Introduction to Part II

IN THE DOMAIN OF STATUTES

For Cardozo, statutory construction was an acquired taste. He preferred common law subtleties, having great skill in bending them to modern uses. But he came to realize that problems of statutory construction had their own exciting subtleties and gave ample employment to philosophic and literary talents.

— Justice Felix Frankfurter[1]

Much more than you probably yet realize, the work of lawyers and judges occurs outside the domain of the common law. Over the 20th century, and particularly in its second half, American law metamorphosed from a system dominated by the common law to one dominated by laws promulgated by legislatures — that is, by statutes.

For example, if, today, a property owner were to ask you whether to fence in a swimming pool, you would be committing malpractice if all you did was read common-law cases concerning potential tort liability. You would also need to investigate whether the state, city, county, or even federal legislature had promulgated "laws" bearing on the subject. Most likely you would find something like this:

> (a) No person in possession of land within the County of San Bernardino, [California,] either as owner, purchaser under contract, lessee, tenant, licensee or otherwise, upon which is situated a swimming pool or other out-of-doors body of water designed, constructed and used for swimming, dipping or immersion purposes by men, women or children, having a depth in excess of eighteen (18) inches, shall fail to maintain on the lot or premises upon which such pool or body of water is located and completely surround

[1] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 532 (1947).

ing such pool or body of water, a fence or wall not less than four (4) feet in height, with openings, holes or gaps therein no larger than four (4) inches in any dimension except for doors or gates; provided, however, that if a picket fence is erected or maintained the opening or spaces between the pickets shall not exceed four (4) inches; provided, further, that a dwelling house or accessory building may be used as a part of such enclosure.

(b) All gates or doors opening through such enclosure shall be equipped with a self-closing and self-latching device designed to keep, and capable of keeping, such door or gate securely closed at all times when not in actual use; provided, however, that the door of any dwelling occupied by human beings and forming any part of the enclosure hereinabove required need not be so equipped.[2]

What is the *justification* (or *explanation*) for this ordinance? One might have thought that common-law liability sufficed to deal with the problem of dangerous swimming pools by providing compensation for injured parties and (thereby) creating incentives for the appropriate level of care by pool owners. If so, then the ordinance is redundant at best, and more likely disruptive and inefficient. Does its existence reflect a legislative judgment that the common law *fails* to produce the appropriate amount of care? Alternatively, does it suggest the existence of a powerful fence-builders' lobby? Is the swimming pool problem more amenable to legislative than to judicial solutions?

What would make it so?

What is the *legal effect* of this ordinance? Most obviously, a pool-owner who violates it may be subject to enforcement by the government, which could lead to a fine or, depending on the penalties provided for in the ordinance, prison. The relevance of a statute or ordinance to a private civil suit for damages is more complicated. For example, would compliance with the ordinance be a defense in a negligence suit? Would failure to comply in itself establish that the defendant was negligent? Does the legislative decision to regulate pool safety displace the common law altogether, meaning that no suits can be brought at all?

What is the *meaning* of this ordinance? No piece of legislation is utterly clear in every case; it will almost always require "interpretation." Our ordinance looks complete and detailed, but cases will inevitably arise in which its meaning is debatable. For example, would it violate the ordinance to prop the gate open? Is a property owner who rents the premises to someone else still responsible for maintaining the fence? Would it be a violation if the owner maintained a fence, but the fence gave way when a seven-year old tried to climb over it? Would the Willsons be in violation of this ordinance, if indeed there was less than 18" of water in their pool?

These questions — about justification, effect, and meaning — can be asked about any piece of legislation. The first two will receive little direct attention in these

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[2] San Bernardino, Cal., Ordinance No. 804, *quoted in* Grant v. Hipsher, 64 Cal. Rptr. 892, 896 (Cal. Ct. App. 1967).

materials; it is the third issue, the interpretation of statutes, which is the main focus of Part II.

Before we start, a word about the differences between statutory and common-law cases. Two stand out. First, in statutory cases the court confronts an authoritative text.

