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TESTS TO DETERMINE WHETHER A STOCK DIVIDEND IS TAXABLE INCOME

By W. LEWIS ROBERTS*

The United States Supreme Court in *Eisner* v. *Macomber*,[1] decided in 1920, raised a question that has ever since given trouble to the courts, the Board of Tax Appeals, and the Internal Revenue Bureau: What stock dividends issued by corporations to their stockholders constitute income to the stockholders and are taxable as such? In the particular instance a dividend of common stock was issued to holders of common stock. The majority of the Court held that such a stock dividend was not income and therefore could not be taxed under the Sixteenth Amendment, which authorized a tax on income from whatsoever source derived.

Mr. Justice Pitney quoted from an earlier opinion of the Court to the effect that a stock dividend takes nothing from the property of the corporation and adds nothing to the shareholder's interest. "What has happened," he said, "is that the plaintiff's old certificates have been split up in effect and have diminished in value to the extent of the value of the new." It "merely changed the evidence which represented that interest". Furthermore, he asserted that since the stock dividend in question was not income, Congress did not have power to tax it without apportionment.

Mr. Justice Holmes dissented on the ground that the word "income" in the Sixteenth Amendment should be read to cover such dividends, and that in his opinion this was the obvious understanding of its purpose. Mr. Justice Brandeis in his dissent went to great length in stating his objection to the majority view. On the analogy of a partner's interest in the partnership's gain for a year, he maintained that segregation of assets was not essential to corporate gain income of the shareholder. Further-

* Professor of Law, Emeritus, College of Law, University of Kentucky; A.B., Brown University; A.M., Pennsylvania State College; J.D., University of Chicago; S.J.D., Harvard; Teaching at University of Houston, School of Law, Houston, Texas, since September, 1947.

[1] 252 U.S. 189 (1920).

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"CHILD MARRIAGES" IN KENTUCKY

Kentucky, together with one or two sister southern states, has received a great deal of notoriety for its "child brides". In fact, so well publicized have been the isolated cases of child marriages that the practice has become linked with the name of the state in the minds of many of the members of the newspaper-reading public. The natural inference, of course, would be that Kentucky's marriage laws have been so fashioned as to permit such marriages and to sanction their valid existence when performed. It is the purpose of this note to examine the statutory and judicial age requirements for marriage in the state and to point out the various possibilities of validity of a marriage relationship, one or both of the parties to which are within such an age classification as to be legally termed an infant.

Of the several statutory provisions bearing upon the question, the one most directly in point is Ky. R. S. 402.020, which reads as follows:

> "Marriage is prohibited and void:
> (1) With an idiot or lunatic;
> (2) Between a white person and a Negro or mulatto;
> (3) Where there is a husband or wife living, from whom the person marrying has not been divorced;
> (4) When not solemnized or contracted in the presence of an authorized person or society;
> (5) *When at the time of marriage, the male is under sixteen or the female under fourteen years of age.*" (emphasis writer's)[1]

The statute, as enacted in 1851,[2] prohibited marriages when the male was under fourteen or the female under twelve, and the present form was adopted by an amendment in 1928.[3] The Court of Appeals has consistently held marriages contracted in violation of each of the first four subsections absolutely void. It is, then, clear that a marriage of a mental incompetent,[4] of a Negro and a white,[5] of one having a living spouse not divorced,[6] or of parties who knowingly fail to conform to the format requirements of subsection (4)[7] can have no validity from its inception. Subsection (5), however, was not interpreted by the court until 1932, in the case of *Crummies Creek Coal Corp.* v. *Napier*.[8] In that case it was held that a marriage in violation of subsection (5) was not void but merely voidable at the option of the infant. This result, while it appears to circumvent the wording of the statute, which as clearly prohibits this type of purported marriage as it does those mentioned in the other subsections, is consistent with the holdings of other states[9] and appears to be the proper one upon the facts. There the father of a deceased miner resisted a motion of the coal company, before the Workmen's Compensation Board, to set aside benefits which he received as a dependent of the deceased son. The motion was made on the ground that the father had subsequently married. The applicable statute declared that, "Compensation to any dependent shall cease . . . at the legal or common law marriage of such dependent."[10] Napier, the father, contended that, since his marriage had been to an infant of thirteen years, it was void under the statute. The court, however, decided against this contention, holding that subsection (5) must be read and construed in connection with Ky. R. S. 402.030 and 402.250, which declare respectively that,

