#11

COURT OF APPEALS,

STATE OF NEW YORK.

PHILO RIGGS as Guardian, et al.,
Appellants,

vs.

ELMER E. PALMER et al.,
Respondents.

ARGUMENT

OF LESLIE W. RUSSELL, FOR APPELLANTS, JUNE 21, 1889.
OPINION OF COURT, EARL, J., OCTOBER 8, 1889.
DISSENTING OPINION GRAY, J.

CANNOT THE UNWRITTEN LAW PREVENT THE MURDERER FROM PERFECTING TITLE BY CRIME?

The only question to be solved upon this appeal is, Does the unwritten law prevent or protect the murderer in the possession of the fruits of his crime? The Trial Court and the General Term have announced that he takes as good a title as any innocent person, though that title be consummated by death which he has murderously caused.

I maintain the reverse, and hence am here, as the final resort, for the maintenance of the principle which I contend underlies the entire artificial framework of the law.

In a quiet rural home lived the grandfather, Francis Palmer, with his second wife and his grandson, Elmer Palmer, the child of a deceased son. The grandfather, on account of a partiality for Elmer, who was a boy of sixteen years, had made his will giving him, practically, the entire estate, to the exclusion of his two daughters, who were married and had other homes. Subject, therefore, only to the charge for the support of the wife, the life of the grandfather stood alone between Elmer and what, to him, was practical riches. He resolved that this life should not stand long in the way, so that he might enjoy a passion, which he had conceived for a young girl, by marriage, if necessary, and, as he declared, "clothe her with gold."

Therefore, during the absence of the grandfather and his wife upon a short visit to a neighbor, he placed in the bottle of liquor which he knew his grandfather would, according to custom, use to some extent on his return, a quantity of strychnine, and coolly watched the grandfather drink the poison, remarking to a companion whom he had sought to enlist in his crime, that "Now he has got a dose." Death soon occurred; the boy was arrested for murder, was let off by a sympathetic jury with a verdict of murder in the second degree; was sentenced by the Court to the Elmira Reformatory, whence, under the rules for superficially good conduct, he soon emerged, and now stands in possession of

the property of his murdered grandfather, gravely asserting that no law in force in the State of New York can prevent this result.

This action was brought by the daughters in the belief of their counsel that this position of the murderer was incorrect. The Trial Court found the facts as stated, that the object of the murder "was to obtain speedy enjoyment of the property bequeathed and devised to him, and to prevent the revocation by Francis of the provisions of the will beneficial to him," yet held that the law of the State devolved the title, by force of the will, upon the murderer; that it needed legislation to effect a different result; and, upon appeal, the General Term of the Supreme Court affirmed this ruling.

In order that I may correctly state the grounds of the judgment below I quote the conclusions of law:

First.—That in the State of New York the transmission of property by will and the descent of property are entirely creations of statute and governed thereby.

Second.—That nothing remains to Courts but to enforce the statutes as they are, the old maxims of the common law being controlled and overridden thereby.

Third.—That under the statute law of this State no exception on account of crime is made as to the right to take by will or descent, though in some civilized countries it is provided by statute that the beneficiary under a will, heir at law or next of kin, who intentionally plots the death of the testator or ancestor, shall not take under his will nor by descent.

Fourth.—That Elmer E. Palmer, though having wickedly and maliciously compassed the death of the testator, is still entitled under the statutes of this State to take under his will and enjoy the fruits of his crime.

Fifth.—That the plaintiffs have therefore failed to establish a cause of action against the defendants.

I maintain that the position of the plaintiffs was correct upon three general grounds:

1st.—On principle.

2d.—By authority.

3d.—For public policy.

On Principle.

I do not claim that the grandson Elmer may not take because there was a revocation of the will, or because there was a new will made, but because he unlawfully prevented a revocation or a new will by the crime, and because he terminated the enjoyment by his grandfather of his own property, and effected his own succession to it, by the same crime.

I maintain that all statutory law, conferring rights, rests upon the broad basis of acquiescence in abstinence from crime, as applied to the enforcement of a right which is dependent upon any statute. I do not claim that any punishment should be added to that prescribed by the statute for the penalty of crime, but I do maintain that, whether a particular crime be punished or not, no civil right can be conferred, which requires the protection and aid of the law in its enforcement and enjoyment, by means of a crime.

In all instruments by which the passage of title is effected there is the ample obligation, which is of universal application, that the beneficiary will do nothing to either criminally obtain the execution of the instrument, or its performance. There is no need of legislation, or of written covenant, to insert this obligation in words in the instrument. It is the very basis of the instrument itself.

If the draughtsman fraudulently inserts in the instrument a bequest to himself, the will, at least as to that part, is void. Yet there is no covenant, nor is there any legislation, which so declares.

And the like rule pertains as to the vesting of the title under the will. Suppose it contained a clause by which the testator, being weary of life, said that the beneficiary should receive his estate at his death, upon his assisting the testator to commit the crime of suicide.

The courts would not enforce such a bequest upon the ground, not of legislation, but of repugnancy to moral and municipal law. Is it any the more enforceable as a bequest because the beneficiary murders the victim against the will of the testator? If the will expressed by the testator cannot be carried into effect, can the clause be effectuated if the instrument, which is revocable until death, becomes operative only by murder?

