputing intention in the context of trusts of the family home are equally present here, but more acute. The difficulties are more pronounced, in that in the succession context there is less likely to be the kinds of activity and financial conduct which can provide some basis for imputation.[45] Succession in the common law is a matter of (potentially capricious) gifts freely given; ascertaining any intention will consequently be challenging.[46] American law on the constructive trust in forfeiture addresses this issue, identifying a hierarchy of claims and

[42] Kerridge, 'Sins' (n 30) 375.

[43] *Restatement (Restitution)* (n 26) §45(3).

[44] *Parry and Kerridge* (n 30) para 14-82.

[45] Limited evidence is still a problem which can be seen in the common intention constructive trust context, where intention can be imputed on the basis of what is 'fair'. HHJ Behrens observed that the intention imputed on the basis of fairness was 'somewhat arbitrary but it is the best I can do with the available material': *Aspden v Elvy* [2012] EWHC 1387 (Ch), [2012] Fam Law 1085 [128].

[46] As Gardner and Davidson note in relation to common intention constructive trusts, 'The fact that some outcome is fair, *alias* that reasonable persons in the parties' circumstances would have considered and agreed upon it, does not mean that the parties actually did so, for all sort of reasons, or even none': S Gardner and K Davidson, 'The Supreme Court on Family Homes' (2012) 128 *LQR* 178, 179.

making clear that the estate should only be given to the person intended to receive by the deceased '*if* such a person can be identified', rather than assuming intention can always be found.[47] A comment in the *Restatement (Third) of Restitution and Unjust Enrichment* also acknowledges that whether or not the child of a killer should be permitted to take under such a trust involves questions of policy in addition to intention, with several states prohibiting benefits passing to children of the killer.[48]

A more fundamental problem is that there is no inherent reason why a constructive trust model leads to a trust which follows the intention (real or otherwise) of the deceased.[49] There are types of constructive trust which are directed to fulfilling a person's intentions. Secret trusts and mutual wills are examples of such trusts which will be familiar to succession lawyers. These trusts are not directed to depriving a wrongdoer of their illegitimate gains, unlike the trust which it is argued should be imposed in the forfeiture context.[50] There is no obvious reason why a constructive trust arising following an unlawful killing should be a trust directed to perfecting intentions. This is not normally the approach taken in trusts imposed to deprive a wrongdoer of their gains. From a succession law perspective, following the intention of a testator is not the approach taken in relation to failed gifts in wills, void wills or intestacy.[51] Some justification needs to be advanced as to why such a following of

[47] *Restatement (Restitution)* (n 26) §45(3)(b) (emphasis added).

[48] *Restatement (Restitution)* (n 26) §45 Comment d.

[49] A point made in Law Com No 295 (n 2) para 3.23.

[50] See R Chambers, 'Constructive Trusts in Canada' (1999) 37 *Alberta Law Review* 173, especially 182-183.

[51] In the Scottish forfeiture case of *Tannock v Tannock* 2013 SLT (Sh Ct) 57 [36], it was observed that it is not appropriate to look beyond the express terms of the will in relation to

intention is particularly necessary in the forfeiture context, but not elsewhere in succession law. No such justification has been advanced. The forfeiture rule is concerned with preventing a killer benefiting from her crime. Once that has been achieved, the rule has nothing more to say. The rule and the underlying policy bar one particular outcome, but a wide range of alternative outcomes remain available.

2.4. Effects on Third Parties

Youdan raised the problem that if an unlawful killer were denied title due to her crime, this would cause considerable complications. If the killer acquired physical control of the property, she would have the appearance of title, and innocent third parties might then rely upon this to acquire property from the killer. However, if the killer in fact had no more than a possessory title, these third parties would not themselves be able to acquire anything more than a possessory right.[52] Were the killer to hold the property on trust, on the other hand, then the usual bona fide purchaser rule would apply to protect many, but not all, such third parties in a well-understood way.

It will be shown below that this concern is misplaced.[53] The bar on the killer receiving benefits from the killing does not work in the way Youdan supposed; third parties already benefit from the bona fide purchaser rule and the *nemo dat* problem he identified does not arise.

2.5. Parliamentary Sovereignty

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ascertaining the deceased's intention, indeed that it is only generally appropriate to do so where there is a particular rule or statute allowing the court to do so.

[52] TG Youdan, 'Acquisition of Property by Killing' (1973) 89 *LQR* 235, 255.

[53] See text to n 93.

The most powerful argument in favour of the constructive trust solution is that the forfeiture rule preventing title from passing to the unlawful killer seems to be contrary to express provisions in statutes. This argument has been particularly powerful in the USA, where it was first propounded,[54] but it has also been adopted by various writers elsewhere.[55] The point was also acknowledged by Sedley LJ in *Re DWS*, who observed that the application of the forfeiture rule to intestacy is a 'judicial interpolation in a statute which says nothing whatever on the subject'.[56] If statutes such as the Administration of Estates Act 1925 are read literally in forfeiture cases, then they appear to require that the killer be given the property.[57] A rule which seems simply to ignore statutory requirements is a constitutionally improper rule. It is constitutionally more appropriate to follow the statutory rules, but then for equity to impose a trust over the property received.[58]

There are two principal problems with this argument. The first is the simple one that not all instances of forfeiture are grounded in statute, most obviously forfeiture in the context

[54] Starting with JB Ames, 'Can a Murderer Acquire Title by His Crime and Keep It?' in JB Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Cambridge MA, Harvard University Press, 1913) especially 312.

[55] eg N Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31 *Common Law World Review* 1, 15; Virgo, *Restitution* (n 32) 551-52; Youdan (n 52) 251-52.

[56] *Re DWS* (n 40) [35].