> Lawyers and judges find the definition of a proposition of common law in inferences and trends of policy indicated by doctrinal analysis and holdings in a succession of precedents; it inheres in the common law process that boundaries and specifications have no single definitive expression. The special character of legislation is the presence of a formally defined text, providing the authoritative base and framework within which all who would resort to the statute must operate.[3]

Although common-law judging also typically involves "texts" in the form of prior opinions, these lack the binding force of a statutory text. In interpreting a common-law precedent, what the court *did* is as important as what it *said*, if not more so; later courts may reject or ignore language in earlier opinions as dicta, or carelessly put, or incomplete. These strategies are not so readily available to a court reading a statute, where what the legislature said *is* what it did. The dominant role of text in statutory cases introduces a set of interpretive and linguistic problems that are absent or at least much less pronounced in common law cases.

The second basic difference is that in statutory cases lawmaking is not just the product of courts and litigants. Legislatures are now added to the brew (and, as we shall see in Chapter 13, administrative agencies as well). The presence of these additional players makes for complicated questions of authority, legitimacy, and deference to other decisionmakers.

The most important premise underlying statutory cases is this: *statutes are binding statements of law.* One can imagine a different system, but in the system we have, legislatures can modify legal rules adopted by courts but courts cannot alter, amend, or ignore legislation. This is the principle of "legislative supremacy." Legislatures are not unconstrained, of course; they are bound by the Constitution. And courts interpret the Constitution and will set aside statutes that are inconsistent with the Constitution — this power of "judicial review," dates back, at the federal level, to the famous case of *Marbury v. Madison.*[4] But as long as they are within constitutional boundaries, statutes trump other sources of law.

> [T]he argument for deference to statutes is [usually] cast in terms of democratic theory. American society, it is argued, is committed to the concept of majority rule. Because of this commitment, judges — like other governmental actors — should follow the will of the majority. The adoption of a statute reflects this will, so under democratic theory the statute should supersede the common law and control the actions of judges, who do not represent the majority. * * *

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[3] James Willard Hurst, Dealing With Statutes 48–49 (1982).

[4] 1 Cranch (5 U.S.) 137 (1803).

> [Another] explanation for the doctrine of legislative supremacy is simply that it reflects a deeply-embedded premise of the American political system. The premise is that, within constitutional limits, the legislature (however constituted) has authority to prescribe rules of law that, until changed legislatively, bind all other governmental actors within the system. * * * To challenge this premise is to attack one of the most basic political axioms of the governmental structure.[5]

At a sufficiently broad level of generality, legislative supremacy is undisputed. At that level of generality, however, it ducks two hard questions. First, how much room for judicial policymaking does the judiciary's subordinate position allow? Second, once we identify the proper judicial task, what are the appropriate tools by which it is accomplished? These are the central questions for Part II.

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[5] Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 7–9 (1988).

Chapter 7

STATUTES V. THE COMMON LAW

This chapter introduces you to statutes and their interaction with and difference from common law precedents. The "v." in the chapter heading has two meanings. First, we will consider how statutes and the common law are adversaries, or at least competitors, in the legal system. The second idea behind the "v." is comparative; this chapter should start you thinking about how statutory and common-law judging differ.

A. A COMMON LAW RULE

FILMORE v. METROPOLITAN LIFE INSURANCE CO.

82 Ohio St. 208, 92 N.E. 26 (1910)

The plaintiff in error, Elmer G. Filmore, as the beneficiary under a policy of life insurance issued to Emma Filmore, his wife, by defendant in error, The Metropolitan Life Insurance Company, brought suit against said company in the court of common pleas of Clark county, Ohio, to recover the sum of two hundred and thirty-nine dollars, with interest thereon from September 3, 1906, which sum he alleged in his petition was due him as such beneficiary under the policy of insurance so issued by said company. For answer to plaintiff's petition, the insurance company pleaded two defenses, the first of which was a general denial, and the second was in the words and figures following, to-wit:

> For a second cause of defense to the petition, this defendant says that on the 3rd day of September, 1906, the said plaintiff murdered his said wife, Emma Filmore, in the city of Springfield, county of Clark, state of Ohio; that on the 25th day of October, 1906, he was indicted by the grand jury of said county for manslaughter on account of the killing of his said wife, and on the 31st day of December, 1906, he was convicted of said crime, and on February 25, 1907, he was sentenced by the court of common pleas to six years' hard labor in the Ohio Penitentiary, at Columbus, Ohio, where the said plaintiff is now confined. Defendant says that, plaintiff having caused the death of the said assured, as herein set forth, he is estopped from asserting any claim as beneficiary under said policy. Defendant, having fully answered, prays to be hence dismissed with its costs.