> "Courts having general equity jurisdiction may declare void a marriage . . . at the instance of any next friend, where the male was under sixteen or the female under fourteen years of age at the time of the marriage, and the marriage was without the consent of the father, mother, guardian or other person having the proper charge of his or her person, and has not been ratified by cohabitation after that age."

and that,

> "Where doubt is felt as to the validity of a marriage, either party may, by petition in equity, demand its avoidance or affirmance; but where one of the parties was within the age of consent at the time of the marriage, the party who is of proper age may not bring such a proceeding for that cause against the party under age."

[1] These are not the only prohibited marriages. Ky. R. S. 402.010 prohibits consanguineous marriages.
[2] Ky. Acts 1850, c. 617, p. 213.
[3] Ky. Acts 1928, c. 156.
[4] Johnson v. Sands, 245 Ky. 529, 53 S.W. 2d 929 (1932).
[5] Moore v. Moore, 30 Ky. Law Rep. 383, 98 S.W. 1027 (1907).
[6] Barth's Adm'r. v. Barth, 102 Ky. 56, 42 S.W. 1116 (1897).
[7] Robinson v. Redd's Adm'r., 43 S.W. 435 (Ky. 1897); *see* Klenke v. Noonan, 118 Ky. 436, 81 S.W. 241 (1904).
[8] 246 Ky. 569, 55 S.W. 2d 339 (1932).
[9] Willits v. Willits, 76 Neb. 228, 107 N.W. 379 (1906); Hunt v. Hunt, 23 Okla. 490, 100 Pac. 541 (1909).
[10] Ky. R. S. 342.080.

The court said that, when all of the above-mentioned sections are read together,

> ". . . it is very plain that, notwithstanding subsection (5) of Ky. R. S. 404.020 positively declares a marriage void, when at the time it is consummated 'the male is under sixteen, or the female is under fourteen years of age,' it may be avoided in a court of equity (a) at the insistence of a next friend, if it was performed without the consent of the father, etc., or (b) where one of the parties who (sic) was within the age of consent at the time of the marriage. But, if the other party is of proper age at the time of the ceremonial marriage, he or she may not in a court of equity avoid the marriage for that cause against the party under age."

No case involving the question of the marriage of one below the age of consent has been decided by the Court of Appeals since the *Crummies Creek* case. In view of the broad language of the court above quoted, dictum though it may be, in application to cases other than those involving Workmen's Compensation,[11] it seems entirely possible that the court would in other cases hold a marriage merely voidable and not void, where it involved a female between the ages of seven and fourteen, or a male between the ages of seven and sixteen. It appears, however, that there is room for considerable doubt that such a marriage would be anything but fully valid if parental consent had been obtained.

However, an additional ground for distinguishing the *Crummies Creek* case may be found. The Workmen's Compensation statute, as has been seen, gives the same effect to a "common law marriage" as to a "legal marriage". At common law, the marriage of a female of thirteen was not void; hence, it might be argued this statute preserves it for Workmen's Compensation purposes *only*, it still being void for all others under Ky. R. S. 402.020.

As to marriages involving parties below the age of seven years, no case has been decided in Kentucky. It will be remembered, however, that such marriages were absolutely void at

[11] In Edgewater Coal Co. v. Yates, 261 Ky. 335, 87 S.W. 2d 596, 597 (1935), it was said: "Common-law marriages, as such are not recognized in Kentucky. However, in applying section 4894 of the statutes (Ky. R. S. 342.080), it has been necessary for us to apply rules in determining the status in the same manner as if such marriages were accepted as legal for all purposes."

common law,[12] and that, according to a universally recognized principle of statutory construction, the common law rules are not to be considered as supplanted unless expressly or by necessary implication abrogated by statute. In view of this principle, then, and of the impelling social interest in the protection of such infants, any marriage contracted in Kentucky, one or both of the parties to which was below the age of seven, would almost certainly be declared void from its inception.