[57] Literal interpretation is stressed in Kerridge, 'Sins' (n 30) 375 and in G Virgo, 'The Law of Restitution and the Proceeds of Crime: a Survey of English Law' [1998] *Restitution Law Review* 34, 57.

[58] Virgo also describes this approach as more 'honest': Virgo, *Restitution* (n 32) 551-52; 'formalistic' may be as good a description.

of testate succession, but also joint tenancy. This is not an especially powerful argument, as the constructive trust approach has the merit of applying to both statutory and non-statutory contexts.

The second, much stronger, challenge is that the insistence on literal interpretation is misplaced. Sedley LJ in *Re DWS* noted the possibility of a non-literal rectifying construction in relation to intestacy, but regarded it as too much of a stretch and so constitutionally improper to apply.[59] Nonetheless, there are plenty of other principles of statutory construction beyond the literal. As *Bennion* observes, one principle of statutory construction which seems to apply generally is that 'Unless the contrary intention appears, an enactment by implication imports the principle of the maxim *nullus commodum capere potest de injuria sua propria* (no one should be allowed to profit from his own wrong)'.[60] Several of the examples cited by *Bennion* are forfeiture cases, but not all of them.

As Lord Hope observed, 'As a general rule Parliament must be taken to have legislated against the background of the general principles of the common law'. It is only if Parliament is found to have decided not to follow the common law, that the common law principles are abrogated.[61] Just such an approach was applied in the forfeiture context by Lord Lane CJ in *R v Chief National Insurance Commissioner, ex p Connor*. A woman who killed her husband applied for a widow's allowance under the Social Security Act 1975,

[59] *Re DWS* (n 40) [35].

[60] O Jones (ed), *Bennion on Statutory Interpretation: A Code*, 6th edn (London, Lexis Nexis, 2013) section 349.

[61] *Wisely v John Fulton (Plumbers) Ltd, Wadey v Surrey County Council* [2000] 2 All ER 545 (HL) 548.

which included no provision barring killers from receiving such an allowance. Lord Lane CJ said that:[62]

> The fact that there is no specific mention in the Act of disentitlement so far as the widow is concerned if she were to commit this sort of offence and so become a widow is merely an indication, as I see it, that the draftsman realised perfectly well that he was drawing this Act against the background of the law as it stood at the time.

This is a well-recognised principle of statutory construction, one which removes the constitutional justification for the constructive trust approach.

2.6. Absence of Authority

The arguments in favour of the constructive trust approach are therefore somewhat equivocal. A particularly telling argument against the constructive trust model, at least as an accurate description of the current law, is that it has no basis whatsoever in English authority. There are no English cases which have applied the constructive trust approach. There are cases which clearly show a model of forfeiture in operation which does not apply a constructive trust model. For example, in *Re Pollock* the victim left her estate to her killer and her executor applied for directions. The executor was told to distribute as if on intestacy, clearly demonstrating that the killer's estate was not to obtain the assets which might then have been held on trust.[63]

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[62] *ex p Connor* (n 28) 765. Similarly *Glover* (n 28).

[63] *Re Pollock* [1941] Ch 219 (Ch).

However, the point never seems to have been raised directly.[64] The only mention of the constructive trust approach in English courts is in *Re K*, where Vinelott J observed, obiter, that some jurisdictions use a constructive trust in relation to killings and joint tenancies, but that England does not, instead simply severing the joint tenancy, suggesting that the constructive trust is not used.[65] In other jurisdictions, the point has been made and rejected.[66] In the United States, the constructive trust model is a residuary one, applicable only where title has already passed to the killer, something which is usually prevented by other rules of law.[67]

It has been claimed that the early case of *Cleaver* demonstrates that the constructive trust approach to forfeiture is compatible with English law.[68] It does not. In *Cleaver* the husband insured his own life, for the benefit of his wife. By virtue of section 11 of the Married Women's Property Act 1882, that policy had to be held on trust by the husband for the benefit of his wife. The wife then murdered her husband. The forfeiture rule prevented the wife from benefiting from the insurance policy, and in consequence the benefit of the property passed to the husband's estate. As Fry LJ observed, this is a simple application of standard equitable principles: 'Whenever there is property produced by the payments of A. which is held in trust for B., and that trust fails or is satisfied, a resulting trust arises for A. or his estate'.[69] A general rule that the killer obtains benefits to which they are entitled on the

[64] Hence the argument in *Parry and Kerridge* (n 30) 350 n 296 that the decision in *Re DWS* was *per incuriam*.

[65] *Re K* [1985] Ch 85 (Ch) 100.

[66] *Troja* (n 25) is the most well-known example.

[67] *Restatement (Restitution)* (n 26) §45, Comment c.

[68] *Cleaver* (n 15), used by Kerridge, 'Sins' (n 30) 374 and Peart (n 55) 15.

[69] *Cleaver* (n 15) 158.

death of the deceased, but holds them on constructive trust, is markedly different.[70] Furthermore, a resulting trust does not lead to property being held for the benefit of the person whom the settlor would have liked to receive it.[71]

2.7. Coherence

A forfeiture rule operating through a constructive trust poses difficulties for the coherence of the law. The constructive trust model raises difficult questions about the place of that trust in wider trusts doctrine.[72] Even if it is accepted that the forfeiture rule operates by preventing killers obtaining rights in testate and intestate succession (as argued below), problems remain in addressing other difficult situations. Some such situations are sensibly, and plausibly, addressed through a constructive trust.[73] However, others are addressed through contract law, and a constructive trust would only be possible if the existing rules of contract were to be displaced.[74]

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[70] *cf* Kerridge, 'Sins' (n 30) 374 ('a slight distinction') and Peart (n 55) 15 (a constructive trust approach 'seems to be consistent with *Cleaver's Case*').

