De Bloedige Hand Neemt Geen Erfenis Revisited

By **PW Thirion**

The headnote to the judgment in *Casey v The Master* 1992 (4) SA 505 reads:

> 'Principle and public policy require that the maxim *"de bloedige hand neemt geen erfenis"* still applies to a person who negligently caused the death of another.'

The object of this note is to examine the validity of this statement of the law. The object is not to question the application of the '*bloedige hand*' maxim, to the crime of murder. In passing though, it may be worth mentioning that even in the case of murder there may be room for relaxation of the rule. Take the case of a dutiful son who, succumbing to his father's plea to be released from intolerable pain resulting from an incurable disease assists his father in bringing about his death. Is our law so hide bound by precedent as to be incapable of making an exception in such a case? The father would not have dreamt of disinheriting his son for causing his death. Neither the interests of the State nor public opinion require that the son should be penalised for what he has done.

I confine myself to the case of the negligent killing of a testator by his heir in circumstances where there was on the part of the person responsible for the death, no intention to cause the deceased any harm and no recklessness or indifference as to whether the deceased would die – in short a case where in local parlance the killing would be said to be 'accidental'.

The old authorities approach the question from varying angles. Certain authorities would disqualify the heir who has negligently killed his testator, on the ground that the killing renders him unworthy of taking the inheritance. Other authorities invoke the principles enshrined in the maxims *nemo ex suo delicto meliorem suam condicionem facere potest* (D. 50.17.134(1)) and '*de bloedige hand en neemt geen erfenis*' to reach the same conclusion. Yet others blend all these considerations. It is perhaps preferable to address each of these considerations separately.

The Digest deals with the ademption of inheritances in D. 34.9 under the heading *De his quae ut indignis auferuntur*. The Digest gives no definition of the term *indignus*. It lists instead a large number of specific instances of conduct which would render the heir *indignus* and hence unworthy of accepting an inheritance from his testator. Certain of these disqualifications were probably imposed by reason of State policy. For example, a woman who had been living with a soldier as his concubine could not benefit from his will (D. 34.9.14). If anyone, while exercising a public employment in a province, were to marry without authority a wife in that province, he would be disqualified from inheriting from her (D. 34.9.2(1)). But the majority of the disqualifications related to dishonourable, deceitful, violent or corrupt conduct on the part of the heir in relation to either the will of the testator or the testator's person or estate. 'Deadly' or 'mortal' hatred (*inimicitiae capitalis*) between the testator and the heir, resulted in the heir not being able to claim the inheritance – but only if it was probable that the testator would have been unwilling, had he survived, that the heir should enjoy the benefit of the inheritance (D. 34.9.9). Certain instances of unworthiness seem to have had as their basis a suspicion that the heir might have had a hand in the death of his testator; for example if an heir failed to avenge (*defendere*) the death of the testator, he was deprived of the inheritance – (D. 34.9.20 and 21) and see C. 6.35.1. It does, however appear that in some instances the rules regarding unworthiness were tempered and some flexibility allowed (D. 34.9.2(2) and 5).

The Codex also lists certain instances of unworthiness but they are not relevant (C .6.25).

The only passage in the Digest's title on unworthiness which refers to a negligent killing is D 34.9.3. This is the passage on which certain Roman Dutch authorities rely so heavily for their view that an heir who has negligently killed his testator, is disqualified from inheriting from him. It reads:

> *'Indignum esse divus Pius illum decrevit, ut et Marcellus libro duodecimo digestorum refert, qui manifestissime comprobatus est id egisse ut per neglegentiam et culpam suam mulier, a qua heres institutus erat moreretur.'*

Mommsen, Krueger & Watson translate this passage as:

> 'The *Divus Pius* decreed – that a man who is clearly demonstrated to have negligently and culpably caused the death of the woman by whom he had been appointed heir, is unworthy.'

Scott renders the passage as:

> 'The *Divus Pius* decided that a person is unworthy (as Marcellus states in the 12th Book of the Digest) who was clearly proved to have permitted the woman by whom he was appointed heir, to die through his own negligence and fault.'