Another Kentucky statute prohibits the issuance of a marriage license in case

> ". . . either of the parties is under twenty-one years of age and not before married, . . . without the consent of his or her father or guardian, or if there is none or he is absent from the state, without the consent of his or her mother personally given or certified in writing to the clerk over the signature of the father, guardian or mother, attested by two subscribing witnesses, and proved by one of the witnesses, administered by the clerk. If the parties are personally unknown to the clerk, a license shall not issue until bond, with good surety, in the penalty of one hundred dollars is given to the Commonwealth, with condition that there is no lawful cause to obstruct the marriage."[13]

In the case of this statute, as with all of the Kentucky marriage laws concerning non-age, there is almost a total absence of judicial interpretation. A dictum in an old case sustains the position that a marriage ceremoniously contracted, but in violation of a similar statutory provision would nevertheless be valid.[14] This is thought to be the more desirable holding and is the almost universal rule of construction of such statutes in other jurisdictions.[15] A penalty is provided for any clerk[16] or deputy clerk[17] "knowingly" issuing a marriage license to any persons prohibited from marrying, but no prosecution under these sections has been reviewed by the Court of Appeals. It is apparent that the inclusion of the word "knowingly" constitutes an almost invincible armor of protection to any clerk who

[12] 1 BLACKSTONE COMM. 436; 2 BURN, ECCLESIASTICAL LAW 394 (4th ed. 1781).

[13] KY. R. S. 402.210.

[14] *See* 1 A. K. Marsh (8 Ky.) 76, 78 (1817).

[15] Fodor v. Kunie, 92 N. J. Eq. 438, 112 Atl. 598 (1920); *Ex parte* Hollopeter, 52 Wash. 41, 100 Pac. 159 (1909); *see* note 22 L.R.A. (N. S.) 1203.

[16] KY. R. S. 402.990(8).

[17] KY. R. S. 402.990(10).

chooses to take at face value the assertion of any applicant for a license that he is above the age of consent. A penalty of not more than three years imprisonment is also provided for ". . . any person who falsely personates the father, mother or guardian of an applicant in obtaining a license . . ."[18]

The only remaining statute bearing upon the question of the marriage of an infant is the one which provides that when a

> ". . . female under sixteen years of age marries without the consent of her father or guardian, or of her mother if there is no father or guardian or he is absent from the state, the court having general equity jurisdiction in the county of her residence shall, on the petition of a next friend, commit her estate to a receiver, who upon giving bond, shall hold her estate, and, after deducting a reasonable compensation for his services, pay out the rents and profits to her separate use during her infancy, under the direction of the court. When the wife arrives at the age of twenty-one the receiver shall deliver her estate to her unless the court considers it for her benefit to continue it in the hands of the receiver."[19]

It is interesting to note that, although the statutes forbid the issuance of a license to any person under the age of twenty-one, without consent, the above provision in fact appears to recognize that such a marriage may be performed and to acknowledge its validity. This is true even though the female is under sixteen and has married without parental consent! The statutes, as interpreted, have apparently attempted to control infant marriage only by providing penalties for clerks or others who aid in the procurement of the license, and not by invalidating the marriage, although, presumably, Ky. R. S. 402.030 and 402.250 would still be considered effective.

It is therefore submitted, in conclusion, that, as to the validity of marriages in Kentucky of persons below the age of twenty-one, the following situation exists: (1) Marriages, one or both of the parties to which are less than seven years of age, are absolutely void from their inception; (2) marriages in which the female is between the ages of seven and fourteen years of age, and those in which the male is between the ages of seven and sixteen years of age, may be voidable at the suit of the infant or of his next friend (although there is doubt on this point where the consent of parents or guardian had been

[18] Ky. R. S. 402.990(6).
[19] Ky. R. S. 402.260.

obtained); (3) marriages duly performed but wherein one or both of the parties is above the age of consent (fourteen for females, sixteen for males) but below the age of twenty-one are absolutely valid, although the clerk is prohibited, under penalty of a fine, from issuing a license to any person under twenty-one who does not have the consent of his parent or guardian; (4) the estate of a female under sixteen who marries without the consent of her parent or guardian may be committed to a receiver upon petition of the infant's next friend; (5) the statutes are in serious need of clarifying revision.

It is further submitted that the marriage laws of Kentucky may not, in any sense, be considered more lax with regard to age requirements than are the laws of the great majority of the states.[20] The causes of the alleged frequency of child marriages in this state are, therefore, to be sought in sociological studies, since they do not result from any exceptional laxity in the law.