[71] Even if one accepts the view that resulting trusts such as that in *Cleaver* are responses to the settlor's intention, that intention is much more limited than in the suggested constructive trust model. It is a presumed intention allowing only one possible beneficiary, the settlor (see B McFarlane and C Mitchell, *Hayton and Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies* 14th edn (London, Sweet and Maxwell, 2015) 14-161–14-64).

[72] See text to n 52.

[73] See text to nn 112-120 and 127-132.

[74] See text to nn 121-122.

3. KILLER OBTAINS NO RIGHTS MODEL

3.1. Introduction

The dominant view in England is that in some sense the unlawful killer does not obtain rights to assets. Quite what this means, and how this occurs, is much less clear. Judges refer to a killer not being able to 'obtain, or enforce, any rights resulting to him from his own crime'.[75] As Phillips LJ observed in *Dunbar v Plant*, there is a difference between obtaining rights and not being able to enforce rights that one does have, but this issue has not been further addressed by the courts.[76]

Evidence that the unlawful killer simply does not obtain any rights is found in various cases connected with the forfeiture rule. The simplest are the pensions and benefits cases. In all these cases, the killer is simply not entitled to receive payments which would otherwise be due to him or her. *Ex parte Connor* is a good example. In that case, a woman who had killed her husband applied for judicial review of the National Insurance Commissioner's decision not to grant her a widow's allowance, seeking *certiorari*.[77] This was not a case in which the widow asked the court to enforce her rights, but merely one in which she asked that a decision (that she had no entitlement) be overturned. The Court of Appeal rejected her case, strongly suggesting that she had no right under the relevant legislation. A similar approach was taken in *Glover v Staffordshire Police Authority*, where a widow was held not to be

[75] *Re Crippen* [1911] P 108 (P) 112 (Sir Samuel Evans P). Very similar language was used almost a century later by Blackburne J at first instance in *Re DWS* (n 40) 571.

[76] *Dunbar* (n 22) 429.

[77] *ex p Connor* (n 28). Although one should be wary of reading too much into the individual words used by judges, it is notable that the language used throughout *Connor* is of the widow's actions 'disentitling' her (765 and 766).

entitled to a pension after she killed her husband.[78] Because of the context of these cases, the courts were required to address directly the question of entitlement – did the killer have a right to be paid the benefit or pension? In both cases, the court answered in the negative. The benefits and pension providers were therefore not required to transfer any property to the widows.

In relation to testate succession, the case of *Pollock* shows that the killer is simply not entitled to rights in the estate of the victim. Under her will a woman left her entire estate to her husband, by whom she was killed (and who then killed himself). The wife's executors applied for directions. In an unusually clear statement of the effects of forfeiture, Farwell J said that the 'estate of [the victim] did not in the events which happened pass under her will to [the killer]' and the wife therefore 'died intestate'.[79]

The view of the law which holds that the killer obtains no rights is reinforced by the seeming rule that the killer, or those claiming through her, cannot be the personal representatives of the victim. In *Re Crippen*, a man killed his wife and was executed for the offence. His personal representative (and mistress) was not permitted to be the personal representative of the deceased wife.[80] While the husband's personal representative would normally have been the person appointed to act as the wife's personal representative too, the circumstances were held to be 'special' under statute and the administration was granted to others.[81] Although linked with a particular statutory rule, the case bears out the point made by Fry LJ in *Cleaver*: that the forfeiture rule operates to the exclusion of the killer and those

[78] *Glover* (n 28). As the pension here was one provided under legislation, the case seems to fall between pensions and benefits cases.

[79] *Pollock* (n 63) 224.

[80] *Crippen* (n 75).

[81] The Court of Probate Act 1857, s 73 (now the Senior Courts Act 1981, s 116).

claiming through her.[82] Given that a personal representative is not entitled to the benefit of the estate, the *Crippen* case suggests that an unlawful killer, and those claiming through her, is excluded from obtaining any rights from the killing, even when the use of those rights is supervised by the court, for the benefit of others.

Re K also suggests that this is the correct analysis. That case raised an awkward question about when the forfeiture rule took effect, as the killing occurred a short time before the Forfeiture Act 1982 came into force. As the Act did not have retrospective effect, the key question was when interested parties acquired rights. Vinelott J noted that beneficiaries under a will do not acquire a right to particular assets, but only a right to due administration of the estate. He held that the right to have the estate duly administered was a chose in action for purposes of the Forfeiture Act 1982. In the victim's will, a life interest in most of the estate (including the residue) was left to the killer, remainder to various residuary legatees. According to Vinelott J, those residuary legatees acquired a right for the purposes of the Forfeiture Act 1982 as soon as the killing occurred, 'in consequence of the forfeiture rule'. This meant that 'a right of action was acquired by each residuary legatee by way of acceleration of his or her interests'.[83] *Re K* suggests that a killer never acquires any rights in relation to the estate, not even the right to its due administration. The forfeiture rule operates at the moment of killing to deny the killer rights and to accelerate the rights of the residuary legatees in the remainder. The same approach could be applied on intestacy: the killer is denied from obtaining any rights under the intestacy.

If this is correct, then the forfeiture rule does not work by depriving an unlawful killer of legal title directly. Instead, the killer never obtains any rights at all, rights which would otherwise be enforceable against personal representatives, pension providers, or welfare

[82] *Cleaver* (n 15) 159.

[83] *Re K* (n 65) 98.

agencies. If the killer has no rights in relation to the victim's estate then the killer will obtain no benefit because the executors or administrators will not give property to the killer. In the pensions and benefits cases, the relevant organisations will not pay money to the killer. The killer will consequently never be given title to assets.

3.2. Consequences

This analysis of the operation of the forfeiture rule clarifies the effect of the rule.

