for succession tax purposes is constitutionally unobjectionable, is a word to the contrary. Nevertheless, the following language also contained in the opinion is rather convincing: ". . . certainly, existing conditions no less imperatively[32] demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions has been in that direction."

In connection with the action of the court in overruling *Blackstone v. Miller* it is noteworthy that the attitude of the court as far as the taxation of debts or choses in action is concerned denotes a return to the view of the earlier state decisions which held that for the purpose of an inheritance tax a chose in action is to be regarded as situated with the creditor, so that a debt due from a resident debtor to a nonresident decedent is not taxable.[33] Likewise, a bank deposit has been held a mere debt due from the bank to depositor; as a mere chose in action it is without actual situs. It may be taxed at the depositor's domicile, and the state where the bank is located has refused to tax it.[34] Professor Beale in criticizing the *Blackstone* case several years ago[35] said: ". . . by the great weight of authority it is agreed that a debt has no territorial situs and can be taxed only as part of the personal tax of the creditor. A creditor may be taxed in the state of his domicile on all debts and choses in action due to him; but the state of the debtor cannot tax a debt due to a nonresident creditor."[36]

WALLACE V. WILSON, JR., '30.

COMPLAINANT'S MISCONDUCT AS A DEFENSE TO HIS ACTION FOR DIVORCE

So long as Roman Catholicism was the state religion of England, that is, up to the reign of Henry VIII, marriage was re-

[32] That is, than tangibles having an extra-state situs.

[33] Allen v. Philadelphia Sav. Fund Society (1879) 1 Fed. Cas. 234; Kintzing v. Hutchinson (1877) Fed. Cas. No. 7, 834; Gilbertson v. Oliver (1906) 129 Ia. 568, 105 N. W. 1002; Matter of Gordon (1906) 186 N. Y. 471, 79 N. E. 722; Orcutt's Appeal (1881) 97 Pa. 179.

[34] Pyle v. Brenneman (1903) 122 F. 787; State v. Clement Nat. Bank (1911) 84 Vt. 167, 78 Atl. 944; Pendelton v. Com'th (1909) 110 Va. 229, 65 S. E. 536. The opposite view was taken in Matter of Houdayer (1896) 150 N. Y. 37, 44 N. E. 189, and again in Blackstone v. Miller (1903) 188 U. S. 189.

[35] (1919) 32 HARV. L. REV. 587 at 603.

[36] Citing Jack v. Walker (1897) 79 F. 138; Collins v. Miller (1871) 43 Ga. 336; Foresman v. Byrns (1879) 68 Ind. 247; McCartney v. Gordon (1901) 127 Mich. 517, 86 N. W. 1042.

garded by the church as indissoluble. This view of the canon law was applied by the ecclesiastical courts in England, which had jurisdiction over matrimonial causes. These courts went no further in the direction of modern divorce than to grant a sort of judicial separation known as divorce *a mensa et thoro*. But the body of ecclesiastical law was not taken over as a part of the common law by the courts in this country and as a result divorce, as it is known in the United States, is almost entirely a product of legislation.[1] Hence it is inevitable that courts in the various states of this country, lacking a common-law background and substantial body of precedent, should differ widely in their interpretation of problems arising in connection with divorce. One such interesting problem is the question as to what misconduct on the part of a spouse is sufficient to constitute a defense to his own action for divorce, based on grounds in themselves sufficient, and it is with defenses of this nature that this discussion is intended to deal.

In order properly to understand the extent and limit of such defenses, and to get them located in their proper category, it is first essential to understand the defenses of connivance and recrimination and to distinguish them from those subsequently to be discussed.

Connivance is defined by Keezer as "the consent, express or implied, of one spouse to the misconduct of the other."[2] Some cases say that a corrupt intent on the part of complainant that the guilty party should commit the offense is an essential element of connivance.[3] On one point, at least, the courts are agreed. If the misconduct does amount to connivance it is without question a good defense to complainant's action.[4] The question as to what misconduct constitutes connivance is a much more difficult one. According to *Leavitt v. Leavitt*[5] the right to a divorce for adultery is barred by connivance, but knowledge of the wife's adulterous disposition and failure to remonstrate is not connivance. A New Jersey case, on the other hand, holds that when a husband knows his wife is tempted and he does not remove the temptation to adultery, though it is easily within his power to do so, he is guilty of connivance and his suit on the ground of his wife's adultery is barred.[6] A Massachusetts case sums up the matter in this way: "He may properly watch his wife whom he suspects of adultery, in order to obtain proof of

[1] See Keezer, MARRIAGE AND DIVORCE (2d ed. 1923) 167.
[2] Keezer, *op. cit.* 292.
[3] Herriford v. Herriford (1913) 169 Mo. A. 641, 155 S. W. 855.
[4] 19 C. J. p. 90, sec. 209.
[5] (1918) 229 Mass. 196, 118 N. E. 262.
[6] Sargent v. Sargent (N. J. 1920) 114 Atl. 428.

that fact. He may do it with the hope and purpose of getting a divorce if he obtains sufficient evidence. He must not, however, make opportunities for her, though he may leave her free to follow opportunities which she has herself made. He is not obliged to throw obstacles in her way, but he must not smooth her path to the adulterous bed."[7] It is apparent from the decisions that no hard and fast rule can be laid down as to what constitutes connivance. It is for the court to decide on the circumstances of each particular case.