Can there be any doubt about the implied obligation of the

beneficiary to abstain from terminating the enjoyment by the testator of his property and of his life? Yet the learned Referee and the General Term are obliged to say there is no such implied obligation to reach the result they attain.

Again, the very object of the protection which the law affords to a will is that the property may go at the death of the testator peacefully, and by force of his wishes legally expressed, to the beneficiary whom he desired to name as his successor.

Yet the very object upon which the law is founded is violated where the succession, through forms of law, is obtained by the highest crime known to the law.

Again, the doctrine of estoppel, which is constantly widening in its application, as various forms of human action vary, rests entirely upon the natural principles of justice, which would be grossly outraged were not such an estoppel applied here. Did not Francis B. Palmer have the undoubted right to believe that Elmer, however badly he might act, would not hasten his succession by murdering his grandfather? And does not estoppel apply to all cases where the commonest principles of justice urge that the wrongdoer shall not take?

And was it necessary for Francis B. Palmer, in order to prevent such a result, to say in his will, "this bequest and devise to Elmer E. Palmer is on the condition that he does not murder me"?

By Authority.

It needs no authority to say that the right of Francis B. Palmer to make another will was a sacred one, entitled to the protection of the law, that he had the same right to enjoy his prop-

erty until death, and that Elmer E. Palmer violated both of these rights, which are civil rights, independently of criminal punishment.

It needs no authority to say that if Elmer had locked up his grandfather to prevent his making a second will, a Court of Equity would restrain the wrongdoer by injunction from continuing such an act. Does it require any authority to maintain that the successors of the grandfather have the right of action continued against Elmer, because he successfully accomplished his purpose? And does the fact of that snccessful accomplishment prevent the continuance of the remedy?

I.—The maxims of both the common and civil law apply with direct force.

"No man shall take advantage of his own wrong."

Broom's Legal Maxims, 275.
Coke's Littleton, 148*b*.

Does not this maxim apply to all human actions? Can any individual acquire a right *ex turpi causa?*

Other maxims of the common law are directly applicable.

Ex dolo malo non oritur actio.

Nemo ex proprio dolo consequitur actionem.

Frustra legis auxilium quaerit, qui in legem committit.

It is not wonderful that we find no case pertinent to the one at bar in the annals of the common law, because at common law the blood of the murderer was corrupted, and he could neither take nor transmit the inheritance.

There is, however, in the Court of Appeals of this State, a case which rests, it seems to me, upon the same general principles, although of far less aggravation. In the case referred to a contract for the sale of property was void because it did not comply with the statute of frauds. There was no power which could compel the vendor to give the vendee the benefit of the contract. It was wholly voluntary with him; yet it was held that where a third person by fraud prevented the execution of the contract which might have been consummated, a cause of action arose in favor of the vendee, who could not enforce the contract against the vendor.

Rice *vs.* Manly, 66 N. Y., 82.

Perhaps a more pertinent case is that of the Mutual Life Ins. Co. *vs.* Armstrong, 117 U. S., 591, 600. In that case the beneficiary murdered the person whose life was assured. The Circuit Court of the United States rejected the evidence of this murder, holding, either that it was not admissible as against Armstrong, the plaintiff, or that, the contract being silent as to the manner of death, took effect and was payable upon the happening of that death, precisely as is claimed here, that the will took effect upon the death of Francis Palmer, and by force of law, Elmer succeeded to the title, irrespective of the manner in which that death was accomplished.

A recovery was had in the Court below. A writ of error was taken to the Supreme Court of the United States. That Court did not deem it necessary to have recourse to any fundamental maxims of the common or civil law, but decided this question upon the broad ground of natural law, and I quote the words upon which they preferred to rest their decision in the case :

"But, independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable upon the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired.

"This view renders it necessary to consider the effect upon the policy of the statements, made in the application of the assured, as to the amount of other insurances on his life.

"*Judgment reversed*, and cause remanded for a new trial."

I cited this case upon my brief before the General Term. It was there disposed of upon the assumption that, in the application of the rule of moral law, recognized by the municipal law, a distinction lies between the passage of title by will and by contract. The assumption of that opinion is that, if Elmer had claimed title by a deed or contract transferring it to him upon the death of his grandfather, the accomplishment of that death by murder, committed by the grantee, would be a violation of all the implied obligations of the contract, and the property would not go to the murderer.

I submit with all earnestness that there is no distinction which

obtains in the enforcement of such a rule of common justice. No case is cited to sustain it. The reason of the rule applies in one instance as well as in the other; and the booty comes to the murderer with as many blood marks where the gracious favor was created by the will.

Upon what ground does the application of the rule rest in the case of a contract? It is that there is an implied obligation of the observance of the primary rules of natural law. That the death which makes the policy payable shall not be consummated, nor shall the natural life be shortened, by the murderous act of the beneficiary.

So also an implied obligation arises, without reference to any clause in the contract, or any statutory law, that the man who has his house insured shall not by his own wilful act determine the occasion by which the policy is payable.