3.2.1. Testate and Intestate Succession

Personal representatives are owners of the assets of the deceased and have the power to dispose of the assets as they wish. They hold the property 'for the purpose of carrying out the functions and duties of administration'.[84] However, if an unlawful killer never obtains a right to receive property from the estate, then she is not entitled to receive anything from the administration. Personal representatives who distribute property to the killer will have committed a *devastavit*, just as if they distribute property to someone clearly not entitled under a will or on intestacy.[85]

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[84] *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 (PC) 707. Although the Administration of Estates Act 1925 refers to personal representatives holding on trust, this does not seem to be a true trust to which all the usual rules of trusts are incident: *Parry and Kerridge* (n 30) para 24-63.

[85] This explains the remark of the Law Commission, that 'no legal title can vest in the killer unless the property has been distributed in ignorance of the facts and the killing is discovered at a later stage': Law Com No 295 (n 2) para 3.23(1). This point was repeated verbatim by the Victorian Law Reform Commission (n 1) para 4.19.

The personal representatives would then have a remedy against the killer for a mistaken distribution. Furthermore, the personal representatives would be liable to account for their incorrect distribution to the killer and would be personally liable to the people otherwise entitled to the victim's estate. This would be less of a burden on the personal representatives than at first appears. First, many forfeiture cases arise before distribution has occurred, on applications to the court for directions.[86] If the personal representatives comply with the terms of the court order, they will not be personally liable.[87] Second, any personal representative who distributes in ignorance of the killing seems likely to be relieved from liability under section 61 of the Trustee Act 1925.[88] Such a distribution would be both honest and reasonable and it is difficult to envisage a court holding that it would not be fair for the personal representative to be excused from personal liability.

The actual beneficiaries of the estate are not without remedies, but those remedies are very unlikely to be against the personal representatives. Instead, the remedy will be against the recipient of the inappropriately distributed assets, the killer.[89] When personal

[86] Usually such applications are helpful, but seemingly exceptionally in *Re Sigsworth* [1935] Ch 89 (Ch) 91-92, Clauson J held that lack of evidence meant that he would only decide the question of law about the applicability of the forfeiture rule in that case, on the assumption that murder had been committed. He warned that '[t]he administrator, if he acts on my decision, will take the risk that the assumption of fact may conceivably hereafter turn out to be erroneous'.

[87] *Parry and Kerridge* (n 30) para 24-07 – 24-08.

[88] Despite not being trustees, this section applies to personal representatives due to section 68(17) of the Trustee Act 1925.

[89] This would apply even if the personal representatives distributed pursuant to a court order: *Parry and Kerridge* (n 30) para 24-07.

representatives distribute estate assets to someone not entitled to them, beneficiaries of the estate are entitled to personal and proprietary remedies, including through tracing, against the recipient.[90] Such remedies will therefore be available if personal representatives distribute assets to an unlawful killer. In the forfeiture context this may look like the imposition of a constructive trust on the proceeds of wrongdoing. However, in *Re Diplock* the Court of Appeal treated this liability as a *sui generis* form of liability in succession law, one which had historically been available in the Chancery. It is now better to see this as part of the law of unjust enrichment, based not on the wrongdoing of the killer but on the personal representative's lack of authority in distributing to the killer.[91]

This analysis addresses the concern about killers not receiving title and therefore not being able to transmit that title to innocent third parties who may believe that the killer is the owner.[92] The killer does obtain title if the personal representatives distribute to her, because the personal representatives as owners of the property have the power to transfer title to the killer. The killer acquires title not directly from the killing, but from the actions of the personal representatives.[93] This transfer of title is nonetheless subject to claims both by the personal representatives and, if necessary, the beneficiaries. *Ministry of Health* v *Simpson* establishes that these claims can be proprietary. Consequently, anyone who acquires title

[90] *Ministry of Health v Simpson* [1950] AC 251 (HL), approving *Re Diplock* [1948] Ch 465 (CA). The House of Lords did not consider the tracing point, but fully approved the Court of Appeal judgment, which did.

[91] See Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff and Jones, The Law of Unjust Enrichment*, 8th edn (London, Sweet and Maxwell, 2011) paras 8-51–8-57 and 8-79.

[92] See text to n 53.

[93] For the personal representatives as owner, see *Livingston* (n 84) 707.

from the killer therefore also obtains title, but will equally be subject to the proprietary claims. However, these are claims in equity, and subject to the usual bona fide purchaser defence. There is consequently no difference in the effect of the forfeiture rule on third parties between the constructive trust model and the analysis proposed here.

The approach taken here shows why it is better to understand the forfeiture rule as one which leads to a killer obtaining no rights, rather than a killer having rights which are unenforceable.[94] If the killer does obtain rights from the victim's will or intestacy, the personal representatives will not commit a *devastavit* if they distribute to the killer. The available remedies will become much more limited. This conclusion can only be avoided by acknowledging that the killer obtains rights, but that public policy nonetheless prevents the personal representatives from distributing to the killer, such that any distribution would still amount to a *devastavit*. This is much more cumbersome.

3.2.2. Pensions and Benefits

On this model, the killer does not become entitled to any payments under pension policies or welfare benefits. If payments are made, pensions providers or welfare agencies would be entitled to bring restitutionary claims. Such payments are recoverable because they are made by mistake.[95]

3.3. Benefits of this Model

[94] For this distinction, see *Dunbar* (n 22) 429 (Phillips LJ).

[95] As noted in *Re Sigsworth* [1935] Ch 89 (Ch) 91-92, the 'mistake' is an assumption that the recipient of the money was not the killer of the deceased. This is described as an 'assumption of fact'. This might be described as restitution for a mistake on the basis of an 'incorrect tacit assumption' (to use the language of *Goff and Jones* (n 91) para 9-35).

