THE RULE OF FORFEITURE – *HENDERSON V WILCOX*

Raj Sahonte, Guildhall Chambers

1. Any consideration of the devolution of property upon a homicide, to a person who kills, will need to reflect upon the effect of the Forfeiture Act 1982. The reasoning is succinctly put by Fry LJ: "no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour…The principle of public policy, like all such principles, must be applied to all cases to which it can be applied without reference to the particular character of the right asserted or the form of its assertion"[1]

2. The principal provisions are set out below.

"1. The " forfeiture rule ".
(1)
In this Act, the " forfeiture rule " means the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing.
(2)
References in this Act to a person who has unlawfully killed another include a reference to a person who has unlawfully aided, abetted, counselled or procured the death of that other and references in this Act to unlawful killing shall be interpreted accordingly.

2. Power to modify the rule.
(1)
Where a court determines that the forfeiture rule has precluded a person (in this section referred to as " the offender ") who has unlawfully killed another from acquiring any interest in property mentioned in subsection (4) below, the court may make an order under this section modifying the effect of that rule.
(2)
The court shall not make an order under this section modifying the effect of the forfeiture rule in any case unless it is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified in that case.
(3)
In any case where a person stands convicted of an offence of which unlawful killing is an element, the court shall not make an order under this section modifying the effect of the forfeiture rule in that case unless proceedings for the purpose are brought before the expiry of the period of three months beginning with his conviction.
(4)
The interests in property referred to in subsection (1) above are:
(a)
any beneficial interest in property which (apart from the forfeiture rule) the offender would have acquired—
(i)
under the deceased's will (including, as respects Scotland, any writing having testamentary effect) or the law relating to intestacy or by way of ius relicti, ius relictae or legitim;
(ii)
on the nomination of the deceased in accordance with the provisions of any enactment;
(iii)
as a donatio mortis causa made by the deceased; or
(iv)
under a special destination (whether relating to heritable or moveable property); or
(b)

[1] Cleaver v. Mutual Reserve Fund Life Association [1892] 1 QB 147 at 156

any beneficial interest in property which (apart from the forfeiture rule) the offender would have acquired in consequence of the death of the deceased, being property which, before the death, was held on trust for any person.
(5)
An order under this section may modify the effect of the forfeiture rule in respect of any interest in property to which the determination referred to in subsection (1) above relates and may do so in either or both of the following ways, that is—
(a)
where there is more than one such interest, by excluding the application of the rule in respect of any (but not all) of those interests; and
(b)
in the case of any such interest in property, by excluding the application of the rule in respect of part of the property.
(6)
On the making of an order under this section, the forfeiture rule shall have effect for all purposes (including purposes relating to anything done before the order is made) subject to the modifications made by the order.
(7)
The court shall not make an order under this section modifying the effect of the forfeiture rule in respect of any interest in property which, in consequence of the rule, has been acquired before the coming into force of this section by a person other than the offender or a person claiming through him.
(8)
In this section—
" property" includes any chose in action or incorporeal moveable property; and
" will" includes codicil."

5. Exclusion of murderers.
Nothing in this Act or in any order made under section 2 or referred to in section 3(1) of this Act **[F1** or in any decision made under section 4(1A) of this Act**]** shall affect the application of the forfeiture rule in the case of a person who stands convicted of murder.

3. Where a killer acquires the legal title to property by his criminal conduct in killing, the forfeiture rule may operate to forfeit the property from the individual. Where the forfeiture rule applies, the Forfeiture Act 1982 confers upon a court a discretion to grant relief against the application of the rule.

4. The Forfeiture rule appears to operate by the imposition of a constructive trust on the property acquired as a result of the killing. This is shown by Re Crippen. In that case, the killer purported to leave what would have inured to him under his wife's intestacy, to his mistress. He had murdered his wife, and had been found guilty of her murder and executed.

5. The issue in the probate proceedings was whether the Mistress was entitled to benefit under the will of the murderer. The principal issue being that if the murderer was not entitled to benefit because the benefit accrued to him as a direct result of his having killed his wife, his interest being forfeit, then he could not as a matter of fact and law be capable of transmitting that benefit.