To this defense a demurrer was interposed by the plaintiff, Elmer G. Filmore, on the ground that the facts therein stated were insufficient in law to constitute a defense. This demurrer was overruled by the court of common pleas, and, the plaintiff not desiring to plead further, judgment was entered dismissing his petition. This judgment of dismissal was subsequently affirmed by the circuit court, and the

plaintiff in error now asks that this judgment of affirmance be reversed by this court.

The sole question here presented is as to the legal sufficiency, against a general demurrer, of this second defense as pleaded in defendant's answer. It is conceded by counsel for plaintiff in error to be the well settled and established rule of law that a beneficiary under a policy of life insurance is without right to recover thereon where the death of the insured has been intentionally caused by the act of such beneficiary, but it is contended in the present case that the second defense of defendant's answer is lacking in essential allegation, and is fatally defective, because it contains no direct or sufficient averment that the killing of the assured by Elmer G. Filmore, the beneficiary under said policy, was an intentional killing. That such objection is purely technical, and in the present case wholly without merit, is apparent, we think, from a consideration of the character and legal effect of the matter pleaded and the allegations made in said second defense. [The defendant's statement that Elmer had "murdered" his wife sufficed as an allegation of an intentional and unlawful killing.] * * * [A]s said by Mr. Justice Field in N. Y. Mut. Life Ins. Co. v. Armstrong, 117 U.S., 600: "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 willfully fired." In the case of Schreiner v. High Court of Illinois Catholic Order of Foresters, 35 Ill. App., 576, cited and relied upon by counsel for plaintiff in error as supporting their contention in the present case, the court also clearly recognizes the principle, applicable to all contracts of insurance, that the insured or beneficiary cannot under such contract receive indemnity for a loss that he himself has intentionally brought about; the second paragraph of the syllabus in that case being as follows: "There can be no recovery in an action founded upon intentional wrong. The beneficiary in an insurance policy cannot recover, where the death of assured has been intentionally caused by his act." * * *

Judgment affirmed.

NOTES AND QUESTIONS

(1) What is the holding of *Filmore*? Note that the insurance company stated that Elmer had *murdered* Emma, but he was actually convicted of *manslaughter*, a less serious crime. Both murder and manslaughter have precise, varying, and multiple definitions. But, very loosely, the basic distinction is between an intentional and an unintentional killing. Do the details of the slaying matter, or is it enough that Elmer killed Emma? Can you think of circumstances in which a slayer should not be barred from recovering under the victim's life insurance policy?

(2) Is *Filmore* correctly decided? Why should a killer forfeit the victim's life insurance benefits?

(3) Suppose you are a trial judge in the state of Ohio with the following case before you. Mrs. X is dead. Under her will, all of her property goes to Mr. X. However, the reason Mrs. X is dead is that Mr. X killed her. The X children, who

would receive the estate were it not to go to Mr. X, sue, arguing that Mr. X cannot take under the will given the fact that he murdered the deceased. There are no Ohio cases about murderous devisees;[1] *Filmore* is the closest thing you can find. With *Filmore* as precedent, how would you rule and why?

In deciding this case, you would do what common law judges do all the time: reason by analogy in light of prior cases and their underlying principles. With an eye on the justification for the court-created rule applied in *Filmore*, you must decide upon "rules of relevance" to determine whether wills and life insurance policies are similar or different, whether they can be assimilated into a single larger category. Is a murdering devisee "like" a murdering insurance beneficiary?

B. THE STATUTORY COMPLICATION

When these cases come up in the real world — and they come up rather more often than one might have hoped — there is always an added complication. The state legislature has had something to say about "descent," that is, about the passing of property from a decedent to the heirs. Assume that in our hypothetical the Ohio legislature has enacted no law specifically addressing the rights of murdering devisees. However, it has provided that (1) a person can direct the disposition of property at her death by will, subject only to certain specific limitations and requirements of formality, and (2) if a person dies without a will, her property passes to her closest surviving relative(s), i.e. to her spouse, or if there is no surviving spouse to her children or their descendants, or if there are none to the parents, and so on.

Are these statutes of any relevance to the case of Mr. X?