In addition to clarifying the position of personal representatives and third parties, there are intellectual and practical benefits to an understanding of the forfeiture rule based on the killer obtaining no rights.

3.3.1. Taxonomy

Traditionally, the law of succession has been understood to form part of the law of property.[96] Analysing the forfeiture rule as a rule that prevents unlawful killers from obtaining title is consistent with this. It also means that the forfeiture rule is located in the same part of the law as the rules about unworthiness to inherit in civilian systems, facilitating comparison. This is particularly important for Ireland, which has a forfeiture rule associated with civilian code provisions.[97] It is also useful in maintaining links in this area with Scots law. There has been continued interaction between the English and Scots law relating to forfeiture situations.[98] The two are not identical, but it is helpful to take a position in English law which does not cause too much tension in relation to the mixed nature of Scots law.[99] Such an analysis of the common law of forfeiture also fits with the dominant American approach. Although there is considerable support for the constructive trust approach in the United States, most states have

[96] For Roman law, see G.2.98-245, J.2.10-23.

[97] See n 16.

[98] MacLeod and Zimmermann (n 11) especially 764-69.

[99] One difference is that Scots law does not permit total exclusion of the forfeiture rule under the Forfeiture Act 1982 (*Cross, Petr* 1987 SLT 384), while English law does (*Re K* (n 65)).

legislated slayer rules which prevent killers from receiving property from the estate of their victim.[100]

Within succession law itself, identifying the forfeiture rule as a rule which prevents killers from obtaining any rights places the rule into a familiar category. The constructive trust model means that the gift in a will or on intestacy succeeds, but a trust is then imposed over the relevant assets. By contrast, denying the killer any rights places the operation of the forfeiture rule clearly within the familiar category of failed gifts. This is what writers on succession law already recognise, placing their discussion of the forfeiture rule into their chapters on failed gifts, even if the authors advocate the constructive trust model.[101]

The various discussions by courts and legal scholars about how the forfeiture rule operates in relation to testate and intestate succession also place the rule within property law, succession law and the rules on failed gifts. Discussion has centred around the forfeiture rule operating as a deemed predecease or a deemed disclaimer.[102] Either of these positions is

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[100] See n 6. Cf *Restatement (Restitution*) (n 26) §45 Reporter's Note c, observing that a different approach was taken in the first *Restatement*, which sought to impose a constructive trust in all forfeiture situations.

[101] *Parry and Kerridge* (n 30) paras 14-64 – 14-69 and 14-81 – 14-82; CV Margrave-Jones, *Mellows: The Law of Succession*, 5th edn (London, Butterworths, 1993) para 30-63; Barlow et al, *Williams on Wills* para 9-17. *Theobald* on wills is something of an exception, with the forfeiture rule placed within a chapter entitled 'Who may be devisees or legatees?' (John G Ross Martyn, Charlotte Ford, Alexander Learmonth, Mika Oldham, *Theobald on Wills*, 17th edn (London, Sweet and Maxwell, 2010) para 12-011).

[102] eg *Restatement (Wills)* (n 6) §8.4(j) and (k) uses deemed predecease, while the *Uniform Probate Code*, § 2-803(b) uses deemed disclaimer. Interestingly, the *Uniform Probate Code*,

possible, although they have different effects in some situations.[103] Importantly, both approaches analogise the forfeiture rule to existing, and better understood, doctrines within the broader category of failed gifts: to lapse and disclaimer respectively. In judicial and academic reasoning, these links are attempts to understand how the forfeiture rule operates, rather than statements that the forfeiture rule is a deemed predecease or disclaimer rule. It is better to understand the forfeiture rule as a distinct mode of gifts failing.

Judges have recognised the utility of analogies to other forms of failed gifts and appreciated that such analogies need to be applied carefully. This is clear in cases where judges applying the forfeiture rule reject arguments that the rule causes gift over provisions in wills to come into effect, as would be the case if the rule operated like lapse.[104] The better analogy is to disclaimer, simply because this is the only other form of failed gift which can apply to both testate and intestate succession.[105] Just such an analogy was expressly used at first instance in *Re DWS*, precisely because it was the closest analogy to the legal issue in that case, namely a failed gift in intestacy.[106] There may be other situations where the analogy is inappropriate and the forfeiture rule has to be understood without the benefit of such

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§ 2-803(c)(1) prevents killers acting as personal representatives or trustees by means of a deemed revocation.

[103] The principal difference is the effect on children of the killer. At common law the children will inherit through a deemed predecease rule, but not through a deemed disclaimer.

[104] eg *Jones* (n 10).

[105] *Parry and Kerridge* (n 30) para 14-70. It was sensible of the Law Commission to consider reform of forfeiture and disclaimer simultaneously in Law Com No 295 (n 2) – both raise issues which cannot arise in relation to other types of failed gift.

[106] *Re DWS* (n 40) 579-80.

analogies.[107] In such situations it will have to be recognised that the forfeiture rule is a *sui generis* form of failure of gift, albeit one which often raises similar problems to other forms of failure.

Legislative rules, such as the predecease rule in the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011, work differently. Such rules create a failure through a genuine lapse (or in some other systems, a genuine disclaimer). Although this is an important change, it should not be overstated. Both the common law rule and the legislative rule operate within the general category of failed gifts. The forfeiture rule's place in legal taxonomy has changed, but only at a low level within the structure of succession law and private law more generally. While it will affect the outcome on some facts, such as those in *Re DWS*, the general categorisation of the forfeiture rule, as one species of failure of gifts, is maintained.

3.3.2. Compatibility with Other Areas of Law

As noted above, the proposed constructive trust in relation to forfeiture appears to be at least very unusual in comparison with other constructive trusts as understood in England and Wales. The model proposed here avoids this difficulty.