6. Sir Stanley Evans P[2] said it: "is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence."
7. In Henderson v Wilcox, the Claimant "Ian" subjected his mother to a serious and sustained attack. As a result, she died from her injuries several weeks later, never having regained consciousness.

8. A plea to manslaughter was accepted on the footing that he did not intend to kill his mother nor subject her to really serious injury and was sentenced to be detained in hospital under section 37

[2] [1911] P 108 at 112

of the Mental Health Act 1983.

9. A number of years prior to the killing Mother and Son had jointly owned the house in which they lived.

10. In or about May 201 the house, which is registered land, was transferred into four names, i.e. Mrs Henderson, Ian and the two Solicitor Trustees. At about the same time, Ian and Mrs Henderson each executed settlements referred to as "Family Protection Trusts". Mrs Henderson's trust named herself and the two Solicitor Trustees as trustees, recited that all her estate and interest in the house had been transferred to the trustees to be held on the trusts set out therein, and named herself, Ian and Julian as beneficiaries. The trusts declared were, in summary, that the property was held on trust for Mrs Henderson, subject to powers to apply income or capital at the discretion of the trustees for the benefit of any of the named beneficiaries. Ian's trust was in mirror image terms to that of his mother save that the range of beneficiaries was slightly larger.

11. The estate accounts showed that a sum of just over £150,000 has been collected. This was mainly from various accounts and investments held by Mrs Henderson, but also includes half of a sum of some £35,000 found in cash in the house that she shared with Ian after her death. The other half of that amount has been treated as Ian's and given to him.

12. Ian spent in excess of £40,000 in bring the claim under the forfeiture Act. This had the effect of leaving him without without any resources. The estate consisted of £150,000 in liquid funds and the interests under the family protective trusts of the house which mother and son had shared.

13. This was a conviction for manslaughter and therefore section 5 of the Act did not apply, this not being a case of murder. That section would have deprived the Court of jurisdiction to consider the issue of whether the rule of forfeiture should be modified.

14. Under the Act there were always two essential questions:

    14.1. Does the Forfeiture Rule Apply at all?;
    14.2. If it does, should it be modified and if so in what way?

15. The Court dealt with the family trusts first.

16. The Courts in deciding the position in respect of the family protective trusts went through the decided cases to understand what the true rule was under forfeiture.

17. The Court considered the following:

    17.1. Cleaver v Mutual Fund Life Association;
    17.2. Re Crippen;
    17.3. Dunbar v Plant[3];
    17.4. Re K[4];
    17.5. Gray v Barr[5].

18. The decided cases yielded the following results from which the guiding principles might be distilled.

19. In Cleaver, the Court of Appeal unanimously held that the effect of this principle however was not that the assurer was not liable to pay, but that payment was to be made to the executors as representatives of the contracting party (ie the husband) who would hold the proceeds free from the trust in favour of the wife, the wife's interest under that trust being unenforceable. It was, therefore, a case in which the wife's interest under the trust arose prior to the husband's death when the policy was written (and so not by virtue of her crime), but it was her crime which caused

[3] [1998] Ch 412
[4] [1985] Ch 85 at 100
[5] [1971] 2QB 554

the rights under the policy to be converted into money, or at least crystallised the occasion when that occurred.

20. In Crippen, Sir Stanley Evans P, relying on Carver, said "It is clear that the law is that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights." He accordingly directed that a grant of administration to the estate of Mrs Crippen should not be issued to the personal representative of her husband, Dr Crippen (the mistress for whose sake he had killed his wife). Her entitlement to a grant depended on Dr Crippen being entitled to the wife's estate in intestacy, but once the fact of the murder was accepted as proved, he would have been prevented by the forfeiture rule from inheriting.