DEEM v. MILLIKIN
6 Ohio Cir. Ct. 357 (1892)

[Caroline Sharkey, a widow, died on January 11, 1889 without a will. Under the Ohio statute of descents, her son, Elmer Sharkey, was her sole heir. To secure certain debts, Elmer then mortgaged property his mother had owned. This is a suit between the lenders, who contended that they held a security interest in the property to cover Elmer's debts, and Caroline Sharkey's siblings, who argued that Elmer had not inherited, and therefore could not mortgage, his mother's property. As for Elmer, he is not participating in the suit for the simple reason that he was hanged on December 19, 1890, having been convicted of murdering his mother.

The lower court ruled that Elmer had inherited his mother's entire estate and therefore the mortgages were valid.]

The judgment under review is unquestionably right if the terms used in the statute of descents should, in all cases, receive their plain and natural meaning.

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[1] A note on terminology. A person who takes property under the will of a deceased person (a "decedent") is a "devisee"; a gift by will is a "devise." Where the decedent has no will (is "intestate"), statutory or common law rules dictate where the property goes. In these circumstances, the recipient is not a "devisee" (there has been no devise), but an "heir." The latter term is also often used more broadly to indicate anyone who receives a decedent's property, whether by statute or by will.

Mrs. Sharkey died intestate and [owning] the lands in controversy. There is neither condition nor exception in the statute which provides that they should descend to her son. * * *

The statute of descents * * * is a legislative declaration of a rule of public policy. * * * [C]ourts should be guided by the maxim "*index animi sermo* [language indicates intention]," and the interpretation should be consistent with the language employed. Knowledge of the settled maxims and principles of statutory interpretation is imputed to the legislature. To the end that there may be certainty and uniformity in legal administration it must be assumed that statutes are enacted with a view to their interpretation according to such maxims and principles. When they are regarded, the legislative intent is ascertained. When they are ignored, interpretation becomes legislation in disguise. The well considered cases warrant the pertinent conclusions that when the legislature, not transcending the limits of its power, speaks in clear language upon a question of policy, it becomes the judicial tribunals to remain silent. [To do otherwise would be] the manifest assertion of a wisdom believed to be superior to that of the legislature upon a question of policy. Chief Justice REDFIELD, in *In re Powers*, observed: "It is scarcely necessary, we trust, at this late day, to say that the judicial tribunals of the state have no concern with the policy of legislation."

Affirmed.

NOTES AND QUESTIONS

(1) The Ohio Supreme Court affirmed without opinion, adopting the reasoning of the court below. 53 Ohio St. 668, 44 N.E. 1134 (1895).

(2) Was this the necessary result? Are you confident that the court effectively carried out the legislature's will? Did the legislature leave no room for a common law resolution?

(3) Do you understand why the *Filmore* court did not even cite *Deem*? Are the two decisions consistent?

Other courts, in cases much like *Deem*, have reached the opposite result. The following is the best-known such case.

RIGGS v. PALMER

115 N.Y. 506, 22 N.E. 188 (1889)

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. * * * 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 willfully 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 law-makers 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. * * *

There was a statute in Bologna 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 interpretation 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 superseded by statutes. * * *

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. * * *

All concur with EARL, J., except GRAY, J., who reads dissenting opinion, and DANFORTH, J., concurring.

Judgment in accordance with the prevailing opinion.

GRAY, J. (dissenting). 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 canceled and annulled.

* * * [I]f I believed that the decision of the question could be affected 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. * * * 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. * * *

I concede that rules of law, which annul testamentary provision 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.

* * * [T]o concede 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 * * * "enhance the pains, penalties and forfeitures provided by law for the punishment of crime."

NOTES AND QUESTIONS

(1) An aside: Judge Gray refers to Elmer as "a lad of sixteen." This may have rung a bell; Cardozo begins his opinion in *Hynes* using the same phrase to refer to the innocent youthful victim, Harvey Hynes. *See supra* page 91. Although Judge Gray was not the stylist that Cardozo was, his use of the phrase not only recalls *Hynes*, it is used to the same end — to elicit the reader's sympathy and conjure up a vision of innocent childish fun. Of course, Judge Gray has rather an uphill battle in that regard.[2]

(2) Can you distinguish *Riggs* and *Deem* on the facts?