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[20] *See* 1 VERNIER, AMERICAN FAMILY LAWS sec. 29 (1931). Eleven other jurisdictions have the same statutory age requirements for females as does Kentucky, while twelve are lower. For males, nine have the same, while eleven are lower.

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MANSLAUGHTER: ADULTERY AS PROVOCATION

The sight of adultery as sufficient provocation to reduce an offense which would otherwise be murder to manslaughter is a precept which the law has long recognized.[1] Although the exact womb from which it sprang is a matter of speculation, the theory behind its inception is readily apparent. The reason for mitigating a homicide on the basis of provocation is that man's nature is such when sufficiently aroused by heat of passion, that his mind is deaf to the voice of reason.[2] The sight of adultery upon the part of one's spouse, is such an act as will arouse great passion; therefore the common law judges in their wisdom recognized that the passion aroused was sufficient to reduce an intentional homicide to manslaughter. Historically there were two requirements which had to accompany the killing. They were: (1) there had to be ocular inspection of the act,[3] and (2) the mortal blow must have been struck in the first transport of passion.[4]

Portions of the historical view are still with us. In order to determine what additions or subtractions have been made, the general precepts laid down above will be examined individually.

First, let us examine the use of the word adultery. It is perhaps best defined as illegal sexual intercourse between two persons, at least one of whom is married. The use of the word is one of limitation as it restricts the invocation of the doctrine of provocation to the spouse[5] of the party caught in the act. The word is perhaps too confining for there are other situations which are similar in nature to the sight of adultery and which arouse such passion that they might justify an extension of the rule. For example, a father catches a person in an unnatural sex act with his son[6] or daughter or a brother finds his sister in the act of fornication.[7] The passion aroused by such a sight would certainly be great. As the passion is equal to that aroused by the sight of adultery, the law should place each in the same class. Therefore, if the sight of adultery is sufficient provocation, the sight of acts such as these certainly should be sufficient to reduce a killing which would otherwise be murder to manslaughter. The step which logically follows is the abandonment of the term adultery and the substitution for it of the phrase "the sight of illicit intercourse being practiced by or upon a spouse or a female relative of close kin or unnatural acts being practiced by or upon one of close kin." The term close kin would be limited to wife, husband, sister, brother and child.

As was noted above, the first qualification placed upon the rule was that the killer had to have "ocular inspection" of the act. Although the exact connotation to be placed upon this phrase is not certain, it strongly implies that the defendant must have actually seen the parties engaging in the act. This does not appear to be a reasonable qualification and it is the opinion of this writer that such is not the rule today. In the case of *Cox* v. *State*,[8] the defendant knocked on the door of the deceased's house. He heard the bed springs screeching and upon being admitted to the room found the deceased in his underclothes and his wife hiding in the next room. Under the "ocular inspection" rule he would have been convicted of murder for killing the deceased because he had not actually *seen* the parties in the act although there was no doubt in his mind that they had just been engaging in intercourse. Great heat of passion was quite naturally aroused in the defendant and he killed the man.

[1] HALE, PLEAS OF THE CROWN 486 (1778).

[2] 1 RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 513-514 (3d ed. 1843).

[3] Pearson's Case, 2 Lewin 216, 168 Eng. Rep. 1133 (1835).

[4] FOSTER, CROWN LAW 296 (2d ed. 1791).

[5] In Daniels v. State, 162 Ga. 366, 133 S.E. 866 (1926) it was held that the same standard of conduct is required of a wife as is required of a husband where a slaying growing out of the sight of adultery is concerned. As this is the only case found where the wife was the slayer, there is a necessary implication that a single standard would be applied in all cases of an adulterous killing. There is room for doubt, however, due to the double standard applied in certain similar cases. For example, in Kentucky, a husband can obtain a divorce by proof of either adultery or lewd lascivious conduct on the part of his wife; [KY. R.S. (1946) 403.020 (4) (c)]; while the wife must prove that the husband has lived openly and notoriously with another woman. [Booth v. Booth, 12 Ky. L. Rep. 988 (1891)]. It seems only just, however, that in criminal actions, a single standard should be applied.

[6] *See* Regina v. Fisher, 8 Car. and P. 182, 173 Eng. Rep. 452 (1837).

[7] *See* Teague v. State, 67 Tex. Crim. Rep. 41, —, 148 S.W. 1063, 1064-1065 (1912).