21. In Dunbar the defendant and the deceased had entered into a suicide pact. The deceased killed himself in performance of that act, but the defendant's attempt to do so was unsuccessful. The judge below held that, unless modified by the Forfeiture Act, the forfeiture rule applied to prevent the defendant obtaining either (a) full ownership by way of survivorship of the house jointly owned by her and the deceased or (b) any benefit arising under two policies on the life of the deceased written for her benefit, one of which was charged to secure a mortgage on the house. It does not appear that the judge's conclusions as to the rights to which the rule applied were challenged on the appeal, which focused on whether the rule applied at all in the circumstances of a suicide pact and whether the judge's exercise of discretion on the question of relief should be upheld.

22. In the same case, the Court of Appeal did not cast any doubt on the conclusions of the trial judge. At p418A Mummery LJ said (referring to Re K [1985] Ch 85 at p100) that it had been rightly conceded that the effect of the forfeiture rule in the case of the house was to sever the joint tenancy so that the defendant retained a half share as tenant in common (the deceased's share therefore passing with his estate). He also noted that there was no dispute that the policy charged to secure the mortgage should be used to satisfy the mortgage debt, notwithstanding that this benefitted the share of the defendant as well as that of the deceased. If that is right, it shows that the forfeiture rule operates not by extinguishing the rights of the criminal to the policy proceeds (since those rights remained enforceable by the chargee) but only as a personal restriction on her own ability to take a benefit arising on the death. That restriction did not extend to the indirect benefit she would achieve by having the mortgage debt reduced.

23. Lastly in Gray v Barr the defendant Mr. Barr had killed Mr. Gray with a shotgun and was convicted of manslaughter. He was sued by Mr. Gray's widow and claimed an indemnity against any damages awarded from an insurance company under a policy covering liability for accidental injury. He was held unable to recover under the policy, both as a matter of construction of the policy but also on public policy grounds. An insurance against liability to third parties is a different form of policy from a life assurance, but where the public policy applies to prevent recovery it will be because the event giving rise to liability, and so to the entitlement to indemnity, is the criminal act of the policyholder. There is considerable discussion in the cases as to the nature of the criminal acts that invoke this policy (distinguishing eg between "motor manslaughter" and deliberate acts see Tinline v. White Cross Insurance Association Limited [1921] 3 KB 327, cf Hardy v. Motor Insurers' Bureau [1964] 2 Q.B. 745) but that does not impact on the type of right affected.

24. In the end, the Judge did not find the cases enormously helpful on the issue of the family trusts but was able to distill a common thread.

25. The cases are all ones where: the offender's right is caused to come into existence, or to be enforceable, or the benefit to the offender is caused to accrue, directly by the death or the criminal act connected with that death.

26. Thus an interest under a will arises on the death of the testator. The right of survivorship operates on the death of a joint owner, but only in respect of that owner's interest. Any interest already held by the criminal in the same property (as in Dunbar v Plant) is unaffected. It would be

true to say that the beneficiary under trust of a life policy has a pre- existing beneficial interest in property (ie the policy) which exists prior to the death. But it is the death that causes that interest to be enforceable in the sense that an entitlement to payment arises. In the case of indemnity insurance, the policy exists beforehand but the right to indemnity arises only because of the commission of the criminal act.

27. The interests under the Family Protection Trusts did not arise from (or "result from") the death of Mrs Henderson. Insofar as he is a discretionary beneficiary of Mrs Henderson's trust, he acquired that status on the execution of the trust and his interest is neither created not enlarged by her death.
28. If the trustees exercise their powers to pay any income or capital to him, he will receive it as a result of the decision of the trustees (albeit one they may make in light of the death) and not by virtue of the death itself. The position is a fortiori in the case of his own trust; the property settled (a joint interest in the house) was his before death and even if he had retained it in his own name he would not have had it removed from him by the forfeiture rule (cf Ms Plant's existing share in Dunbar v Plant).

29. The effect of each joint owner separately dealing with their own beneficial interest (by declaring the Family Protection Trusts) would be to sever the beneficial joint tenancy in the House. Ian's separate share is now held by the trustees (there is no suggestion that the trust is invalid) and his present interest in it derives from the terms of the trust and not in any respect from the death of Mrs Henderson.

30. As a result, the Rule doe not apply to any interest now existing or one that might arise in the future from an exercise of the trustees' discretion.