Therefore, I think all of the urgency that the moral, natural and municipal law brings to the contemplation of the application of law to occasion applies here as well as in case of contract. Nay, more; the difference is in favor of the will. That is purely gratuitous and of kindly favor, *and the event may never happen which would make it effective, if law be regarded*, while in the case of a life policy it must happen. Death must come some time to the insured, and then the policy is payable. It may not come to the testator in the lifetime of the benficiary, and then the devise would lapse. The beneficiary has no right to make the contingency absolute in his own favor.

I say then, that the foundation of the decisions, in this and kindred cases, is the assumption that no man can take title by an unlawful act; that, if the unlawful act be provided for in the body of the instrument, it makes that instrument void; and, if that unlawful act be in execution of a contingency in a valid instrument it destroys the efficacy of the instrument itself in its application to the criminal.

I submit further, that in the construction of wills, in the application of extrinsic facts, happening subsequently to the execution of the will, the fundamental rule for the Courts is, as has been

expressed so often as to have become trite, that the intent of the testator is the polar star to guide the Courts; and, having here the express finding, which was, perhaps, entirely unnecessary, it being so certain that, had the testator anticipated the murderous intent, the bequest never would have been made or continued, that intent will not be so grossly violated, as to give to this criminal the benefits expressed under a mistaken belief, and preserved in technical form only for want of knowledge of the murderer's heart.

Such considerations have, in a far feebler case, been held very pertinent by this Court. "Where a person, even by silent acquiescence, encourages a testator to make a devise or bequest to him, with the declared expectation that he will apply it for the benefit of others, this has the force and effect of an express promise so to apply it, as if he does not intend so to do, the silent acquiescence is a fraud."

O'Hara Will Case, 95 N. Y., 403, 412.
See also Wallgrave *vs.* Tebbs, 2 K. & J. 321.
Schultz's Appeal, 80 Penn. St., 405.
Russell *vs.* Jackson, 10 Hare, 204.

Is not the same principle applicable here? Is it not a fraud upon the testator that the beneficiary should intend to deprive him of the enjoyment of his property and prevent the revocation of a will? Is it not such a fraud as will justify the Courts in saying that it reaches back to the making of the original will, or deprives the execution of that will of validity and effect, so far as this beneficiary is concerned? Will not the law say to the murderer who claims at its hands the property devised and bequeathed. "It is only yours upon the happening of a death produced in the due course of nature from causes with which you are not guiltily associated, and that time can never come now?"

"No Court will lend its aid to a man who founds his cause of action upon a fraudulent or illegal act."

Ld. Mansfield in Holman *vs.* Johnson, Cowp., 343.

"The Courts favor a decision which upholds common decency and common morals and violates no rule of law or equity."

Piper *vs.* Hoard, 107 N. Y., 82.

I also refer to the doctrines of the civil law with all the more confidence because we have seen the reason why a precisely parallel case would not arise under the common law. The principle of the common law, applicable especially here, lies dormant in cases where title could never be taken for other reasons.

And, as so little attention was paid below to the maxims of the civil law, let me premise in regard to their present efficacy and force.

In regard to the application of payments, which is a common law subject, Judge Story says, in his Equity Jurisprudence, Sec. 459 *e*: "Notwithstanding there are contradictory and conflicting authorities on this subject in the English and American Courts, one should think that the doctrine of the Roman law is, or at least ought to be held, and may well be held, to be the true doctrine to govern our Courts."

I also refer to the opinion of Judge Peckham in Orleans County Bank vs. Moore, 112 N. Y., 549, in which he says, that we may go to the civil law for enlightenment on principle.

I also refer to Justinian himself to show how nearly like the common law the civil law regarded the force of unwritten laws.

"The unwritten law is that which usage hath approved ; for daily customs, established by the consent of those who use them, put on the character of law."

Cooper's Ed. Insts. of Justinian, Sec. 9, p. 10.

Wherever a moral question was involved in the application of civil rights, the civil law, whether announced in the Institutes, Codes and Pandects, or whether it rested simply in the application of unwritten law, was founded, so far as Courts could take cognizance of human action, on *fas, jus, et boni mores.*

Encyclopedia Brittanica, Title, Roman Law, "Introduction."

The whole legislation of Justinian; and that preceding it, was founded on natural law.

Same article, "Justinian Legislation."

It is without doubt that the beneficial maxims of the common law, collected by Littleton, Coke and Bacon, as well as the modifying influences of equity jurisprudence, are founded npon these enlightened maxims of civil law which were brought to Great Britain by the German, French and Latin races. And it is diffi-

cult, to this day, to discover a single maxim, which was founded on natural law, that is not directly traceable to the Roman Jurisprudence.

Those maxims have become insensibly assimilated to the elastic combined common law and equity jurisprudence of the English speaking peoples. They guide and they govern men in their social and business life. They are founded upon the highest of all possible motives for human action. They cannot be disregarded. And, when I quote such maxims as applicable to a question of natural law, and the desirability of enforcing that law, I believe in the absence of direct precedent, if none exists, they certainly ought to be followed to prevent the successful accomplishment of crime, and the installation of a harmful principle, and the confession that our unwritten law is incapable of executing itself in the defense of the commonest principles of justice.