Usefully, an understanding of the forfeiture rule in accordance with which the killer obtains no rights also avoids difficult questions about the interaction of the forfeiture rule and the statutory regime for confiscation of assets under the Proceeds of Crime Act 2002. The

[107] For example, disclaimer can only occur only following an action by the intended beneficiaries after the death of the deceased: *Re Smith* [2001] 3 All ER 552 (Ch). The forfeiture rule operates earlier, and there may be situations where this time difference could be relevant.

2002 Act can apply if a defendant is convicted of an offence and 'obtains property as a result of or in connection with' the offence.[108] That property can include choses in action and there is nothing to suggest that this does not apply to rights arising in relation to the victim's estate.[109] It therefore appears that if a killer were to acquire any rights from the killing, there would be a risk of these being seized by the state.[110] A model which regards the killer as obtaining no rights prevents the Proceeds of Crime Act applying, while still preventing the killer from benefiting from his wrongdoing. The constructive trust model would also achieve this result, as the value of the rights the killer obtains as trustee would be nothing, but any model based around personal restitutionary claims would be difficult to accommodate with the Act. In such a situation the killer does obtain rights, and the Act's concession to the claims of others in relation to the criminal's offence is limited to claims made by the 'victim', which are necessarily precluded in homicide cases.[111] Denying that the killer obtains any rights seems the better solution.

3.3.3. Practicality

By preventing the killer acquiring any rights, even a right to due administration of the estate, the forfeiture rule excludes the killer from the administration of the estate. This will often be a relief to other family members, some of whom may be acting as personal representatives or might have to deal with the killer as the personal representative. It also makes administration of the estate easier if the killer has been detained. The constructive trust model is also

[108] Proceeds of Crime Act 2002, s 76(4).

[109] Proceeds of Crime Act 2002, s 84(1)(c).

[110] As occurred before the 2002 Act in *Halifax Building Society v Thomas* [1996] Ch 217 (CA) in the context of a fraud.

[111] Proceeds of Crime Act 2002, s 6(6).

problematic in this regard: family members would be required to deal with the killer in order to ensure that the trust is not breached and the trust assets transferred elsewhere. On a model where the killer obtains no rights, action of this kind would only require other beneficiaries of the estate to engage with the killer in an adversarial manner, to claim personal or proprietary remedies.

4. PROBLEMATIC SITUATIONS

The argument so far has not addressed some situations in which issues arise that are difficult for the forfeiture rule to resolve, namely the operation of survivorship in joint tenancies, the acceleration of interests in remainder vested in the killer that results from the life tenant's death, and effects on class gifts. Also difficult are some situations involving life insurance and the 'extended' forfeiture rule. However, the analysis of the forfeiture rule as the killer obtaining no rights through the killing illuminates why these situations are so difficult to resolve. These are not situations concerning the acquisition of rights by a killer, and fall outside the notion of the forfeiture rule outlined above (and of the idea of the law of succession as concerning the acquisition of rights in things). These are instead situations where the killer's enjoyment of existing or future rights is enhanced, to her benefit.[112] The final difficult situation, that of the 'extended' forfeiture rule, covers situations where the killer acquires benefits from the killing, but only does so indirectly. In many of these situations, the appropriate remedy is one for the victim's estate. Should the person entitled to

[112] Such situations are therefore also generally outside the scope of the Proceeds of Crime Act 2002, as the killer does not 'obtain' property, as required by section 76(4). The killer already held the property rights.

that estate be the killer, the forfeiture rule in relation to testate and intestate succession will apply as above.

4.1. Joint Tenancies and Survivorship

If the killer and victim are joint tenants, then the killer was already entitled to all of the jointly owned property before the victim's death.[113] Lord Nicholls has cautioned against undue stress being placed upon the idea of joint tenants each owning the whole, describing it as an 'esoteric concept remote from the realities of life' that 'should be handled with care'.[114] But in this context the point is central. It explains why a joint tenancy situation has to be treated differently to most other applications of the forfeiture rule.

The current English position seems to be that a joint tenancy is severed by the killing of one joint tenant by another. The point has not been authoritatively decided[115] and there

[113] This point is more or less made in TK Earnshaw and PJ Pace, ' "Let the Hand Receiving It Be Ever So Chaste ..." ' (1974) 37 *MLR* 481, 488-92, although the authors there refer to the surviving joint tenant's rights being 'enlarged', which is not strictly correct. As McFarlane, Hopkins and Nield put it, 'Title simply "survives" in the remaining joint tenants': B McFarlane, N Hopkins and S Nield, *Land Law: Texts, Cases and Materials*, 3rd edn (Oxford, Oxford University Press, 2015) 567). In legal terms, there is no increase in the rights of the remaining joint tenant(s).

[114] *Burton v Camden London Borough Council* [2000] 2 AC 399 (HL) 404.

[115] As Tarrant observes, all of the English cases involve concessions by counsel, so are of little precedential value: J Tarrant, 'Unlawful Killing of a Joint Tenant' (2008) 15 *Australian Property Law Journal* 224, 236-37.

remain considerable uncertainties[116] and a range of possibilities.[117] The severance solution may be the desirable one, not for conceptual reasons, but for the pragmatic reason that it is relatively simple to apply, without any need to determine the killer's enrichment. However, it should be acknowledged that this position lacks a firm intellectual foundation and does not provide guidance in other difficult situations.

