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might well feel that a particular defendant's potential for rehabilitation is good and that an extended prison term would be detrimental to that promise. Under the rule of the *Lewis* case, however, the trial judge is faced with a choice between black or white and has no authority to consider the shades in between.

It is submitted that accordance of authority to trial judges to utilize the split sentence would effectively fill the void between the existing extremes of suspension in entirety or complete active imposition of the sentence. Presumably this could be legislatively accomplished by amending G.S. § 15-197 to provide express authorization for partial suspension.[32] Such action would allow the judge to treat the defendant more as an individual and to adapt the sentence to the offender rather than to the offense. It would effect recognition of "the differences in men which justify differences in treatment and the differences in treatment which will achieve the ends at which we aim."[33]

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Domestic Relations—Abandonment—Divorce Granted to an Abandoning Husband After the Wife's Action for Support

By statute in North Carolina,[1] a husband or wife, having lived separate and apart from the other for two years, may obtain an absolute divorce, provided the residence requirement is satisfied. However, the North Carolina Supreme Court has held that notwithstanding this statute if the husband has abandoned his wife, she may set up the abandonment as a bar to his action for divorce.[2]

problem might be to provide for separation of defendants serving short split sentences such as is now provided for youthful offenders. N.C. GEN. STAT. § 15-212 (Supp. 1959).

[32] Should the North Carolina court adhere to the same reasoning as in the *Lewis* case, however, they might regard this as an infringement on the power of the parole board, and thus hold the provision of the statute to be of no effect.

[33] Coates, *supra* note 30, at 230.

[1] N.C. GEN. STAT. § 50-6 (1950).

[2] Byers v. Byers, 223 N.C. 85, 25 S.E.2d 466 (1943). In this case the court stated: "It is true, the statute under review provides that either party may sue for a divorce or for a dissolution of the bonds of matrimony, 'if and when the husband and wife have lived separate and apart for two years'.... However, it is not to be supposed the General Assembly intended to authorize one spouse willfully or wrongfully to abandon the other for a period of two years and then reward the faithless spouse a divorce for the wrong committed, in the face of a plea in bar based on such wrong." *Id.* at 90-91, 25

A limitation on this interpretation first appeared in *Lockhart v. Lockhart*.[3] There the court stated that the effect of a judgment granting a divorce from bed and board was to legalize the separation of the parties which theretofore had been an abandonment on the part of the husband. The court then concluded that the separation contemplated by the statute included a judicial separation as well as one brought about by an act of the parties. Therefore, the husband could obtain a divorce two years after such separation.

This limitation was again applied in the recent case of *Sears v. Sears*.[4] In this case the husband sought an absolute divorce on the ground of two years separation. The wife, who had been awarded a divorce from bed and board by a New York court, set up as a defense the fact that the husband had originally abandoned her. In rejecting this defense and granting the divorce, the court stated that the husband's abandonment did not preclude him from maintaining the action since it was brought more than two years after the divorce from bed and board.

These cases raise the following question: why should a husband who seeks a divorce on the ground of two years separation be denied such divorce because he has abandoned his wife, and yet be able to obtain a divorce two years subsequent to the wife's judgment for alimony without divorce or divorce from bed and board?

The rationale of the court in refusing to grant the abandoning husband a divorce before the wife has brought an action for support is that the husband should not be permitted to profit from his own wrong.[5] But where the wife has obtained a support decree or a

S.E.2d at 470. Whether the abandonment must be criminal or civil in order to be a good defense, the court in *Byers* indicated that abandonment without failure to support was not a good defense to an action for absolute divorce based on two years separation. See also Hyder v. Hyder, 215 N.C. 239, 1 S.E.2d 540 (1939). But in Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957), the court indicated that abandonment was a bar to the husband's action for divorce although the husband continued to support the wife. For a discussion of this problem, see Note, 36 N.C.L. REV. 495 (1958).

[3] 223 N.C. 559, 25 S.E.2d 902 (1941).

[4] 253 N.C. 415, 117 S.E.2d 7 (1960).

[5] Briggs v. Briggs, 215 N.C. 78, 1 S.E.2d 540 (1939); Reynolds v. Reynolds, 208 N.C. 428, 181 S.E. 338 (1935). In the *Sears* case the court referred to the wife's defense of abandonment as a plea of recrimination and concluded that since the New York decree had legalized the separation of the parties, she could not defend on the ground of recrimination. 253 N.C. at 419, 117 S.E.2d at 10. But in Byers v. Byers, 223 N.C. 85, 25 S.E.2d 466 (1943), the court in holding that abandonment was a defense to an action for divorce on the ground of two years separation, specifically stated that this was not a matter of recrimination. The general rule is that the

divorce for bed and board, the court, in granting the divorce, says that the prior decree legalized the separation of the parties.[6]

It appears that the court is seeking to balance two conflicting social policies: (1) where the parties cannot live together in harmony, it is in the best interest of society and the parties themselves to grant a divorce irrespective of who was the original wrongdoer;[7] (2) the wife should not become dependent on society but should be able to obtain alimony.