If the beneficiary attempts the life of the testator he cannot take under the testament.

Domat, Civil Law, Part II, Book I, Tit I, Sec. 3, Cushing Ed., 1850, 2d Vol., 78, 84.
Pothier on Successions, Chap. I, Sec. 2, Art. IV, Sec. 2.
Toullier, Vol. IV, pp. 113, 114.
Duranton, Vol. VI, p. 111.
Marcade, Vol. III, p. 42.
Code Napoleon, Art. 727.
Spanish Partidas, 994.
Louisiana Code, 1560, 1710.

This claim can be sustained upon the ground that Elmer Palmer is estopped by his own conduct from claiming the title to this property, or that the condition upon which he takes has, in contemplation of law, never happened. Francis Palmer had the undoubted right to his life, and also the undoubted right to rely upon Elmer's not doing anything to shorten it. It matters not whether that reliance was an active one, induced by direct asseverations or actions, or the unconscious reliance of one who does not even find it necessary to inquire into the assurance of his own safety from the murderous hand of his grandson, because of the unheard of possibility of danger from such an act.

The doctrine of estoppel, from a feeble beginning, recognized in the time of Coke as applicable only to the recognition of a

landlord's right by the receipt of rent, and a few other cases, has grown and widened as its equitable force has become more apparent, until now the rule is that no man may take title to the property when, by so doing, he injures confidence which he has induced, or gets it by an act which the law recognizes as evil in itself.

Bigelow on Estoppel, 370.
Herman on Estoppel, Secs. 733, 731, 740, 991.
2 Story's Equity Jurisprudence, Secs. 1533, 1544.

No man may assert title where equity and good conscience forbid.

Herman on Estoppel, Secs. 734, 743.

Estoppel is founded on the rule that no man shall take advantage of his own wrong.

Id., 735.

Will the law say that equitable estoppel applies where a bailee receipts property, and not where he takes property by murder? Citations from eminent authorities justify the assertion that equitable estoppel now goes beyond the case where the party acts upon the conduct of another, fraudulent or innocent, and would be harmed if the assumption were successfully contradicted by proof, to cases where equity requires silence as to an asserted claim.

Thus, in case of a will: This Court has held that a party is estopped from asserting a just claim against an estate because it is inconsistent with her action in receiving benefits under the will.

Caulfield *vs.* Sullivan, 85 N. Y., 153.

The doweress is estopped from asserting a rightful claim to dower even in an intestate or residuary share, because of acceptance under a will.

Chamberlain *vs.* Chamberlain, 43 N. Y., 425, 442.

A son is estopped from claiming title to land coming to him from a person other than his father because of his acceptance of a benefit under his father's will.

Leonard *vs.* Crommelin, 1 Edw. Ch., 206.

One who receives an interest under a will is estopped from maintaining an action upon a guardian's bond given for his bene-

fit by the testator, although a large sum is rightfully due upon it, because of a condition in the will that he should refrain from suit.

Shivers *vs.* Goar, 40 Ga., 676.

It is on the ground of estoppel that these and kindred rulings are made.

Cox *vs.* Rogers, 77 Pa. St., 160.

It will be observed that the acceptance under the will after the testator's death, in no manner influences the testator's conduct in making the will, and the only ground upon which the estoppel works is that, as the testator made the bequest in reliance upon the acceptance, or, as the acceptance and the claim both would be inconsistent with the testator's intent, the estoppel works.

So here, the testator made this devise and bequest in reliance, at least, upon that good faitn of the beneficiary which the law recognizes as binding upon all, and the violation of which it will punish.

For Public Policy.

Words would be wasted in the endeavor to portray the evil consequences of the judicial ruling, that a bequest or devise may take effect in favor of a murderer by the commission of his crime. The lower Courts concede this, and only say that the law of the land is manacled by legislation so that justice cannot be done, and the General Term significantly hints that the attention of the Legislature should be called to the deficiency.

I had always supposed that the statutory and unwritten law formed a complete body applicable to the prevention of private wrongs, as well as the enforcement for public example of salutary rules forbidding the acquisition of property by crime. I do not believe yet that I am mistaken.

What are the statutes to which vague reference is made by the lower Courts? They are simply those statutes which provide how a will shall be executed, and how it may pass title, and how the will as a whole may be revoked. Those statutes in no manner provide that every bequest or devise shall be effective or valid, and we have, in fact, legislation which provides for the testing of the effectiveness of devises either upon the face of the will, or

for extrinsic circumstances not connected with the execution of the will.

Code Civil Procedure, § 866.
Ct. of Appeals, Anderson *vs.* Anderson, 112 N. Y., 104.

We might not be able to resist the probate of the will, because validly executed, and not revoked ; but we might show matters, *dehors* the will, which prove that a devise or bequest is ineffective, as alienage of the taker, confusion in regard to the person meant as beneficiary, or incapacity to take from any cause.

It is, therefore, a grave mistake for the Courts to rule that the efficacy or invalidity of the disposing clauses in a will, which is partly valid in effect, are to be judged purely by statutory law. Nine-tenths of the questions arising upon such clauses are determined by the principles of the unwritten law. It will not be assumed that the statute was intended to protect and cover a foul crime. If it were, that statute itself would be void.