31. The application of the rule to the £150,000 liquid estate was a different matter. The Rule prima facie applied. The Claim was brought within the 3-month time limit. Section 5 does not apply. The Court has a discretion.

32. The court was required to have regard to the conduct of the offender and the deceased, and any other circumstances which appear to the court to be material.

33. The Court must be positively satisfied that "the justice of the case requires" not just that the rule be modified, but that it be modified in the particular respect determined by the court.

34. The power may be flexibly exercised; s2(5), the effect of which is that the court may disapply the rule in respect of part or all of the property affected by it, and, where different interests are created in property, in respect of all or any of those interests (see per Vinelott J in Re K, above at p 100, cited by Phillips LJ in Dunbar v Plant at p 436).

35. The Act itself gives no guidance as to the matters to be taken into account other than the conduct of the offender and the deceased. "In Dunbar v Plant Mummery LJ said at p 427:

> "[Section 2(2)] requires that the judge should look at the case in the round, pay regard to all the material circumstances, including the conduct of the offender and the deceased, and then ask whether "the justice of the case requires" a modification of the effect of the forfeiture rule... The court is entitled to take into account a whole range of circumstances relevant to the discretion, quite apart from the conduct of the offender and the deceased: the relationship between them; the degree of moral culpability for what has happened; the nature and gravity of the offence; the intentions of the deceased; the size of the estate and the value of the property in dispute; the financial position of the offender; and the moral claims and wishes of those who would be entitled to take the property on the application of the forfeiture rule."
> Phillips LJ (with whom Hirst LJ agreed) did not comment specifically in relation to this list of matters, saying only (at p 438)
>
> "The discretion is a broad one, and it is legitimate to have regard to all the consequences of the order, but it is not right to approach the exercise of the discretion as if dealing simply with

an inter partes dispute...The first, and paramount consideration, must be whether the culpability attending the beneficiary's criminal conduct was such as to justify the application of the forfeiture rule at all... I have already given my reasons for suggesting that it is likely to be appropriate to relieve the unsuccessful party to a suicide pact of all effect of the forfeiture rule..."

36. The Court was struck by the following features:

36.1. A sustained assault over a number on months culminating in the final one;
36.2. The Culpability of the Claimant was a high one, he knew right from wrong and there was no doubt about his capacity. He knew assaulting his mother was wrong and yet he continued and manipulated others to conceal his actions. He bullied his mother into silence. He lied to social workers and instructed solicitors to threaten harrasement proceedings against them on a false basis.;

36.3. He has his own trust and may benefit from his mother by the trustees' discretion if he has real hardship.

37. This fell on the wrong side of an application to modify the and relief was refused.

Donatio Mortis Causa King v Redwings

1. This was an appeal brought by two charities against the decision of a Deputy High Court Judge who found that the property, which would have otherwise passed under a valid will, had in fact passed under a Donatio Mortis Causa " DMC".

2. The Claim before the Court of first instance was that the property passed under a DMC and alternatively a claim under the Family Inheritance Act 1975 for provision.

3. The Judge upheld both claims and under the 1975 act awarded £75,000 as an alternative to the DMC claim should he be proved wrong.

4. The facts were that the Deceased, a retired police officer made a valid will in March 1998 and after some modes legacies she left her estate to 7 charities.

5. The Claimant was her nephew and had led a colourful and non too successful life. This led him eventual to lodge with his Aunt who was becoming increasingly frail. This was around 2007. The Deceased died in April 2011.

6. As background to the DMC, the Court found the following matters to be of some importance:

    6.1. In November 2010, the Aunt wrote and signed a short note stating that in the event of her death she left the house and and her property to the Claimant "in the hope that he will care for my animals";
    6.2. Shortly afterwards the Aunt collected her title deeds to the house from her bank and presented them to the Claimant with the statement that "this will be yours when I go";
    6.3. In February 2011 a document written by the Aunt leaving her house to the claimant in the hope that he will care for her animals;
    6.4. A pro forma will down loaded from the internet, which left here real and other estate to the Claimant. The will was not attested in accordance with section 9 of the wills Act 1839.