4.2. Killer's Interest in Remainder

If a killer has an interest in remainder in property, and the victim has a life interest, the killing of the victim accelerates the killer's interest. The benefit the killer receives from her existing property right increases from the moment of the victim's death. There seem to be no English cases on this point. Actuarial calculations could be used either to determine the longevity of the victim, providing a means of calculating the extent to which the killer has been enriched by the killing. A constructive trust could then be imposed over the killer's remainder interest, in effect recreating the life interest but necessarily in favour of the victim's estate, rather than the victim herself. Alternatively, the actuarial calculations could be used to place a financial value on the killer's enrichment for a monetary award, again for the victim's estate. Both cases are examples of restitution for wrongs and the remedy is gains-based.[118]

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[116] The discussion by Laffoy J in the Irish case of *Re Celine Cawley* (n 16) is excellent and highlights the difficulties and uncertainties.

[117] The many possibilities in relation to joint tenancy and survivorship are discussed well in Tarrant (n 115).

[118] The *Restatement (Restitution)* (n 26) uses the constructive trust model here. A similar issue arises if the killer's interest is contingent on surviving the victim; here it is presumed that the killer would not have been the survivor: *Restatement (Restitution)* (n 26) §45 Comment g).

4.3. Class Gifts

The New Zealand Law Commission identified situations in which a killer may benefit from a killing, without directly obtaining any assets from it.[119] A killing might eliminate the victim from a class of which both the killer and victim were members, enlarging the killer's share of a gift to which they were both otherwise entitled, as in the joint tenancy situation. Alternatively, it might limit the membership of a class which has not yet closed, to the killer's benefit. An example would be where a gift is made to the grandchildren of an individual, one of whom is the killer, and the killer kills her only remaining parent, uncle or aunt, preventing any more grandchildren being born.

In both cases, the killer was definitely entitled to some share of the gift. In the first case the killer will obtain more than she otherwise would and a restitutionary, gains-based, remedy for her wrongdoing seems plausible. In the second case the killer may obtain more than she otherwise would, but it is possible that no more grandchildren would have been born before the class closed in any event. Devising a suitable remedy in such a situation is more difficult. Notably, the New Zealand Law Commission, despite drafting a statutory forfeiture rule which identified these problems, did not seek to provide guidance as to how such situations should be addressed, simply commenting that it will ultimately be for the courts 'to settle the detailed application of [the forfeiture rule] to the many and varied interests in property to which it can apply'.[120] For all such situations, it seems that the appropriate remedy would be gains-based. The killer has obtained an illegitimate benefit from an unlawful act, and should be deprived of that benefit.

[119] NZLC Report 38 (n 4) pp 32 and 33 (draft bill s 11).

[120] NZLC Report 38 (n 4) p 33.

4.4. Life Insurance

A simple life insurance situation is already addressed under the forfeiture rule. Any policy owned by the victim will be an asset in the victim's estate and pass according to the rules of testate and intestate succession, with the forfeiture rule working in the usual way. The difficulties arise in more complicated situations: first, if the life insurance policy has been assigned to the killer before the victim's death; second, where the killer took out the life insurance policy on the victim's life, for the killer's benefit; and third, where the victim's life insurance is held on trust for the killer. In all of these scenarios, the problem is that the killer has acquired a right in the life insurance before the victim's death and that right becomes more valuable on the victim's death. In all of these situations, the solution lies in ordinary principles of law outside succession.[121]

The first two situations are addressed by a remark of Lord Esher MR in *Cleaver*: 'No doubt there is a rule that ... if the performance of a contract would be contrary to public policy, performance cannot be enforced'.[122] This is a rule about the performance of contracts and part of contract law. As a matter of contract a killer cannot enforce a life insurance policy on the victim's life. This is not a deprivation of the killer's existing rights. The killer has contractual rights (which amount to a chose in action), but contractual rights are always subject to the risk that a combination of events and general principles of contract law will render them worthless, as in frustration of contract. A similar limitation on contractual rights applies here.

The third situation is different. The killer does not hold the contractual rights directly; instead those rights are held by the victim or someone else, on trust for the killer. This is a

[121] Cf *Foskett v McKeown* [2001] 1 AC 102 (HL) 122 (Lord Hope) and 134 (Lord Millett), noting that a policyholder's choses in action under the policy amount to a property right.

[122] *Cleaver* (n 15) 151.

common situation, as it avoids the need to assign the policy, or to address the requirement of an 'insurable interest' when seeking to insure the life of a third party. In the trust situation, the killer has a vested beneficial interest in the policy from the moment the trust is created. However, performance of the contract by the insurer is not barred, as there is no policy bar to the trustee enforcing the policy. The result in this situation is clearly identified in *Cleaver* – the trust fails and the trust property (the policy-holder's contractual rights against the insurer and then the policy proceeds) go on resulting trust to the victim's estate.

What is much less clear from *Cleaver* is quite how the trust fails. Lord Esher MR expressed the matter as one where the rule of public policy meant that the trust became impossible to be performed, but his analogy was to a situation where the beneficiary had predeceased the settlor, which looks closer to a model of the beneficiary ceasing to have any rights.[123] Fry LJ was also ambiguous, observing that the trust 'cannot be enforced' by the killer,[124] but also explaining that if the trustee claims the money due on the policy, it cannot be for the killer's benefit, suggesting that the killer no longer has rights under the trust.[125]

The better approach is to treat this as a situation where the forfeiture rule actually does operate as a forfeiture: the killer-beneficiary loses her rights under the trust. This would then be a situation where 'for some reason, such as the impact of a rule of the law of trusts ... the provisions of a particular trust fail to exhaust the income and capital of a trust fund',

[123] *Cleaver* (n 15) 154. The language of performance was probably influenced by that of section 11 of the Married Women's Property Act 1882, which refers to an object of the trust remaining 'unperformed'.

[124] *Cleaver* (n 15) 158.

[125] *Cleaver* (n 15) 156.

leading to a resulting trust.[126] Here the forfeiture rule is a rule of public policy applicable throughout the law, including the law of trusts, which prevents the disposition of a trust asset (the proceeds of the policy) to the express beneficiary. A resulting trust then arises.