(3) The *Riggs* court states that for Elmer to take under the will would be an "offense against public policy." Is this an appropriate consideration for the court? *Deem* says that judges must avoid evaluating "the policy of legislation." In invoking public policy, does *Riggs* run afoul of that admonition?

(4) Suppose a statute prescribes that an unmarried intestate's estate goes to her "children." Mary Smith dies, survived by her two sons. One is a devoted, attentive, upstanding Boy Scout, the other a good-for-nothing, prodigal lout. Could a court say that the good son inherits the entire estate?[3] If not, why exactly does the bad son lose his share if he actually kills his mother?

(5) Consider whether the *Riggs* court was simply following this ancient instruction from William Blackstone:

> [I]f there arise out of [acts of parliament] collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. * * * [T]he 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. Thus 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 a party, the act is construed not to extend to that; because it is unreasonable that any man should determine his own quarrel.[4]

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[2] Although for us, in these materials, the *Riggs* dissent "recalls" *Hynes*, the case itself preceded *Hynes* by almost half a century. Cardozo was familiar with *Riggs*; he devoted a few pages to it in *The Nature of the Judicial Process*. *See* NJP at 40–43. It is the purest speculation, but it is at least possible that, consciously or not, Gray's description of the wretched Elmer Palmer contributed to Cardozo's of Harvey Hynes.

[3] For example, in Cheatle v. Cheatle, 662 A.2d 1362 (D.C. 1995), the will left all to the decedent's sister; the decedent's brother challenged the bequest arguing that the sister, who lived with and cared for the decedent during the last decade of his life, had mistreated him and hastened his death. In the sort of finding of fact you do not hear every day, the trial court determined that the sister was "selfish, angry, resentful, indignant, bitter, self-centered, spiteful, vindictive, paranoid and stingy," and that her "benign neglect" of her brother had shortened his life. But her general poor conduct and character defects did not stand in the way of her taking the bequest.

[4] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *91 (1765).

What general principle, if any, equivalent to the proposition that "no man should determine his own quarrel," justifies the result in *Riggs*? Can you think of a general principle to support the result in *Deem*?

(6) Suppose the blanket rule that an intestate's estate goes to her children was not set out in the Ohio Code, as was the case in *Deem*, but instead arose out of a series of common law decisions. Would *Deem* have come out the same way? After all, "the law" — the substantive standard — would be no different. Yet presumably the court would be free to narrow broad statements about children taking their parents' estate found in the opinions of those prior cases. It could, assuming that *Filmore* or a similar case is "on the books," equate a murdering heir with a murdering life insurance beneficiary, not with an innocent heir. Should the courts have the same freedom to "fine-tune" statutory requirements? Is that in essence what the court in *Riggs* did?

(7) One important lesson from *Deem* and *Riggs* is that it seems unwise to name a child Elmer (or to marry an Elmer, see *Filmore*). What other conclusions do you draw? In particular, what do the two decisions teach you about the relation between courts and legislatures? Which is more consistent with the principle of legislative supremacy? What makes the court in *Deem* so cautious, what is it worried about?

C. THE LEGISLATIVE RESPONSE

In 1932 Ohio adopted a so-called "slayer statute," thereby "overruling" *Deem v. Millikin* legislatively. The statute is at issue in the following case.

WADSWORTH v. SIEK

23 Ohio Misc. 112, 254 N.E.2d 738, 50 Ohio Op.2d 507 (1970)

[Rosaline Siek made out her will on May 19, 1967, dividing her estate between her mother, brother, and nieces and nephews. In September she married John Siek. Not long thereafter, he beat her to death. Siek was indicted for first degree murder but pled guilty to the lesser offense of manslaughter in the first degree. He was convicted and sentenced to prison.

Like every state, Ohio has legislatively guaranteed a surviving spouse at least some share of the decedent's estate, even if the will gives him or her nothing. Seeking to avoid having to make any such payment, the executor of the estate brought this declaratory judgment action, asking the court to rule that Siek's manslaughter conviction precluded his receiving any of his wife's estate.]

Our starting point logically, though not chronologically, is Section 2105.19, [of the Ohio] Revised Code, the pertinent part of which reads:

> No person finally adjudged guilty * * * of murder in the first or second degree, shall inherit or take any part of the real or personal estate of the person killed. * * * With respect to inheritance from or participation under the will of the person killed, such person shall be considered as though he had preceded in death the person killed. * * *

Prior to the adoption of the statute, Ohio case law permitted a murderer to inherit from his victim. The basic case is *Deem v. Millikin* * * *.