With the greatest respect I venture to suggest that some of the meaning of the original might have been lost in translation. The phrase '*qui manifestissime comprobatus est id egisse, ut per neglegentiam et culpam suam mulier… moreretur*' would, I think, more literally mean 'who is most clearly proved to have acted in such a manner that through his negligence and culpa the woman died.' The reference to the testator as a woman suggests that the testatrix was a woman whom the heir was under a legal obligation to support. Viewed in that light the rescript refers to a case where the heir, over a period of time, neglected his duty to such an extent that the testatrix died as a result. It refers to a course of conduct which caused the death of the testatrix. I think the use of the term '*neglegentia*' in apposition to '*culpa*' strengthens such interpretation. It suggests that the heir was at

least indifferent to whether the testatrix would die in consequence of his neglect. It indicates a callous and deliberate neglect of duty and not merely an inadvertent omission. It is more in line with the reckless disregard of the welfare of the testatrix which the heir displayed in the case of *Taylor v Pim* 1903 NLR 484. The Romans, of course, recognised various degrees of *culpa* ranging from slight negligence to negligence approximating to *dolus*; one where there is a reckless disregard of the possibility of death ensuing. See also *S v Van Zyl* 1969 (1) SA 553 (AD).

To my mind D. 39.9.3 is not authority for the wide proposition that any negligent killing whatsoever of a testator by his heir renders the heir unworthy of inheriting from him.

Voet deals with the subject of 'unworthiness' in Book 34.9 of the *Commentary on the Pandectas*. At 34.9.6 Voet says:

> 'Most of all is one unworthy who has killed the testator or has brought about his dying through negligence.' (Gane's translation.)

For this statement Voet relies on D. 34.9.3, 49.14.9 and 48.20.7.4. I have already dealt with D. 34.9.3. D. 49.14.9 and D. 8.20.7.4 do not seem to deal with a negligent killing but with a case of murder. (See the reference in D. 48.20.7.4 to '*veneno necasse conviceretur*' and in D. 49.14.9 *to 'veneficii'*.)

Grotius in his *Introduction to Dutch Jurisprudence* says at 2.24.24 that 'according to Roman law when the person to whom anything is bequeathed is found to have been the "cause of the testator's death" he forfeits the bequest.' Again at 2.28.42 Grotius says 'Whoever has criminally caused the death of the deceased even though he be the next of kin, may not inherit.' (Maasdorp's translation).

To this Schorer adds note CXCVII saying that it is a common proverb that the bloodstained hand takes no inheritance (*de bloedige hand neemt geen erf*).

For his statement at 2.28.42, Grotius also relies on D. 34.9.3 as well as on D. 24.3.10(1). D 24.3.10(1) says:

> *'Si vir uxorem suam occiderit dotis actionem heredibus uxoris dandam esse. Proculus ait et recte: non enim aequum est virum ob facinus suum dotem sperare lucrifacere…'*

The use of the word '*occidere*' suggests a killing or slaying amounting to murder. The text also justifies the forfeiture of the dowry on the ground that it is no just that a wrongdoer should prosper from his wrongdoing. I shall deal later with this aspect. It cannot be deduced however from the rather superficial manner in which Grotius generalises on the consequences of a killing, that he intends his remarks to apply also to an '*accidental*' killing.

Van Leeuwen in his *Censura Forensis* Part 1, Book 3, Ch 4.42 says:

> 'He who has killed another or has given aid or assistance in the commission of this crime, is unworthy of succeeding to that man by testament or on intestacy and what has been left to him the treasury deprives the murderer of on the ground that he is unworthy of it. But unworthy persons of this kind, as is the case too with other unworthy persons, are regarded by usage as incapable of taking, and what has been left to them is regarded as not having been left. (Schreiner's translation.)

It seems clear that Van Leeuwen is here referring only to a killing amounting to murder because not only does he refer to the killer as a murderer but it is also not usual to talk of assistance or aid to the commission of culpable homicide. In his Roman Dutch Law, Van Leeuwen says at 1.3.3.9:

> 'So, no one who has helped to kill another, or has given counsel or assistance for the purpose can inherit any property from such other by testament, or by law *ab intestato* for no one can benefit himself by his own wrong or profit by what is punishable. (Kotze's translation.)