4.5. The 'Extended' Forfeiture Rule

A situation that has been discussed in American scholarship, but to no great extent elsewhere, is what has been called the 'extended' forfeiture context. This arises when a killer obtains benefits indirectly from the victim. Writers about the English law of forfeiture have only considered this problem in relation to the South African case of *ex parte Steenkamp and Steenkamp*.[127] A couple made wills leaving property to their daughter and grandchildren. Their son-in-law (the daughter's husband) killed the couple, whose estates were administered according to the terms of their wills. One of the grandchildren died in infancy, and the rules of intestacy meant that the son-in-law acquired a share of the grandchild's estate. That estate consisted of assets received from the administration of the couple's estate. The killer ultimately obtained a benefit from the victim's estate. It was held that the killer was entitled to benefit from his own child's estate, and the source of that estate was irrelevant.

Steyn J's judgment cites only authorities from the Roman-Dutch, civilian, tradition, but the analysis of the common law forfeiture rule presented here would lead to the same outcome. The son-in-law did not acquire any rights to due administration of the couple's

[126] D Hayton, P Matthews and C Mitchell, *Underhill and Hayton, Law Relating to Trusts and Trustees*, 18th edn (London, Lexis Nexis, 2010), para 21.5. The alternative presents the same problem as regarding killer's as having rights in succession law, but not being able to enforce them – if the trustees were to distribute trust assets to the killer, this would not be a breach of trust (see text to n 95).

[127] *ex p Steenkamp and Steenkamp* [1952(1)] SA 744.

estate, but did acquire such rights to the administration of the grandchild's estate. We might quite legitimately consider this to be the wrong outcome as a matter of policy; the killer appears to have received an inappropriate windfall. That does not necessarily mean the issue should be addressed through the forfeiture rule itself. The killer here has not benefited from the death of her victims. An inappropriate windfall might be expressed alternatively as an unjust enrichment, making this an issue not for the law of succession, but of the law of restitution for wrongdoing. Virgo adopts this position, but observes that on the facts of *Steenkamp*, it is likely that the initial killing will not be seen as an operating cause of the killer's enrichment, preventing any gains-based remedy for her wrongdoing too.[128]

There is one relevant English case which has been largely overlooked. It relates to a different factual scenario, but a judicial remark suggests that causation may not be an insuperable obstacle to a restitutionary approach to the extended forfeiture situation. *Davitt v Titcumb* concerned the proceeds of sale of a house originally co-owned by two tenants in common.[129] The house was purchased with a joint mortgage to be repaid using an endowment policy, payable at a set date in the future or on the death of one of the tenants in common. The endowment policy was assigned to the mortgagee (a building society). One co-owner murdered the other, triggering payment under the policy. The policy provider paid the proceeds of the policy to the mortgagee, discharging most of the outstanding mortgage. The killer was convicted of murder. The personal representatives of the victim sold the house and the killer applied for his share of the proceeds of sale.

[128] Virgo, *Restitution* (n 32) 548. The Law Commission observed that the forfeiture rule is not concerned with ensuring that no one is in a position to benefit the killer, but did not consider the precise facts in *Steenkamp* (Law Commission, *The Forfeiture Rule and the Law of Succession: A Consultation Paper* (Law Com CP No 172, 2003) 5.19-5.22).

[129] *Davitt v Titcumb* [1990] Ch 110 (Ch).

As a tenant in common, the killer had a distinct share in the beneficial ownership of the house before the killing occurred. However, it was held that he was not entitled to any of the proceeds of sale. Scott J rejected the killer's claim, on the basis of 'the inescapable fact that if the defendant can claim [his share of the proceeds of sale], he will be claiming a fund that would not have come into existence *but for* his criminal act'.[130] Such an analysis of the situation suggests that 'but for' causation is not an insurmountable obstacle to restitutionary claims for wrongdoing.[131] The benefit to the killer, of a share in the beneficial ownership almost unencumbered by a mortgage charge, followed inevitably from the killing as the personal representatives were required to use the assets received from the policy to discharge the deceased's debts. That is different to the situation in *Steenkamp*, where the benefit followed from assets received on succession. While *Steenkamp* was an intestacy case, the general principle is of freedom of testation, and so the courts might view a testamentary gift as a free choice by a third person, unlike the situation in *Davitt v Titcumb*.[132]

[130] *Davitt* (n 129) 116 (emphasis added)

[131] Scott J did not treat the case as a restitution one, instead arguing that the mortgagee only held the policy as mortgagee, so that the victim and killer were co-owners of the equity of redemption in the policy. The killer was then barred from asserting any rights under the policy due to the forfeiture rule, and so the funds used to discharge the mortgage were treated as solely those of the victim. The killer's share of the proceeds of sale was then used in paying an equitable contribution to the estate of the victim, due to the benefit he would otherwise receive from the victim discharging their joint debt.

[132] Even intestacy can be regarded as a choice, in that some people may be happy with the outcomes the law of intestacy prescribes, a point noted by Sedley LJ (*Re DWS* (n 40) [33]).

5. CONCLUSION

The forfeiture rule raises a number of difficult questions of both principle and policy. This paper has shown that the forfeiture rule is best understood in the succession context as one which prevents a killer from obtaining any rights as a consequence of the killing, including the right to due administration of an estate. This approach does not address all situations in which the forfeiture rule is relevant. Some difficult situations can be settled through principles of contract and trusts law, while others are more appropriately resolved through gains-based remedies concerned with restitution for the killer's wrongdoing. Seen from this perspective, it may be better to describe the forfeiture rule more generally as a principle, with particular applications in various branches of the law.