[8] 100 Tex. Crim. Rep. 402, 273 S.W. 580 (1925). The unusual instruction indicating that the offense might have been justifiable is based on TEXAS PENAL CODE, art. 1220 (Vernon 1936) which makes justifiable the killing by a husband who catches the parties in the act of adultery.

It seems illogical to conclude that the defendant should be guilty of murder in such a case simply because there was a door between him and the act, in spite of the fact that reasonable men could draw but one inference from the circumstances. The fallaciousness of such a conclusion is readily apparent and it is believed that the requirement of "ocular inspection" defeats the purpose of the rule, that is, to mitigate on the grounds of heat of passion. Therefore, it is submitted that the only logical test, provided the other requirements are met, is that the defendant find the parties under such circumstances as would lead to no other conclusion than that the parties had just engaged, or were preparing to engage, in the act.[9]

The final common law requirement that the mortal blow must be struck in the first transport of passion is still alive today. Although this phrase as such is not often used, the courts hold that the killing must be *immediate* and before the heat of passion has subsided.[10] The word "immediate" adds very little to the phrase "in the first transport of passion" and it is believed that neither term is clear. It is therefore suggested that whenever the word "immediate" is given in an instruction to a jury, it should be pointed out that the heat of passion in an ordinary man, as the law visualizes such a person, cools relatively quickly, and therefore, it is up to the jury to distinguish between the word "immediately" and the word "presently" in arriving at whether or not the passion of the particular defendant should have cooled. The test then would be if the defendant killed *immediately*, the killing could well be manslaughter. If, however, it occurred *presently*, or if the defendant's passion had actually cooled, it would be murder as the ingredient of malice would be added to the intentional killing. This distinction will certainly not solve the problem but it is believed that this will aid the jury in determining whether or not the defendant's act was done under the smart of heat of passion.

As heat of passion denotes an emotional state of a man's mind and provocation refers to those acts which arouse the mind to such a state, it is readily discernible that the sight of every adultery will not be sufficient to reduce the offense. There are

[9] *See* State v. Pratt, 1 Houst. Cr. Cas. 249, 265-266 (Del. 1867). Excellent instruction on reasonable circumstances.

[10] *See* Crowder v. State, 208 Ala. 697, —, 93 So. 338, 340 (1922).

at least two types of cases where such a sight will not mitigate. They are: (1) where the defendant has consented to the act,[11] and (2) where the defendant has a preconceived plan to entrap the parties in the act combined with an intent to kill.[12] In these instances, the element of suddenness is eliminated and the defendant has had time to coolly calculate the heinousness of the offense. Any killing that may occur under the above conditions savors of revenge and hence is malicious. For this reason such a killing is deemed murder. It should be added that mere suspicion[13] or even the wife's admission[14] of past acts, even though the mental anguish may be great,[15] is not sufficient, since this would violate the cardinal principle that words alone are not deemed legal provocation.[16]

In defending one charged with the killing of another caught in the act of adultery, the skillful practitioner has available one of four alternatives in preparing his case. First, he can have his client plead guilty and throw himself upon the mercy of the court. In practically every case this ends in a quick trip to the death house unless there happens to be a statute making the offense justifiable.[17] The second alternative is that of self defense. This type of defense is common in the entrapment cases. The typical situation is where the defendant catches the parties in the act, as he knew he would, and then contends that the deceased attacked him and that he killed only to protect his life.[18] This defense is relatively weak for the defendant had too obvious a motive to kill for the jury to place much credence in any story that he may tell. Moreover, in such cases it is hard to overcome the natural presumption that the defendant was the aggressor. However, it is used in quite a number of cases because an ac-

[11] *See* State v. Holme, 54 Mo. 153, 165 (1873).

[12] People v. Gingell, 211 Cal. 532, 296 Pac. 70 (1931); State v. Agnesi, 92 N.J.L. (7 Gummere) 53, 104 Atl. 299 (1918); State v. Imundi, 45 R.I. 318, 121 Atl. 215 (1923).

[13] State v. John, 30 N.C. (8 Ire. Law) 330 (1848).

[14] Humphreys v. State, 175 Ga. 705, 165 S.E. 733 (1932); State v. Herring, 118 S.C. 386, 110 S.E. 668 (1922).