Again it would appear from the context that Van Leeuwen is confining his observation to the crime of murder because he refers to one who has helped to kill another or has given counsel for that purpose. Van Leeuwen dealt rather extensively with the peremption of inheritances and if he intended the disqualification to extend to an accidental negligent killing it is probable that he would have said so.

Huber in *Hedendaegse Rechtsgeleertheyt* (5th edition, 1768) says at 2.23.56:

> *'Deselve Fiscus erft ook als yemant zich onwaerdig heeft gemaekt, om iets van de overleedene te genieten, als, by exempel de erfgenaem den eflater heeft om't leven gebracht, en om andere reden waer van beneeden in't Kapittel van de Legaten sal gesproken worden. (Gane translated 'om't leven gebracht' as 'murdered'.)*

In Chapter 27 of Book 2, Huber mentions further instances of unworthiness which result in the ademption of inheritances but he makes no further reference to ademption resulting from killing. He does not make mention of a negligent killing at all. In 2.27.48 Huber refers to a case in which, in 1663, an heir was deprived of his inheritance for having stabbed the testator to death (*doodgestoken*). This seems to have been a case of murder. Had there been cases of accidental but negligent killings which resulted in the ademption of inheritances they would surely have been important enough to have merited mentioning. It also is not likely that Van Leeuwen, who was an assiduous writer, was not aware of what Voet had said at 34.9.6 or of D. 34.9.3. If he had interpreted those passages from Voet and the Digesta as meaning that any negligent killing of a testator by his heir resulted in the heir forfeiting the bequest he would certainly have commented on it. Much the same can be said of Huber's treatment of the subject. Ulrik Huber died in 1694, but the 5th edition of 1768 of his work added to the original, cases decided since then. If there had in the interval been cases of unworthiness stemming from negligent killing one would have expected reference to them to have been made in the 1768 edition. There is none.

I deal next with the two maxims which are invoked by certain authorities as authority for disqualifying the heir who negligently kills his testator. A maxim is a succinct expression of a legal principle. But legal principles are subject to exceptions and qualifications. A maxim must not be applied beyond its proper scope of application.

In *Stauffer Chemicals v Monsanto Co* 1988 (1) SA 805 at 812 Harms J warned that legal maxims must be applied with circumspection. They must not be indiscriminately applied as if they are the answer to every problem whatever.

In *Oosthuizen v Homegas (Pty) Ltd* 1992 (3) SA 463 Smuts JP said at 476 with regard to the maxim *nemo ex suo delicto meliorem suam condicionem facere potest:*

> '.. were this principle to be applied indiscriminately to every set of facts where a wrongful act of a person who has suffered damages is involved, one would find a result is achieved which

> is neither good nor just. It might defeat the very purpose which the common law sets out to achieve by evolving principles which are intended to achieve fair dealing between man and man. *In Waring & Gillow Ltd v Sherborne* (supra) Innes CJ stated of the maxim *volenti non fit injuria* that: "like so many other maxims the one under consideration need to be employed cautiously and with circumspection." The same applies to the maxim presently being considered.'

In present day law the intention of the testator in making a bequest is a major consideration. Where it is clear that the testator would have wished the heir, despite his wrongful conduct, to receive the bequest, the court should not for insufficient reason deprive the heir of his bequest. The *'bloedige hand'* maxim applies more appropriately to murder. The *'nemo ex suo delicto'* maxim if it were to be applied indiscriminately to a negligent killing, would lead in most instances to results which the testator would not have approved of.

In the case of an 'accidental' negligent killing of a testator by his heir, the heir does not gain the inheritance by design. It is a fortuitous consequence of the killing. Only in an analogical sense can it be said that he profits by his negligence. The real cause is the testator's decision to make the bequest. To my mind the maxim *nemo ex suo delicto* does not find application to a negligent killing.