7. The Aunt died in April 2011 and the Claimant sent the animals off to animal homes.

8. The document signed by the Aunt did not comply with section 9 of the 1839 Act and therefore the validly executed will of 1998 took effect. As a result, the Claimant, who would be deprived of benefitting, brought a claim for a DMC.

9. The judge found in favour of the claimant. He granted a declaration to the effect that the Aunt had made a valid Donatio mortis causa; therefore, the claimant had become the legal and beneficial owner of the property on 10 April 2011.

10. A summary of the the judge's findings and reasoning is as follows:
    10.1. "i) The judge had not found it an easy question whether to accept the claimant's evidence. Nevertheless the documents which June signed in the last six months of her life were powerful corroborative evidence. In the end, whilst approaching the claimant's evidence "with a very considerable degree of circumspection", the judge accepted it as accurate on the matters relevant to the DMC.
    10.2. ii) The judge reviewed the authorities on DMC, gaining particular assistance from Sen v Headley [1991] Ch 425 and Vallee v Birchwood [2013] EWHC 1449 (Ch); [2014] Ch 271.
    10.3. iii) Applying the principles stated in those authorities, the words spoken by June to the claimant four to six months before her death and the act of handing over the deeds constituted a DMC.
    10.4. iv) June had capacity to make the DMC.
    10.5. v) June did not subsequently revoke the gift. Accordingly it took effect on her death;
    10.6. if he was wrong about the DMC, then the claimant was a dependant of the Aunt and he had a good claim against her estate for reasonable financial provision under the 1975 Act. The judge quantified that (on his analysis hypothetical) claim at £75,000.

11. The Charities appealed to the Court of Appeal

The Law

12. Donatio mortis causa is a principle of Roman law which emerged in the classical period. It was refined and codified under Justinian. The principle is concisely stated in the Institutes, book 2, title 7.

13. In accepted translation, this is a gift with the following characteristics:
    i) D makes the gift because he anticipates death;
    ii) D makes the gift to R on the understanding that if D dies, R will keep it;
    iii) If D survives, he shall receive it back;
    iv) D may revoke the gift at any time;
    v) If R predeceases D, D shall receive it back.

14. The Court went through a number of authorities. One is deserving of mention. Cosnahan v Grice [6] a claim for a DMC failed because of the "looseness" of the language used by D when handing over the relevant items to R. Lord Chelmsford stressed the need for strict proof. He stated at 223:

> "Cases of this kind demand the strictest scrutiny. So many opportunities, and such strong temptations, present themselves to unscrupulous persons to pretend these deathbed donations, that there is always danger of having an entirely fabricated case set up. And, without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of persons languishing in a mortal illness, and, by a slight change of words, to convert their expressions of intended benefit into an actual gift of property, that no case of this description ought to prevail, unless it is supported by evidence of the clearest and most unequivocal character."

44. The Court then went on to note that the first consideration as to whether the rule applied to real property was Sen v Headley[7]and observed that: *"DMC was an anomaly in English law for two reasons. First, it was immune to the Statute of Frauds 1677 and the Wills Act 1837. Secondly, it was an exception to the rule that there was no equity to perfect an imperfect gift. Nourse LJ conducted an extensive review of the authorities. He noted that D must make the gift in contemplation of impending death. That was satisfied here. He noted that the gift must be conditional upon death. That was satisfied in the present case. Thirdly, there must be a delivery of the subject matter of the gift, which amounted to a parting with dominion. Nourse LJ concluded that, by giving R the keys to the box holding the deeds, D had parted with dominion over his house. Accordingly, all the elements of DMC were satisfied".*

15. Last in the review of authorities was Vallee v Birchwood.[8] This was a case where D who appeared to be in failing health said to a daughter that he did not expect to be alive on her next visit. He gave her the title deeds and a key to his house. He died intestate 5 months later.