Recrimination may be defined as the commission by the complainant of acts which afford sufficient grounds for divorce.[8] While it is true that the offense set up in recrimination need not be of the same nature as the one relied upon in the libel, yet it must be such as to constitute, in law, a sufficient ground for divorce.[9] The theory is that divorce is a remedy for the innocent against the guilty and, of course, if the parties are equally at fault there can be no decree for either. But the typical suit barred by recrimination is easily distinguished from a suit in which defendant sets up complainant's misconduct in justification of the offense upon which the suit is based. In the latter the defendant is guilty of an offense constituting grounds for divorce. The complainant is guilty of a lesser offense. But the lesser contributes to and in some measure causes the greater, on which the suit is based. In recrimination, on the contrary, the offense of the one spouse need have no connection with that of the other. Hence for the one to constitute a defense to the other it must in itself be a ground for divorce.

As distinguished from the defenses of connivance and recrimination, the misconduct of complainant is often set up by defendant in mitigation of the offense upon which the suit is predicated. Typical examples arise in suits based upon adultery, cruelty and desertion and in these connections the defense may well be considered.

In the first situation we have conduct on the part of the husband which is conducive to the adultery which his wife commits, though in itself it is not sufficient ground for divorce. In *Pike v. Pike*[10] a young man married a chorus girl and model, but they lived apart and kept the marriage secret. The husband furnished his wife with living expenses but gave her none of the other protection and care usually incidental to marriage, though

[7] Noyes v. Noyes (1907) 194 Mass. 20, 79 N. E. 814.

[8] Keezer, *op. cit.* 304.

[9] Cushman v. Cushman (1907) 194 Mass. 38, 79 N. E. 809; Malone v. Malone (1905) 76 Ark. 28, 88 S. W. 840; Appeltofft v. Appeltofft (1925) 147 Md. 603, 128 Atl. 273.

[10] (1927) 100 N. J. Eq. 486, 136 Atl. 421.

he was fully aware of her previous incontinence. The wife committed adultery. She brought an action for divorce on the ground of desertion and the husband brought a cross-bill on the ground of adultery. The husband had not in fact deserted. Neither party was granted a divorce, the husband's cross-bill being denied on the ground that his conduct, though it was not such as to give the wife a cause for divorce, was conducive to the commission of her offense and hence constituted a good defense.

In suits based on the ground of cruelty we have very much the same situation. Says Corpus Juris: "The general rule is that a divorce will not be granted on the ground of cruelty when the cruelty was provoked by the misconduct of the complainant."[11] The difficult question is what amount of misconduct is sufficient to provoke or justify defendant's cruelty. According to *Bohan v. Bohan*[12] the misconduct of a complainant, to defeat the right to a divorce for cruelty, need not have been equal to the defendant's, but must have been of the same general character and such as was reasonably calculated to provoke the defendant's misconduct. It is also sometimes said that misconduct of complainant constituting a defense on the ground of provocation, justification, or excuse, need not be such as in itself would entitle defendant to a divorce.[13] Here again it is almost impossible to lay down a general rule as to what misconduct will constitute justification. In *Weirsmith v. Weirsmith*[14] the friendship of a wife, thirty-five years of age, with a Bible class leader, seventy-four years old, where evidence showed that he had nothing more than a fatherly interest in her welfare, was held no justification for cruel treatment alleged by the wife as a ground for divorce. After all, each decision of a court in a divorce action depends upon the circumstances of the particular case. There seems to be no reason why the misconduct should be of any particular degree so long as the court finds that it is such as is reasonably calculated to provoke defendant's misconduct.

Now if the circumstances are such as to justify or excuse one spouse in separating from the other, the latter cannot obtain a divorce for desertion.[15] This raises the question as to what misconduct of a spouse will justify the other in leaving home. It is often said that to justify desertion of one spouse the misconduct of the other must be such as would in itself constitute a ground

[11] 19 C. J. p. 78, sec. 175. See also Smith v. Smith (Tex. 1918) 200 S. W. 1129; Hatchett v. Hatchett (1923) 89 Okla. 176, 214 Pac. 929; White v. White (1921) 100 Ore. 387, 197 Pac. 1080.

[12] (Tex. 1900) 56 S. W. 959.

[13] 19 C. J. p. 77, sec. 171.

[14] (Iowa 1917) 161 N. W. 439.

[15] 19 C. J. p. 79, sec. 177.

for divorce.[16] But some courts hold that conduct not in itself constituting grounds for divorce may yet be sufficient to justify desertion.[17] In *Campbell v. Campbell*[18] a husband sued his wife for divorce on the ground of desertion, the wife having left home. In a previous suit by the husband on the ground of habitual intemperance the wife filed a cross-complaint on the ground of intolerable cruelty. Both grounds were there held insufficient to justify a divorce. In the later action it was held error for the trial court to reject testimony of the wife as to the husband's cruelty merely because it had been held to be insufficient as a ground for divorce. A case in West Virginia, *Hamilton v. Hamilton*,[19] holds that misconduct insufficient even to justify desertion, though it was conducive to it, may prevent a decree to the deserted party.