But even if it could be held that the old authorities are to the effect that any negligent killing disqualifies the killer from inheriting from the testator whom he has killed, then nevertheless I would argue that the law on this point has long since become obsolete. In *Estate Heinemann & others vs Heinemann* 1919 AD 99 at 136 Juta AJA had occasion to remark on Voet 34.9.5 that even in Voet's time there were doubts as to which of the old instances of indignity had or had not become obsolete and he then commented: 'it is natural that where obsoleteness depends so much upon the ideas of society prevailing at any particular time, it is difficult to say which of these particular cases of Indigni were or were not obsolete' and he points out that the old authorities were not in agreement as to which were obsolete.

In *Green v Fitzgerald* 1914 AD 88 at 101 Lord De Villiers CJ remarked:

> 'This conception (ie that adultery is such a heinous offence that it has to be visited with punishment also on the innocent offspring) still existed at the time of the cession to Great Britain but during the last century a great change has come over men's minds and adultery is no longer regarded in this country as an offence to be visited with criminal penalties.'

In the same case Buchanan AJA remarked at 119:

> 'The practical abolition of the *querela inofficiosi testamenti* and the *action in supplementum* by our statute, which practicably confers free testamentary disposition should, I think, have great weight in deciding whether or not the old rules of Roman Dutch Law have become obsolete. As to the considerations which should weigh with the Court in taking this view, besides the authorities cited, I may refer to the remarks of Connor J in *Danta v Hart's Executors* (Buch 1868, p 173): "Some provisions of the Roman Law in reference to wills are, I think, generally admitted to be unsuited to the requirements of modern society; and I think that Courts are not only warranted but bound, to avail themselves of any sufficient authority for rescuing the public from the inconvenience of being subjected to the objectionable parts of the old law." And again in *Henderson v Hanekom* (205 SCR, p 159) De Villiers CJ says: "However anxious the Court may be to maintain the Roman Dutch law in all its integrity there must in the ordinary course be a progressive development of the law keeping pace with modern requirements." '

The tendency towards allowing a testator freedom of testation has continued unabated since the time when these remarks were made. Nowadays effect has wherever possible to be given to the intention of the testator as expressed in his will and that intention should not be frustrated by adherence to notions which have become outdated. Apart from *Casey's* case I am not aware of any case in which our courts have ruled that an heir who has 'accidentally' but negligently killed his testator is disqualified from inheriting from him. *Taylor v Pim* (supra) is obviously not such a case and in *Caldwell v Erasmus* the question of obsolescence was not addressed at all.

There must over the last 100 years have been a fairly large number of instances where a driver of a motor vehicle has, through his negligent driving, caused the death of a passenger who was his parent or close relative and from whom he stood to inherit. Yet his right to do so has never been challenged in court. That to my mind is a strong indication that society does not look upon such a killing as rendering the killer unworthy.

The disinheriting of an heir can only to be justified on one or other of the following grounds:

> *one* – that society's ideas of morality justify it or,
> *two* – that the interests of the State require that it be done or,
> *three* – that the deceased testator would have wanted the heir to be disqualified from inheriting from him.

I am sure that, in the vast majority of cases of negligent killing, the testator would not have wanted that, especially in a case where disinheritance would leave the heir without support, such as in the case of a surviving wife or minor. In my view neither the interests of the State nor the values of modern society demand that the heir who has 'accidentally' but negligently caused the death of the testator should be deprived of his inheritance.

In his *Commentary on the Pandects* 1.3.37 and 39 Voet says:

> 'Owing to the constant change of times and manners, laws do not for ever remain praiseworthy by reason of benefit like that with which they were originally brought into force..."Surely you must know," says Gellius "that the timeousness and healing power of the law shifts and varies with manners of the times, with the classes of public business, with the grounds of present advantage and with the accesses(?) of the evils, which have to be remedied; and that it never continues in one stay – nay that it changes with the storms of fortune and of affairs, like the face of the sea and the sky."'

It is well also to bear in mind what Steyn says in the introduction to the *Uitleg van Wette (4th edition):*

> 'Die gebruik van ons howe en juriste is wel 'n aanduiding van die wil van die gemeenskap, maar dit maak nog nie daardie wil uit nie.'

I am convinced that whatever the courts may rule, the statements of the law as stated in *Casey's* case will be almost universally disapproved of by modern society. A