1895

*April 1, 2.

*June 26.

LENORE LUNDY AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

JOSEPH LUNDY (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will—Devise—Death of testator caused by devisee—Felonious act.

No devisee can take under the will of a testator whose death has been caused by the criminal and felonious act of the devisee himself, and in applying this rule no distinction can be made between a death caused by murder and one caused by manslaughter. Taschereau J. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court (2), in favour of the plaintiffs.

The action in this case was brought to obtain a declaration of title to land and the only question raised on the appeal was as to defendant's title, he claiming under a deed from his brother who was devisee of the land under his wife's will and who had been convicted of manslaughter and sentenced to imprisonment for killing his wife. The Court of Appeal held that the brother did not forfeit his devise by the crime as the conviction for manslaughter negatived an intent to kill.

S. H. Blake Q.C. for the appellants. There is no distinction between murder and manslaughter in a case like the present. *Riggs* v. *Palmer* (3); *New York Mutual Co.* v. *Armstrong* (4).

PRESENT :—Sir Henry Strong C.J.,and Fournier, Taschereau, Sedgewick and King JJ.

(1) 21 Ont. App. R. 560 sub nom. *McKinnon* v. *Lundy*.
(2) 24 O. R. 132.
(3) 115 N. Y. 506.
(4) 117 U. S. R. 591.

The principle upon which a devise fails in such a case is that one cannot profit by his own wrong. *Cleaver* v. *Mutual Reserve Fund Life Association* (1).

Aylesworth Q.C. and *Murphy* for the respondent. A devise will not lapse in a case such as this unless the devisee had the intention of hastening the operation of the will. Here the crime was manslaughter which negatives felonious intent. Harris on Criminal Law (2); and see *Clark* v. *Hagar* (3).

The judgment of the majority of the court was delivered by:

THE CHIEF JUSTICE.—The facts are fully set forth in the judgment of Mr. Justice Ferguson, which has been reversed by the Court of Appeal.

In the view I take it will not be necessary to consider the question of the construction of the will, which was one of the subjects discussed in the courts below.

I am of opinion that Mr. Justice Ferguson was entirely right in holding that the respondent, Joseph Lundy, who claims as assignee of James B. Lundy, is not entitled to the benefit of a devise contained in the will of Clementina, the wife of James B. Lundy, made in favour of her husband. The testatrix was killed by her husband, who was convicted of manslaughter therefor and sentenced to twenty years imprisonment. Subsequently to the commission of the felony for which he was so convicted and condemned James B. Lundy conveyed the land now in question, which had been devised to him by his wife, to his brother, the present respondent, Joseph Lundy.

Mr. Justice Ferguson was of opinion, that no devisee could take under the will of a testator whose death had been caused by the criminal and felonious act of

(1) [1892] 1 Q. B. 147. (2) 5 ed. p. 197.
(3) 22 Can. S. C. R. 510.

1895

LUNDY v. LUNDY.

The Chief Justice.

the devisee himself, and that in applying this rule no distinction can be made between a death caused by murder and one caused by manslaughter, both offences having been formerly felonies.

The Court of Appeal drew a distinction between murder and manslaughter, and held that whilst the devisee would forfeit any gift under the will of the person whose death he had caused by an act which amounted to the crime of murder, he still might take in the case of manslaughter.

I cannot agree in the conclusion of the Court of Appeal, nor in the reasoning by which that conclusion was arrived at. The reasoning of the court would seem to me rather to apply to a case of justifiable or excusable homicide than to a case of manslaughter. The principle upon which the devisee is held incapable of taking under the will of the person he kills is, that no one can take advantage of his own wrong. Then surely an act for which a man is convicted of manslaughter and sentenced to a long term of imprisonment was a wrongful, illegal and formerly (when felonies were recognized as forming a particular class of offences) a felonious act. I can see no principle on which to rest the decision of the Court of Appeal, and I can find no authority in support of it. On the contrary, the case of *Cleaver* v. *Mutual Reserve Fund Life Association* (1), proceeds upon reasons which admit of no such distinction as has been made by the judgment appealed against in the present case. That was itself a case of murder, but the Lord Justices lay no stress on the crime being a premeditated one, and indeed Lord Justice Fry uses language which indicates, as the ground of his decision, a principle which would include all wrongful acts, not merely felonies but misdemeanours, and this sound

(1) [1892] 1 Q.B. 147.

principle of universal jurisprudence the Lord Justice states in the following language:

> No system of jurisprudence can with reason include among the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour.