In North Carolina alimony cannot be awarded in an action for absolute divorce.[8] Therefore, the wife will not be able to obtain support unless she has obtained an alimony decree prior to an award of absolute divorce to the husband. In order to protect the wife, the court uses the "wrongdoer" theory to deny the husband a divorce even though he has complied with the literal provisions of the statute. However, if the husband is granted a divorce on the ground of two years separation after the wife has obtained a support decree, such decree will survive the divorce.[9] Since the wife is protected in the latter instance, the court grants the divorce and justifies its decision by using the "legalized separation" theory.

In the majority of states which have statutes similar to the North Carolina statute,[10] a divorce may be granted to either party

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recriminatory grounds must be of equal standing with the plaintiff's grounds for divorce. Evans v. Evans, 219 Ark. 325, 241 S.W.2d 713 (1951); Pharr v. Pharr, 223 N.C. 115, 25 S.E.2d 471 (1943). Since two years separation is a ground for an absolute divorce and abandonment is a ground only for a divorce from bed and board, the two are not of equal standing. Thus abandonment is not a recriminatory defense to an action for divorce on the ground of two years separation. The court seems to be confusing the doctrine of recrimination with the rule that an abandoning party will not be allowed to take advantage of his own wrong.

[6] Lockhart v. Lockhart, 223 N.C. 559, 25 S.E.2d 902 (1941).

[7] Where the statute provides for an absolute divorce based on separation for a specified period, the courts are inclined to grant a divorce to either party in the best interest of society irrespective of fault. *E.g.*, Parks v. Parks, 116 F.2d 556 (D.C. Cir. 1940); Bernard v. Jefferson, 191 La. 881, 186 So. 599 (1939); Lemp v. Lemp, 62 Nev. 91, 141 P.2d 212 (1943).

[8] N.C. GEN. STAT. § 50-11 (Supp. 1959); Yow v. Yow, 243 N.C. 79, 89 S.E.2d 867 (1955); Stanley v. Stanley, 226 N.C. 129, 37 S.E.2d 118 (1946); Duffy v. Duffy, 120 N.C. 346, 27 S.E. 28 (1897); *accord*, Commissioner v. Mesta, 123 F.2d 986 (3d Cir. 1941).

[9] N.C. GEN. STAT. § 50-11 (Supp. 1959).

[10] Eighteen states, the District of Columbia, and Puerto Rico have similar statutes. They are listed in KEEZER, MARRIAGE AND DIVORCE § 455 (3d ed. 1946), as Alabama, Arizona, Arkansas, Idaho, Kentucky, Louisiana, Maryland, Minnesota, Nevada, New Hampshire, North Dakota, Rhode Island, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming.

notwithstanding his or her fault.[11] Also, in the majority of states, alimony may be awarded in an action for absolute divorce.[12] Therefore, the husband may obtain a divorce even though the wife has not previously obtained an alimony decree.[13]

Although the North Carolina court may be achieving desirable results under its present policies, it is not the function of the court to determine what the social policy should be in an area in which the legislature has already made such determination. Since the legislature has provided in express terms that a divorce shall be granted after two years separation, the court should not qualify this in order to carry out another policy—that of protecting the wife's right to support from her husband rather than from society.

It is submitted that the legislature should amend our statutes to permit an award of alimony in an action for absolute divorce. This will permit the court to carry out both social policies and at the same time adhere to the express mandate of the two years separation statute.

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Domestic Relations—Divorce and Adoption—Residence Requirement for Servicemen

Acquisition by service personnel of a domicile of choice has for many years presented vexing quandaries both to lawyers and to legislatures. For example, questions as to domicile may be of critical importance in resolving problems encountered by servicemen in such diverse areas as taxation,[1] establishment of voting rights in

[11] *E.g.*, Schuster v. Schuster, 42 Ariz. 190, 23 P.2d 559 (1933); Sandlin v. Sandlin, 289 Ky. 290, 158 S.W.2d 635 (1942); Best v. Best, 218 Ky. 648, 291 S.W. 1032 (1927); Otis v. Bahan, 209 La. 1082, 26 So. 2d 146 (1946); Bernard v. Jefferson, 191 La. 881, 186 So. 599 (1939); Lemp v. Lemp, 62 Nev. 91, 141 P.2d 212 (1943).

[12] Northcutt v. Northcutt, 262 Ala. 98, 77 So. 2d 336 (1955); Schiebe v. Schiebe, 57 Cal. App. 2d 336, 134 P.2d 835 (Dist. Ct. App. 1943); Weintraub v. Weintraub, 302 N.Y. 104, 96 N.E.2d 724 (1951); Hyde v. McCoart, 82 R.I. 426, 110 A.2d 658 (1955).

[13] Barrington v. Barrington, 206 Ala. 192, 89 So. 512 (1921); Rylands v. Rylands, 65 Ariz. 97, 174 P.2d 741 (1946); George v. George, 56 Nev. 12, 41 P.2d 1059 (1935); Dawson v. Dawson, 62 Wyo. 519, 177 P.2d 200 (1947).

[1] See Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937). See generally Baer, *So Your Client Wants A Divorce*, 24 N.C.L. REV. 1, 14 & n.55 (1945).