[15] Howell v. Commonwealth, 218 Ky. 734, 292 S.W. 329 (1927).

[16] Richardson v. State, 123 Miss. 232, 85 So. 186 (1920); State v. Benson, 183 N.C. 795, 111 S.E. 869 (1922).

[17] 6 GEORGIA CODE sec. 75 (Park 1914), see annotations for cases; 5 UTAH CODE, tit. 103 sec. 28-10 (1943), see annotations for cases; TEXAS PENAL CODE, art. 1220 (Vernon 1936).

[18] State v. Agnesi, 92 N.J.L. (7 Gummere) 53, 104 Atl. 299 (1918).

quittal will follow in the event the jury does believe the story. The third alternative is based on the technical definition of provocation. The case is built around the premise that the defendant caught the parties in the act and was so blinded by his passion that he became deaf to the voice of reason.[19] This defense is very effective as the average juror has a natural aversion for the despoiler of the home and a great sympathy for the wronged spouse. Although this line of defense will usually save the defendant from capital punishment, it is used as a last resort due to the fact that in most states it only mitigates the offense to manslaughter. The fourth alternative is definitely the most picturesque. The defense here is based on temporary insanity.[20] The defendant testifies that he remembers seeing the parties in the act, everything went blank and the next thing he remembers is waking up several hours later in jail. This defense, often referred to as the "unwritten law," is not too effective for the modern juror is too realistic to believe that a man goes insane for an hour or so during his whole lifetime and that the insanity occurs at the only time it could possibly have been of any advantage to him.

As the existence of provocation in the law of homicide has not shown a tendency to fade, the sight of adultery remains as sufficient provocation to reduce an intentional killing to manslaughter. As such, it is a strongly entrenched form of defense. It must be admitted that such a sight does ordinarily create great passion due to the deep possessiveness that man feels for his mate. As it does create such a great passion, the killing that follows could not be said to be malicious. Therefore, it is logically classified as a provoked homicide.

Unquestionably, however, such a sight should not be held to *justify* the offense, as it is in a number of states.[21] Also, it is believed that there should be a strong movement to eliminate such defenses as the "unwritten law" and that the offense should be placed on a realistic plane. The reason the law should be more exacting in such cases is that home ties are not as close today as they were when the doctrine was conceived. This is

[19] State v. Lee, 6 W. W. Harr. 11, 171 Atl. 195 (Del. Ct. Oyer and Ter. 1933).

[20] *See* Commonwealth v. Whitler, 2 Brewst. 388, 393 (Pa. 1868); State v. Pratt, 1 Houst. Cr. Cas. 249, 269 (Del. 1867).

[21] See note 17 *supra*.

conclusively proved by the extreme advance in divorce rates in recent years. It logically follows that as the marriage bonds grow increasingly loose, the sight of adultery will become more frequent and hence while the passion aroused by such a sight will in a majority of cases be sufficient to mitigate the offense, extrinsic facts should be carefully weighed to determine whether the passion of the particular defendant was *actually* aroused. This will eliminate the blind application of the rule to every case, but will allow it in those cases where the defendant was actually overcome by his heat of passion.

It is believed that all that is required today, realistically speaking, is for a husband or wife to catch the parties in the act of adultery or to catch them in such circumstances as would lead a reasonable man to believe that the parties had just engaged, or were preparing to engage, in the act and to kill immediately provided there has been no consent or preconceived plan to entrap with the intent to kill. Liberal construction has resulted in too loose an application of the rule. While the rule remains fundamentally sound, it should be cautiously and conservatively applied in order that its purpose may be achieved under modern, changing social conditions.

It is further submitted that the word "adultery" is perhaps too confining as the sight of unnatural sex acts being committed upon a son or daughter or fornication upon a daughter or sister arouse a passion which is on a par with that of the sight of adultery. Within the limits as defined above and with this last extension, it is believed that the leniency of the law in the cases under discussion should give way to the increased need for severe punishment of persons committing homicide. Too many other legal remedies[22] are available to the wronged party to continue to perpetuate a loose application of a doctrine which does not strenuously discourage the taking of a human life. It should be borne in mind that one cannot make one's spouse virtuous by killing, and when the flame of life is once snuffed out, nothing but eternity can restore it.

HARRY B. MILLER, JR.

[22] Divorce, alienation of affection and prosecution for adultery, to name a few.