I quote from elementary authority, all of which is in unison upon this subject—Broom's Legal Maxims, pp. 19, 20, under the rule, "*Summa ratio est quae pro religione facit.*" Coke on Littleton, 341*a*.

"It may, however, safely be affirmed that, if ever the laws of God and man are at variance, the former are to be obeyed in derogation of the latter, that the law of God is, under all circumstances, superior in obligation to that of man, and that, consequently if any general custom was opposed to the divine law, or if any statute were passed directly contrary thereto, as if it were enacted generally that no one should give alms to any object in ever so necessitous a condition—such a custom, or such an Act, would be void."

Affirmed also by these authorities :
Finch's Law, 75, 76.
Noy, Max., 9th Ed., 2.
Doct. & Stud., 18th Ed., 15, 16.

And a party is estopped from maintaining even a statutory claim of right, as in cases of usury, where his conduct led to the belief that the security was perfect.

The mistake that is made, when it is said that legislation is

needed to prevent such a gross perversion of justice is in not recognizing the distinction between *malum prohibitum* and *malum in se.*

In the former case artificial lines of action may require legislation to declare a wrong. In the latter case, even where legislation may not have made an evil thing a crime, it is never necessary to declare by statute that an act, which is recognized as base in itself, shall not pass a property, or convey a right.

Again, the theory of the statute may well be that legislation fulfills its office in simply declaring how the testator shall act to destroy the efficacy of a will, but not how the beneficiary can destroy his power to receive.

So applied, the law operates upon the capacity of a murderer to take property by murder, and not upon the force of the will, and perfect justice is accomplished without the disregard of a single rule of law.

I ask, therefore, that this judgment be pronounced ;

1st. That Elmer and the administrator be enjoined from using the personalty or real estate for Elmer's benefit.

2d. That it be declared that the devise and bequest in the will to Elmer was not effective to pass the title to him.

3d. That by reason of the crime of murder committed upon his grandfather, Elmer is estopped from taking any interest in the estate which would otherwise come to him upon such death.

4th. That the plaintiffs are the true owners of the real and personal estate left by Francis Palmer, deceased, subject to the charge in favor of Elmer's mother, and the ante-nuptial agreement.

LORETTA A. RIGGS, *et al.*,
Appellants,

vs.

ELMER E. PALMER, *et al.*,
Respondents.

October 8th, 1889.

LESLIE W. RUSSELL, for Appellants.

W. M. HAWKINS, for Respondents.

EARL, J.:

On the 13th day of August, 1880, Francis B. Palmer made his last will and testament, in which he gave small legacies to his two daughters, Mrs. Riggs and Mrs. Preston, the plaintiffs in this action, and the remainder of his estate to his grandson, the defendant, Elmer E. Palmer, subject to the support of Susan Palmer, his mother, with a gift over to the two daughters, subject to the support of Mrs. Palmer, in case Elmer should survive him and die under age, unmarried, and without any issue. The testator, at the date of his will, owned a farm and considerable personal property. He was a widower, and thereafter, in March, 1882, he was married to Mrs. Bresee, with whom, before his marriage, he entered into an anti-nuptial contract, in which it was agreed that, in lieu of dower and all other claims upon his estate, in case she survived him, she should have her support upon his farm during her life, and such support was expressly charged upon the farm. At the date of the will and subsequently to the death of the testator, Elmer lived with him as a member of his family, and at his death was sixteen years old. He knew of the provisions made in his favor in the will, and, that he might prevent his grandfather from revoking such provisions, which he had manifested some intention to do, and to obtain the speedy enjoyment and immediate possession of his property, he wilfully murdered him by poisoning him. He now claims the property, and the sole question for our determination is, can he have it?

The defendants say that the testator is dead; that his will was made in due form and has been admitted to probate, and that, therefore, it must have effect according to the letter of the law.

It is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer.

The purpose of those statutes was to enable testators to dispose of their estates to the objects of their bounty at death, and to carry into effect their final wishes, legally expressed, and in considering and giving effect to them this purpose must be kept in view.

It was the intention of the lawmakers that the donees in a will should have the property given to them. But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it. If such a case had been present to their minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it. It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers.

The writers of laws do not always express their intention perfectly, but either exceed it or fall short of it, so that judges are to collect it from probable or rational conjectures only, and this is called rational interpretation; and Rutherford in his Institutes, page 407, says: "When we make use of rational interpretation, sometimes we restrain the meaning of the writer so as to take in less, and sometimes we extend or enlarge his meaning so as to take in more than his words express."

Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view, for *qui haeret iu litera, haeret in cortice.* In Bacon's Abr. Statutes, 1, 5, Puffendorf, Book 5, Chap. 12; Rutherford, pp. 422, 427; and in Smith's Commentaries, 814, many cases are mentioned where it was held that matters embraced in the general words of statutes nevertheless were not within the statutes, because it could not have been the intention of the law makers that they should be included. They were taken out of the statutes by an equitable construction, and it is said in Bacon: "By an equitable construction a case not within the letter of the statute is sometimes

holden to be within the meaning because it is within the mischief for which a remedy is provided. The reason for such construction is that the law makers could not set down every case in express terms. In order to form a right judgment whether a case be within the equity of the statute, it is a good way to suppose the law maker present, and that you have asked him this question : did you intend to comprehend this case? Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given. If this be that he did mean to comprehend it, you may safely hold the case to be within the equity of the statute ; for, while you do no more than he would have done, you do not act contrary to the statute, but in conformity thereto." In some cases the letter of a legislative act is restrained by an equitable construction ; in others it is enlarged ; in others the construction is contrary to the letter. The equitable construction which restrains the letter of a statute is defined by Aristotle as frequently quoted in this manner : *Aequitas est correctio legis generaliter latæ qua parti deficit.* If the law makers could as to this case be consulted would they say that they intended by their general language that the property of a testator or of an ancestor should pass to one who had taken his life for the express purpose of getting his property? In 1 Blackstone Com., 91, the learned author, speaking of the construction of statutes, says : "If there arise out of them any absurd consequences manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. * * * When some collateral matter arises out of the general words, and happen to be unreasonable, then the judges are, in decency, to conclude that this consequence was not foreseen by the Parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it," and he gives as an illustration if an Act of Parliament gives a man power to try all causes that arise within his manor of Dale, yet, if a cause should arise in which he himself is party, the act is construed not to extend to that because it is unreasonable that any man should determine his own quarrel.

There was a statute in Bolognia that whoever drew blood in the streets should be severely punished, and yet it was held not to apply to the case of a barber who opened a vein in the street. It is commanded in the Decalogue that no work shall be done upon the Sabbath, and yet giving the command a rational inter-

pretation founded upon its design the Infallible Judge held that it did not prohibit works of necessity, charity or benevolence on that day.

What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable and just devolution of property that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate ? Such an intention is inconceivable. We need not, therefore, be much troubled by the general language contained in the laws.

Besides, all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries and have nowhere been superceded by statutes. They were applied in the decision of the case of the New York Mutual Life Ins. Co. *vs.* Armstrong, 117 U. S., 599. There it was held that the person who procured a policy upon the life of another payable at his death and then murdered the assured to make the policy payable could not recover thereon. Mr. Justice Field writing the opinion said : " Independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper he forfeited all rights under it when, to secure its immediate payment he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired."

These maxims without any statute giving them force or operation frequently control the effect and nullify the language of wills. A will procured by fraud and deception like any other instrument may be decreed void and set aside, and so a particular portion of a will may be excluded from probate or held inoperative if induced by the fraud or undue influence of the person in whose favor it is. (Allen *vs.* McPherson, I. H. Lds Cases, 191 ; Harrison's Appeal, 43 Conn., 202). So a will may contain pro-

visions which are immoral, irreligious or against public policy and they will be held void.

Here there was no certainty that this murderer would survive the testator, or that the testator would not change his will, and there was no certainty that he would get this property if nature was allowed to take its course. He therefore murdered the testator expressely to vest himself with an estate. Under such circumstances, what law, human or divine, will allow him to take the estate and enjoy the fruits of his crime? The will spoke and became operative at the death of the testator. He caused that death, and thus by his crime made it speak and have operation. Shall it speak and operate in his favor? If he had met the testator and taken his property by force, he would have had no title to it. Shall he acquire title by murdering him? If he had gone to the testator's house and by force compelled him, or by fraud, or undue influence had induced him to will him his property, the law would not allow him to hold it. But can he give effect and operation to a will by murder and yet take the property? To answer these questions in the affirmative it seems to me would be a reproach to the jurisprudence of our state and an offense against public policy.

Under the civil law, evolved from the general principles of natural law and justice by many generations of juris consults, philosophers and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered. (Domat. Part II., Book I., Tit. I., Sec. III.; Code Napoleon Sec. 727; Mackelday's Roman Law, 530, 550). In the Civil Code of Lower Canada, the provisions on the subject in the Code Napoleon have been substantially copied. But, so far as I can find in no country where the common law prevails has been deemed important to enact a law to provide for such a case. Our revisors and law makers were familiar with the civil law and they did not deem it important to incorporate into our statutes its provisions upon this subject. This is not a *casus omissus*. It was evidently supposed that the maxims of the common law were sufficient to regulate such a case, and that a specific enactment for that purpose was not needed.

For the same reasons the defendant Palmer cannot take any of this property as heir. Just before the murder he was not an heir, and it was not certain that he ever would be. He might have died before his grandfather, or might have been disin-

herited by him. He made himself an heir by the murder, and he seeks to take property as the fruit of his crime. What has before been said as to him as legatee, applies to him with equal force as an heir. He cannot vest himself with title by crime.

My view of this case does not inflict upon Elmer any greater or other punishment for his crime than the law specifies. It takes from him no property, but simply holds that he shall not acquire property by his crime and thus be rewarded for its commission.