Siek was not adjudged guilty of murder, but only of first degree manslaughter. That he was indicted for murder in the first degree is immaterial under the statute.

In the absence of a statutory provision precluding defendant Siek from inheriting, Ohio case law will govern. As we have seen, this case law allows even a murderer to inherit.

There appear to be no Ohio cases dealing directly with the effect of the statute on a person adjudged guilty of manslaughter; but there are Ohio cases holding or stating that the statute means what it says, i.e., that the person must be adjudged guilty of murder in the first or second degree in order to be precluded from inheriting.

The cases outside Ohio hold that under a statute like ours, a person convicted of manslaughter is not precluded from inheriting from the estate of his victim. By contrast, consider a statute providing that any person who shall kill another shall be precluded from inheriting from his victim.

I have considered the possibility of holding that Section 2105.19, Revised Code, indicates a change in policy by the legislature, whereby no felonious killer, in any degree, shall be permitted to inherit from his victim. But such a decision would be directly contrary to the provisions of the statute. Had the legislature wished to include a person adjudged guilty of manslaughter, it could easily have done so, and it may do so in the future by amending the statute.

Whether the omission by the legislature was intentional or inadvertent, the fact is that manslaughter was omitted, and this Court has no right to "amend" the statute by adding it.

First degree manslaughter, although a felony, is much less serious than murder. It lacks the deliberate and premeditated malice of first degree murder and the malice of second degree murder. It consists of voluntary manslaughter, which is an unlawful and intentional killing under the influence of a sudden passion or heat of blood produced by an adequate provocation; or involuntary manslaughter, which is an unintentional killing while in the commission of an unlawful act.

We have no right to regard defendant John J. Siek as a murderer. He has been convicted only of manslaughter in the first degree. Whether the manslaughter was voluntary or involuntary is not a matter of record. Despite the tragic circumstances of this case, I must conclude that under the present law of Ohio, defendant John J. Siek is entitled to one half of his wife's net estate.

QUESTIONS

(1) Is it accurate to say that the legislature decided that a *manslaughterer should* inherit, or did it decide only that a *murderer* should *not*?

(2) The reasoning and approach in *Wadsworth* seems generally consistent with *Deem v. Millikin*. In which, if either, is the inference from legislative silence stronger?

NOTE ON STATUTES AND PRECEDENTS

Suppose the rule of § 2105.19 were contained in common-law precedents rather than in a statute. That is, in several prior cases, Ohio courts have held that persons found guilty of first or second degree murder could not inherit or take any part of the estate of the person they had killed. The manslaughter case has not come up. Now *Wadsworth* arises. How is the question different in this setting than in the actual case? Can a court reason analogically from a statute the way it does from a common law precedent? The possibility seems not to have crossed the court's mind in *Wadsworth*. Why not?

One possible answer is this. In the common law, judges are free, indeed expected, to determine the appropriate categories of assimilation. Turntables and pools, for example, might be assimilated into the same broader category of attractive nuisances. In statutory cases, in contrast, the statute itself defines the category of assimilation, which judges cannot broaden. Does this make sense?

Suppose *Barrett v. Southern Pacific Co.* had been based on a statute making railroads liable for the negligent maintenance of turntables. Now *Knight v. Kaiser* (the sand pile case) arises. Could or should the court "simply" "follow" *Barrett*?

In Chapter 5, Professor Schauer referred, borrowing from Ronald Dworkin, to "the enactment force" of a common law precedent.[5] Did you understand what he meant? Do you now? Here is a fuller excerpt from Dworkin:

> Statutory interpretation * * * depends upon the availability of a canonical form of words, however vague or unspecific, that set limits to the political decisions that the statute may be taken to have made. * * * [In contrast, most judicial opinions] do not contain any special propositions taken to be a canonical form of the rule that the case lays down. * * * [E]ven important opinions rarely attempt that legislative sort of draftsmanship. They cite reasons, in the form of precedents and principles, to justify a decision, but it is the decision, not some new and stated rule of law, that these precedents and principles are taken to justify. Sometimes a judge will acknowledge openly that it lies to later cases to determine the full effect of the case he has decided.
>
> Of course, [a judge] might well decide that when he does find, in an earlier case, a canonical form of words, he will use his techniques of statutory interpretation to decide whether the rule composed of those words embraces a novel case. He might well acknowledge what could be called an enactment force of precedent. He will nevertheless find that when a precedent does have enactment force, its influence on later cases is not taken to be limited to that force. Judges and lawyers do not think that the

[5] *See supra* page 168.