A related question is raised in divorce suits based on constructive desertion. It is held by many courts that the husband is the deserter if, without just cause, he subjects his wife to such treatment as compels her to leave him.[20] Moreover, some courts hold that to justify the innocent spouse in leaving home and to constitute constructive desertion the treatment must be such that an action for divorce could be predicated directly on that conduct or treatment.[21] On the other hand some jurisdictions hold that the misconduct which caused the innocent spouse to leave need not be such as would be a ground for divorce.[22] The West Virginia court in *Hall v. Hall*[23] held that though the acts of the offending spouse were not sufficient to constitute grounds for divorce yet the innocent spouse was justified in leaving home. A court in the same state in *Roberts v. Roberts*[24] held that if the offended spouse was justified in leaving she could procure a divorce on the ground of constructive desertion. But to adhere

[16] Arnaboldi v. Arnaboldi (N. J. 1929) 144 Atl. 917; Douglas v. Douglas (1928) 156 Tenn. 655, 4 S. W. (2d) 358; Craig v. Craig (1909) 90 Ark. 40, 117 S. W. 765; Frank v. Frank (1913) 178 Ill. App. 557; Towson v. Towson (1920) 126 Va. 640, 102 S. E. 48.

[17] Lyster v. Lyster (1873) 111 Mass. 327; Hall v. Hall (1911) 69 W. Va. 175, 71 S. E. 103; Wulke v. Wulke (1921) 149 Minn. 289, 183 N. W. 349; Hardin v. Hardin (1850) 17 Ala. 250; Watts v. Watts (1894) 160 Mass. 464, 36 N. E. 479.

[18] (1929) 110 Conn. 277, 147 Atl. 800.

[19] (1921) 87 W. Va. 534, 105 S. E. 771.

[20] Roberts v. Roberts (W. Va. 1929) 150 S. E. 231; Elder v. Elder (1924) 139 Va. 19, 123 S. E. 369; Pattison v. Pattison (1918) 132 Md. 362, 103 Atl. 977; Lundy v. Lundy (1922) 23 Ariz. 213, 202 Pac. 809; MacPherson v. MacPherson (1926) 100 N. J. Eq. 91, 135 Atl. 91.

[21] Pidge v. Pidge (Mass. 1841) 3 Met. 257; Dwyer v. Dwyer (1885) 16 Mo. A. 422; Padelford v. Padelford (1893) 159 Mass. 281, 34 N. E. 336; Lynch v. Lynch (1870) 33 Md. 328; Barnett v. Barnett (1901) 27 Ind. App. 466, 61 N. E. 737.

[22] Curlett v. Curlett (1903) 106 Ill. App. 81. See 9 R. C. L. p. 362, sec. 149.

[23] See note 17 above.

[24] See note 22 above.

to the holding of the latter case is in effect to say that any conduct on the part of a spouse which justifies the other in leaving gives the latter a right to a divorce. But the problem as to what misconduct will justify a spouse in leaving then becomes just as difficult to determine as the amount which will justify a divorce, and though the formalistic basis has been changed the actual problem as to where to draw the line remains the same. Massachusetts cannot be accused of this inconsistency for in that state a divorce cannot be granted on the ground of constructive desertion unless the acts of the guilty party were such as to justify the other in obtaining a divorce on those grounds alone. The West Virginia court obviously is subject to criticism on this point.

Now the divergent opinions of different courts and the inconsistent positions of the same court in different cases have been briefly pointed out. The chief difficulty seems to arise from the use of legal terminology, such as the use of the term connivance in connection with defenses to suits based on adultery. Courts disagree as to what constitutes connivance, some holding the corrupt intent necessary and others going very far in implying it. It is of little importance that courts uniformly hold connivance a good defense so long as they differ widely as to what constitutes it. They have a legal term which scarcely has a meaning except as each court gives it one, and as a result it serves to confuse more than to aid. Likewise in the cruelty cases the courts refuse to grant the divorce where the defendant's cruelty was "provoked" by misconduct of complainant. But here again what constitutes sufficient provocation is a subject of controversy. In the cases of desertion it is easy for the courts to say that no divorce will be granted if the spouse leaving home was "justified" in doing so, but when they start to determine what is justification some say it must be such misconduct as would constitute grounds for divorce and others say less misconduct than this will be sufficient. The same difficulty arises in cases of constructive desertion.

Divorce is a legal field in which there is much litigation at the present time. It is a problem of public importance and one which we cannot afford to treat lightly. Hence the treatment of it by the courts should be anything but superficial. The general principles of law with regard to divorce are fairly well defined and uniformly recognized by the courts, but in the application of these principles there are glaring inconsistencies. Many of these arise from the courts' attempts to place the parties' misconduct in certain legal categories and to determine from these what the decision should be. But if the courts would look more to the substance and less to the form it is certain that their positions would be much more consistent and the general handling of the problem much more efficient.

BARTON L. WARREN, '31.