Our attention is called to Owen *vs.* Owen, 100 North Carolina, 240, as a case quite like this. There a wife had been convicted of being an accessory before the fact to the murder of her husband, and it was held that she was nevertheless entitled to dower. I am unwilling to assent to the doctrine of that case. The statutes provide dower for a wife who has the misfortune to survive her husband and thus lose his support and protection. It is clear beyond their purpose to make provision for a wife who by her own crime makes herself a widow and wilfully and intentionally deprives herself of the support and protection of her husband. As she might have died before him and thus never have been his widow, she cannot by her crime vest herself with an estate. The principle which lies at the bottom of the maxim *volenti non fit injuria* should be applied to such a case, and a widow should not, for the purpose of acquiring, as such, property rights, be permitted to allege a widowhood which she has wickedly and intentionally created.

The facts found entitled the plaintiffs to the relief they seek. The error of the Referee was in his conclusion of law. Instead of granting a new trial therefore I think the proper judgment upon the facts found should be ordered here. The facts have been passed upon twice with the same result, first upon the trial of Palmer for murder and then by the Referee in this action. We are therefore of opinion that the ends of justice do not require that they should again come in question.

The judgment of the General Term and that entered upon the report of the Referee should therefore be reversed and judgment should be entered as follows: That Elmer E. Palmer and the administrator be enjoined from using any of the personalty or real estate left by the testator for Elmer's benefit; that the devise and bequest in the will to Elmer be declared ineffective to pass the title to him; that by reason of the crime of murder com-

mitted upon the grandfather he is deprived of any interest in the estate left by him; that the plaintiffs are the true owners of the real and personal estate left by the testator, subject to the charge in favor of Elmer's mother and the widow of the testator, under the ante-nuptial agreement, and that the plaintiffs have costs in all the Courts against Elmer.

"All concur, except Gray, J., who reads dissenting opinion and Danforth, J., concurs."

A copy.

H. E. SICKELS,
Reporter, per C.

PHILO RIGGS as Guardian, &c., *et al.*,
Appellants,

vs.

ELMER E. PALMER,
Respondent.

Oct. 8th, 1889.

Gray, J. (Dissenting opinion).

This appeal presents an extraordinary state of facts, and the case, in respect of them, I believe is without precedent in this State.

The respondent, a lad of sixteen years of age, being aware of the provisions in his grandfather's will, which constituted him the residuary legatee of the testator's estate, caused his death by poison, in 1882. For this crime he was tried and was convicted of murder in the second degree, and at the time of the commencement of this action, he was serving out his sentence in the State reformatory. This action was brought by two of the children of the testator for the purpose of having those provisions of the will in the respondent's favor cancelled and annulled.

The appellants' argument for a reversal of the judgment, which dismissed their complaint, is that the respondent unlawfully prevented a revocation of the existing will; or a new will from

being made by his crime ; and that he terminated the enjoyment by the testator of his property and effected his own succession to it by the same crime. They say that to permit the respondent to take the property willed to him, would be to permit him to take advantage of his own wrong. To sustain their position, the appellants' counsel has submitted an able and elaborate brief and, if I believed that the decision of the question could be effected by considerations of an equitable nature, I should not hesitate to assent to views, which commend themselves to the conscience. But the matter does not lie within the domain of conscience. We are bound by the rigid rules of law, which have been established by the Legislature, and within the limits of which the determination of this question is confined. The question we are dealing with is whether a testamentary disposition can be altered, or a will revoked after the testator's death, through an appeal to the Courts ; when the Legislature has by its enactments prescribed exactly when and how wills may be made, altered and revoked and, apparently, as it seems to me, when they have been fully complied with, has left no room for the exercise of an equitable jurisdiction by Courts over such matters. Modern jurisprudence in recognizing the right of the individual, under more or less restrictions to dispose of his property after his death, subjects it to legislative control, both as to extent and to mode of exercise. Complete freedom of testamentary disposition of one's property has not been and is not the universal rule ; as we see from the provisions of the Napoleonic code, from the systems of jurisprudence in countries which are modeled upon the Roman law, and from the statutes of many of our States. To the statutory restraints, which are imposed upon the disposition of one's property by will, are added strict and systematic statutory rules for the execution, alteration and revocation of the will ; which must be, at least substantially, if not exactly, followed to ensure validity and performance. The reason for the establishment of such rules, we may naturally assume, consists in the purpose to create those safeguards about these grave and important acts, which experience has demonstrated to be the wisest and surest. That freedom, which is permitted to be exercised in the testamentary disposition of one's estate, by the laws of the State, is subject to its being exercised in conformity with the regulations of the statutes. The capacity and the power of the individual to dispose of his property after

death and the mode by which that power can be exercised, are matters of which the legislature has assumed the entire control and has undertaken to regulate with comprehensive particularity.

The appellants' argument is not helped by reference to those rules of the civil law, or to those laws of other governments by which the heir, or legatee, is excluded from benefit under the testament, if he has been convicted of killing, or attempting to kill the testator. In the absence of such legislation here, the Courts are not empowered to institute such a system of remedial justice. The deprivation of the heir of his testamentary succession by the Roman law, when guilty of such a crime, plainly was intended to be in the nature of a punishment imposed upon him. The succession, in such a case of guilt, escheated to the exchequer.

See Domat's Civil Law, Part II, Book I, Title I, Sec. III.