> force of precedents is exhausted, as a statute would be, by the linguistic limits of some particular phrase. [The precedent also has a "gravitational" force; it affects the result in cases to which the opinion's language does not squarely apply.] * * *
>
> The gravitational force of precedent cannot be captured by any theory that takes the full force of precedent to be its enactment force as a piece of legislation. But the inadequacy of that approach suggests a superior theory. The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike. * * * This general explanation of the gravitational force of precedent accounts for the feature that defeated the enactment theory, which is that the force of a precedent escapes the language of its opinion.[6]

Does the distinction between "enactment" force and "gravitational" force accurately describe the different judicial treatment of statutes and common-law precedents?

In 1975 the Ohio legislature amended the statute at issue in *Wadsworth v. Siek* in three respects: (1) the offenses mentioned were changed from "murder in the first or second degree," to offenses contained in "section 2903.01, 2903.02, or 2903.03 of the Revised Code" (these sections forbid, respectively, murder in the first degree, murder in the second degree, and voluntary manslaughter); (2) the law was changed to apply to one who was "convicted" or pleads guilty to one of these offenses; and (3) the sanction was changed from one prohibiting a person to "inherit or take any part of the real or personal estate of the person killed," to one providing that no person "shall in any way benefit by the death," and specifically disentitling the slayer to "all money, insurance proceeds, or other property or benefits payable or distributable in respect of the decedent's death."

In light of the legislature's change, extending § 2105.19 to manslaughter, would you say that *Siek* was wrongly decided? Would your answer be different if the amendment had come just one year after *Siek* rather than five?

Suppose Wadsworth thinks the amendment shows that his case was wrongly decided. Relying on the new statute, he brings a new suit to recover the portion of the estate that went to John Siek as a result of the decision in *Wadsworth v. Siek*. Apart from the fact that the suit would be barred by *res judicata*, does the new statute even apply to John Siek?

By amending the statute to include manslaughter the Ohio legislature seems now to have covered the waterfront. Or has it? Suppose the slayer is acquitted because crucial evidence was suppressed, or is never prosecuted, or kills himself immediately after killing the victim. Then in a civil trial over the inheritance the court finds that he was indeed the slayer. In all these situations, the slayer has committed the crime, but has not been *convicted*. Should the statute apply? Do you think the Ohio courts would apply it?

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[6] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 110–113 (1978).

Consider the following decision.

SHRADER v. EQUITABLE LIFE ASSURANCE SOCIETY

20 Ohio St. 3d 41, 485 N.E.2d 1031, 20 Ohio B. Rep. 343 (1985)

[In 1981 Jean Shrader was strangled to death in a parking garage in downtown Columbus, Ohio. No one was ever arrested for, charged with, or convicted of the crime. Equitable Life held two life insurance policies on Jean Shrader, each of which named her husband as the primary beneficiary and her parents as the secondary beneficiary. Husband and parents both sought the proceeds; the former brought this suit to obtain them. The insurance company deposited the funds with the court and left the two claimants to fight the matter out between them. The key issue at trial concerned whether the husband had killed his wife. The trial court concluded that he had and that he was therefore ineligible to receive the proceeds of the policy. The court of appeals reversed, holding that the identity of the killer had to be established in a criminal proceeding. The case is now before the Ohio Supreme Court.]

I

The first issue in this case is whether R.C. 2105.19, dealing with persons prohibited from benefiting from the death of another, is applicable in this case. * * *

It is undisputed that John Shrader has never been convicted of, or pled guilty to, any of the homicides enumerated in the above provision. Indeed, he has never been charged with any criminal homicide offense. Since Shrader is presumed innocent of any criminal violation until his guilt is established by proof beyond any reasonable doubt, he cannot be said to be a "guilty person." Since R.C. 2105.19 only operates to prevent certain criminals from reaping the fruits of their crimes, and since John Shrader does not fall into that category of persons, the statute is not applicable in this case.