Taking the principle thus expounded as my *ratio decidendi*, I am of opinion that the judgment of Mr. Justice Ferguson was right and must be restored.

The appeal is allowed with costs.

TASCHEREAU J.—I would dismiss this appeal. I adopt the reasoning of the learned judges of the court *a quo* who unanimously concurred in the opinion that this case does not fall under the maxim that *nullus commodum capere potest de injuriâ suâ propriâ*, no one can profit by his own wrong, or get a benefit from his criminal act. The fallacy of the appellants' case is, it seems to me, apparent. They assume that it is from the homicide that Lundy, the husband, derives, or attempts to derive any benefit. Now, first, I do not see any evidence of it in the record. It may be that his wife, after being wounded, lived for weeks or months, in a perfect state of ability to make a new will, and if that was so, I do not see upon what principle her previous will in favour of her husband would not be perfectly valid. For it cannot be denied, I presume, that a will by any one in favour of the person who killed him is good, if made in the interval between the wound and the death. And, if she could have altered her will and did not do it, she must have persevered in her intention to bequeath her estate to her husband, though she knew his crime. So that the appellants here cannot succeed except upon the assumption that she did not have time to change her

1895

LUNDY v. LUNDY.

Taschereau J.

will after being wounded, and that, for there is no evidence of it, I do not see why we should assume.

But leaving that aside, and taking it for granted that she was killed on the spot, the appellants want us to assume that she would have altered her will if she could have done so. Upon what principle of law we can so assume I fail to see. She did not revoke her will, and how can we say that she would have revoked it had she been able to do it?

A life insurance fund is on a different footing. There it is the death that creates the fund, if I may use that expression. But here it is not rights resulting directly from his crime, to use the words of Fry L. J. in the Cleaver case, that Lundy gets under his wife's will.

If Lundy, the husband, had died before trial or conviction, and left a will, would not his will be good and valid to transmit his wife's estate that he came to under her will?

Under the civil law the rules on the subject are quite different. Articles 610 and 893 of the Quebec code, and 727 of the Code Napoléon re-enact the common law upon it. Demolombe (1). But, under the English law, the appellants have failed to convince me that there is room here for the application of the doctrine they invoke.

And, it may not be amiss to remark, the rule of the civil law is not applicable to a will based on the maxim that *nemo ex suo delicto meliorem suam conditionem facere potest*, but on the presumption that the deceased would have disinherited his slayer or revoked his will, if he had had time to do so, and on grounds of public policy.

The Cleaver case does not help the appellants' contentions. It is a totally different case. The learned judges in the Court of Appeal have pointed out the

(1) Success. Vol. 1, nos. 217 *et seq.*

1895

LUNDY v. LUNDY.

Taschereau J.

distinctions between the two cases. The American cases cited appear to be somewhat favourable to the appellants' contentions, but they are not law here, and were it necessary, they might easily be distinguished from this one.

One additional remark. This case is governed by the law as it stood before the Criminal Code, art. 965. And though there was no "inquest of office, or office found" have the appellants a *locus standi?* They have no right to the personal estate, I assume. *Reg.* v. *Whitehead* (1). However, these points are not here in issue, and have not been argued.

Appeal allowed with costs.

Solicitors for the appellants: *Guthrie & Watt.*

Solicitors for the respondent: *T. & W. Morphy.*

(1) 2 Moody C. C. 181.