I concede that rules of law, which annul testamentrry provisions made for the benefit of those who have become unworthy of them, may be based on principles of equity and of natural justice. It is quite reasonable to suppose that a testator would revoke or alter his will, where his mind has been so angered and changed as to make him unwilling to have his will executed as it stood. But these principles only suggest sufficient reasons for the enactment of laws to meet such cases.

The statutes of this State have prescribed various ways in which a will may be altered or revoked ; but the very provision defining the modes of alteration and revocation implies a prohibition of alteration or revocation in any other way. The words of the section of the statute are " no will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered otherwise, etc., ete." Where, therefore, none of the cases mentioned are met by the facts and the revocation is not in the way described in the section, the will of the testator is unalterable. I think that a valid will must continue as a will always ; unless revoked in the manner provided by the statutes. Mere intention to revoke a will does not have the effect of revocation. The intention to revoke is necessary to constitute the effective revocation of a will ; but it must be demonstrated by one of the acts contempleted by the statute. As Woodworth J. said in Don *vs.* Brown, 4 Cow., 490, " revocation

is an act of the mind, which must be demonstrated by some outward and visible sign of revocation." The same learned Judge said in that case : "The rule is that if the testator lets the will stand until he dies, it is his will ; if he does not suffer it to do so, it is not his will. (And see Goodright *vs.* Glacier, 4 Burr, 2512, 2514 ; Pemberton *vs.* Pemberton, 13 Ves., 290).

The finding of fact of the Referee, that presumably the testator would have altered his will had he known of his grandson's murderous intent, cannot affect the question. We may concede it to the fullest extent ; but still the cardinal objection is undisposed off ; that the making and the revocation of a will are purely matters of statutory regulation ; by which the Court is bound in the determination of questions relating to these acts.

Two cases, in this State and in Kentucky, at an early day, seem to me to be much in point. Ganis *vs.* Ganis (2 A. K. Marshal, 199), was decided by the Kentucky Court of Appeals in 1820. It was there urged that the testator intended to have destroyed his will and that he was forcibly prevented from doing so by the defendant in error or devisee, and it was insisted that the will, though not expressly, was thereby virtually revoked. The Court held, as the act concerning wills prescribed the manner in which a will might be revoked, that as none of the acts, evidencing revocation were done, the intention could not be substituted for the act. In that case the will was snatched away and forcibly retained.

In 1854 Surrogate Bradford, whose opinions are entitled to the highest consideration, decided the case of Leaycroft *vs.* Simmons (3 Bradf. 35). In that case the testator, a man of eighty-nine years of age, desired to make a codicil to his will, in order to enlarge the provisions for his daughter. His son, having the custody of the instrument, and the one to be prejudiced by the change, refused to produce the will at testator's request, for the purpose of alteration.

The learned Surrogate refers to the provisions of the civil law of such and other cases of unworthy conduct in the heir or legatee, and says, "our statute has undertaken to prescribe the mode in which wills can be revoked, (citing the statutory provision). This is the law by which I am governed in passing upon questions touching the revocation of wills. The whole of this subject is now regulated by statute and mere intention to revoke, however well authenticated, or however defeated, is not suffi-

cient." And he held that the will must be admitted to probate.

I may refer also to a case in the Pennsylvania Courts. In that State the statute prescribed the mode for repealing or altering a will, and in Cluigan *vs.* Micheltree (31 Pa. State Rep. 25), the Supreme Court of the State held, where a will was kept from destruction by the fraud and misrepresentation of the devisee, that to declare it cancelled as against the fraudulent party would be to enlarge the statute.

I cannot find any support for the argument that the respondent's succession to the property should be avoided because of his criminal act, when the laws are silent. Public policy does not demand it ; for the demands of public policy are satisfied by the proper execution of the laws and the punishment of the crime. There has been no convention between the testator and his legatee ; nor is there any such contractual element, in such a disposition of property by a testator, as to impose or imply conditions in the legatee. The appellant's argument practically amounts to this : that as the legatee has been guilty of a crime, by the commission of which he is placed in a position to sooner receive the benefits of the testamentary provision, his rights to the property should be forfeited and he should be divested of his estate. To allow their argument to prevail would envolve the diversion by the Court of the testator's estate into the hands of the persons, whom, possibly enough, for all we know, the testator might not have chosen or desired as its recipients. Practically the Court is asked to make another will for the testator. The laws do not warrant this judicial action, and mere presumption would not be strong enough to sustain it.

But more than this, to concede the appellants' views would involve the imposition of an additional punishment or penalty upon the respondent. What power or warrant have the Courts to add to the respondent's penalties by depriving him of property ? The law has punished him for his crime, and we may not say that it was an insufficient punishment. In the trial and punishment of the respondent, the law has vindicated itself for the outrage which he committed, and further judicial utterance upon the subject of punishment, or deprivation of rights is barred. We may not in the language of the Court in People *vs.* Thornton

25 Hun, 456), "enhance the pains, penalties and forfeitures provided by law for the punishment of crime."

The judgment should be affirmed with costs.

"Danforth, J., concurs."

A copy.

H. E. SICKELS,
Reporter, per C.