Shrader argues that R.C. 2105.19 provides the exclusive method for disqualifying a beneficiary from receiving life insurance proceeds. A familiar principle of statutory construction, however, is that a statute should not be construed to impair pre-existing law in the absence of an explicit legislative statement to the contrary. All that R.C. 2105.19(A) does or purports to do is to eliminate the necessity to prove that the beneficiary of a policy of life insurance committed such an act, when the beneficiary has been convicted of or has pled guilty to one of the specifically enumerated homicide offenses. There is no indication that the General Assembly or any case law intended or requires that the statute be construed to be the exclusive method to determine whether a person should be barred from recovering as a beneficiary under a policy of insurance on the life of a decedent alleged to have been killed by the beneficiary. Thus we find Shrader's argument regarding the statute unpersuasive.

II

The second issue in this case is whether the common law will bar a beneficiary of a life insurance policy from receiving the proceeds of that policy when the beneficiary intentionally and feloniously caused the death of the insured.

* * * [Under *Filmore v. Metropolitan Life Ins. Co.*, among other cases,] the common law bars a beneficiary of a life insurance policy from receiving the proceeds of that policy when the beneficiary intentionally and feloniously caused the death of the insured.

III

The third issue in this case is whether the identity of one who intentionally and feloniously causes the death of another can be established in a civil proceeding thereby preventing the wrongdoer from receiving the proceeds of the deceased's life insurance policy.

* * * Is it reasonable to say that because there has been no criminal conviction in such cases that those seeking to prove the identity of an alleged wrongdoer are precluded in a civil proceeding from doing so because there has been no criminal conviction? We think such a proposition is neither reasonable nor proper.

* * * [T]he concept that no one should be allowed to profit from his own wrongful conduct is a civil concept, and the civil courts are, therefore, a proper forum to determine the identity of one who has been alleged to have caused, intentionally and feloniously, the death of another and if that person is the beneficiary of the proceeds of insurance held on the life of a decedent, then to deprive such person of the proceeds and thereby prevent ill-begotten gain.

NOTES AND QUESTIONS

(1) Is the result or method of this case consistent with those in the prior Ohio cases? Did the court show adequate deference to the legislature? One Ohio law professor concluded that *Siek*, which was an example of "rigid formalism," was "devitalized" by *Shrader*.[7] Was it? Can you synthesize these cases?

(2) *Shrader* was followed in *In re Estate of Cotton*, 104 Ohio App. 3d 368, 662 N.E.2d 63 (1995). There, a husband killed his wife; a criminal prosecution resulted in his pleading guilty to involuntary manslaughter. In a subsequent civil suit over the victim's estate, the court concluded that, notwithstanding the plea, the husband had in fact "intentionally and feloniously" killed his wife. Relying on *Shrader*, the court ruled that section 2105.19 was not the exclusive mechanism for disqualifying a devisee. "Although defendant was not convicted of any of the offenses specified in R.C. 2105.19(A), and thus is not barred by the terms of that statute from benefitting from his wife's death, [the administrator of the estate] may assume the burden

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[7] Addison E. Dewey, *Civil Murder Trials: Macabre Reflections of Our Violent Society*, 19 CAP. U. L. REV. 897, 925 (1990).

under common law to prove that defendant intentionally and feloniously killed decedent, and thus is barred under common-law principles from receiving under her last will and testament." Are the two settings the same? Could *Shrader* be distinguished?

(3) Suppose a state court holds that at common law a murderer/beneficiary *can* recover on the victim's life insurance policy. The legislature then passes a law forbidding a murderer/devisee to take under the victim's will. Now the life insurance case arises again. Does the statute have any bearing on the case?

Many years ago — at a time when courts and lawyers viewed statutes with "indifference, if not contempt" — Roscoe Pound suggested four possible ways in which courts might treat legislative innovation:

> (1) They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by analogy in preference to them. (2) They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or co-ordinate authority in this respect with judge-made rules upon the same general subject. (3) They might refuse to receive it fully into the body of the law and give effect to it directly only; refusing to reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field it was intended to cover. (4) They might not only refuse to reason from it by analogy and apply it directly only, but also give to it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly.[8]

Apply each of these approaches to the hypothetical.

(4) Go back and review the cases in this section. Which of Pound's four categories do they reflect? In light of these cases, can you describe how statutes and the common law interact?