16. Jackson LJ who was very sceptical about the usefulness of the doctrine said *"I must confess to some mystification as to why the common law has adopted the doctrine of DMC at all. The doctrine obviously served a useful purpose in the social conditions prevailing under the later Roman Empire. But it serves little useful purpose today, save possibly as a means of validating death bed gifts. Even then considerable caution is required. What D says to those who are ministering to him in the last hours of his/her life may be a less reliable expression of his/her wishes than a carefully drawn will. The will may have been prepared with the assistance of a solicitor and in the absence of the beneficiaries. There are no such safeguards during a deathbed conversation. The words contained in a will are there for all to see. There may be much scope for disagreement about what D said to those visiting or caring for him in the last hours of his life.*
In my view therefore it is important to keep DMC within its proper bounds. The court should resist the temptation to extend the doctrine to an ever wider range of situations"

[6] (1862) 15 Moo. P.C. 215
[7] [1991] Ch 425
[8] [2013] EWHC 1449

17. So what are the proper bounds of the doctrine?

54. Jackson LJ found them to be as follows: *"The first requirement is that D should be contemplating his impending death. That means D should be contemplating death in the near future for a specific reason: see the dictum of Farwell J in Craven. Beaumont, Wilkes v Allington, Craven's Estate, Birch and Sen are all good illustrations of such contemplation. In Beaumont D was in hospital and seriously ill. In Wilkes v Allington D had an incurable disease and knew that he could not live long. In Craven D was about to undergo an operation which might (and in the event did) prove fatal. In Birch D was a frail elderly woman, who was in hospital after suffering a serious accident. In Sen D was in hospital suffering from pancreatic cancer. His condition was inoperable and he knew that he was dying. I do not say that DMC is only available when D is on his deathbed, even though that is the situation in which the doctrine might be said to serve a useful social purpose (provided that no-one is taking advantage of D's dire situation). Nevertheless it is clear on the authorities that D must have good reason to anticipate death in the near future from an identified cause. It is also clear on the authorities that the death which D is anticipating need not be inevitable. The illness or event which D faces can be one which D may survive. In Craven, for example, if the operation had been successful D would have recovered."*

18. In looking to the Vallee case which the Deputy Judge followed, the Court of Appeal decided, that it had been wrongly decided but crucially in respect of the first matter. Namely that D did not have reason to anticipate death in the near future from a known cause. If D wanted to leave his house to his Daughter, he had the time to take advice and make a will. Having found Vallee wrongly decided, it left the Court to look at the case on hand afresh.

19. The first requirement is that the Aunt was contemplating her impending death when she had the crucial conversation with the claimant. There was no evidence that she was suffering from any specific illness. She had not visited a doctor for some time.

20. It could not be said that June was contemplating her impending death at the relevant time. She was not suffering from a fatal illness. Nor was she about to undergo a dangerous operation or to undertake a dangerous journey. If she was dissatisfied with her existing will and suddenly wished to leave everything to the claimant, the obvious thing for her to do was to go to her solicitors and make a new will. She was an intelligent retired police officer. There is not the slightest reason why she should not have taken that course.
21. If She had taken that course, the solicitors would have talked to her in the absence of the claimant. They would have ensured that she understood the new will which she was making and that she intended the consequences. One of those consequences was that the animal charities, which June had supported for many years, would inherit nothing on her death. If the DMC claim is upheld, the effect will be that June's will is largely superseded and the bulk of her estate will pass to the claimant, who is not even named as a beneficiary in the will. This would bypass all of the safeguards provided by the Wills Act and the Law of Property Act.

22. The first requirement of the DMC doctrine is not satisfied and the claim thus failed.

23. The Court also found that the Second requirement had also not been satisfied: The Court found the words: "this will be yours when I go" are more consistent with a statement of testamentary intent, than a gift which was conditional upon June's death within a limited period of time. Furthermore, both the claimant and his aunt acted as if the conversation had constituted a statement of testamentary intent. The ineffective documents which June signed on 4th February and 24thMarch 2011 indicated that she was trying to dispose of her assets by means of a will. (She was doing this with the active assistance of the proposed beneficiary, rather than someone independent.) Those actions were inconsistent with the proposition that June had already disposed of her assets by means of a DMC".

24. The effect of this decision is to leave the state of the law in this field much clearer and easier to apply.

Raj Sahonte
Guildhall Chambers
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