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The Problem of Family Support: Criminal Sanctions for the Enforcement of Support

Sybil M. Jones

THE PROBLEM OF FAMILY SUPPORT: CRIMINAL SANCTIONS FOR THE ENFORCEMENT OF SUPPORT

SYBIL M. JONES*

A SURVEY OF THE LAW OF ABANDONMENT AND NONSUPPORT OF SPOUSE, CHILD AND PARENT IN NORTH CAROLINA

The problem of family desertion is becoming increasingly acute. Studies show that approximately one million women and children a year are affected by desertion of the breadwinner or by non-support after a voluntary separation of the members of the basic family group.[1] Generally, the acuteness of the problem may be attributed to the cumulative effects of the circumstances which have operated to produce a higher degree of family instability—namely, the world wars, the industrialization and urbanization of society, the high mobility of the population, the shift in emphasis from spiritual and moral values to materialistic values, and, in some measure, the emancipation of women.

Studies also show that the family is usually deserted by the husband, who traditionally in our society has the primary responsibility for the care and maintenance of the members of the family unit. In addition to the contributing factors above, the husband's desire to escape financial responsibility, dissatisfaction with the marital relation, personal maladjustment, emotional immaturity, alcoholism, and inability to find adequately paying employment is a factor which increases the problem of family desertion.[2]

While the deserted family is immediately affected by desertion of the breadwinner, ultimately, the community as a whole feels the impact of the abnegation of family responsibilities by the one legally obligated to maintain the family. In June 1957 there were 63,922 recipients of aid to dependent children in North Carolina. At the same time 647,208 families throughout the nation were receiving such aid. Expenditures from federal, state, and local funds for the aid to dependent children program during the 1956 calendar year amounted to 16,000,000 dollars in North Carolina and 731,802,000 dollars for the country as a whole.[3]

Until recently there have been no effective legal remedies, common law or statutory, for coping with the problems of abandonment and non-

* Associate Professor of Law, North Carolina College.

[1] Von Otterstedt, *Reciprocal Support Legislation,* in CURRENT TRENDS IN STATE LEGISLATION 165 (1952).

[2] THORMAN, BROKEN HOMES (Public Affairs Pamphlet No. 135, 1947); Tunley, *Family Fugitives—Why Millions Run Away From Home,* 157 AMERICAN MAGAZINE 30 (1954).

[3] COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 338-39 (1958).

support of dependents. Especially has this been true in the cases where the family deserter resorted to the "poor man's divorce," that is, left the state for the purpose of avoiding his duty to support his family, thereby creating a problem of interstate enforcement of family support duties; for it is in these cases that the concomitants of a system of multiple sovereignties—namely, concepts of jurisdiction, full faith and credit, comity and reciprocity—operate to complicate further an already complex problem and militate against a workable solution to a problem that is no longer one of local concern only.

The purpose of this article is to survey the law of family support and examine the remedies, common law and statutory, civil and criminal, for the enforcement of duties of support, with particular emphasis on the use of criminal sanctions for the enforcement of support.

I

Husband's Duty To Support Wife

If there is one duty to provide support that is unquestioned, it is that of a husband to support his wife. At common law a husband is bound to support and maintain his wife,[4] and, according to most authorities, his immediate family.[5] This duty, one of the most fundamental in the law of domestic relations, is something more than a mere moral obligation; it is a duty imposed by law.[6] Although it is universally agreed that the husband's obligation to maintain his wife and family exists apart from statute,[7] nevertheless, the obligation is now everywhere expressly imposed upon the husband by statute.[8]

[4] State v. Lucas, 242 N.C. 84, 86 S.E.2d 770 (1955); State v. Clark, 234 N.C. 192, 66 S.E.2d 669 (1951); Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945); Reynolds v. Reynolds, 208 N.C. 254, 180 S.E. 70 (1935); 26 Am. Jur. *Husband and Wife* §§ 337-40 (1940); 41 C.J.S. *Husband* and Wife § 15 (1944); Madden, Persons and Domestic Relations §§ 58-60 (1931).

[5] Joyner v. McMurphy, 26 Ala. App. 549, 163 So. 533 (1935); Phillips v. Phillips, 1 App. Div. 2d 393, 150 N.Y.S.2d 646 (1956), *aff'd*, 2 N.Y.2d 742, 138 N.E.2d 738, 157 N.Y.S.2d 378 (1956); Jacobs v. Jacobs, 163 Misc. 98, 297 N.Y. Supp. 642 (Dom. Rel. Ct. 1937). The term "family" is one of varied meanings. In a broad sense it refers to a collective body of persons, usually related by consanguinity and affinity, "who live in the same household, subject to the general management and control of the head thereof . . . ." McGee v. Crawford, 205 N.C. 318, 321, 171 S.E. 326, 327 (1933). In a narrow, restricted sense "family" means a father, mother and children, whether living together or not. Higgins v. Safe Deposit & Trust Co., 127 Md. 171, 172, 96 Atl. 322, 323 (1915). In the law of abandonment and support the term "family" usually has the latter meaning, with the further qualification that "children" generally refers to minor, unemancipated children. As to the liability of the father for the support of his children, see the discussion in Part III *infra*.

[6] Joel Bailey Davis, Inc. v. Poole, 194 Ga. 824, 22 S.E.2d 795 (1942); Lyons v. Schanbacher, 316 Ill. 569, 147 N.E. 440 (1925); Fink v. Fink, 139 Misc. 630, 248 N.Y. Supp. 129 (Sup. Ct. 1931).

[7] Brown v. Brown, 199 N.C. 473, 154 S.E. 731 (1930); Anderson v. Anderson, 140 Okla. 168, 282 Pac. 335 (1929); 26 Am. Jur. *Husband and Wife* § 337 (1940); 41 C.J.S. *Husband and Wife* § 15 (1944).

[8] D. H. Holmes Co. v. Morris, 188 La. 431, 177 So. 417 (1937); Labadie v. Henry, 132 Okla. 252, 270 Pac. 57 (1928). Some of the statutes are criminal

The husband's duty does not arise out of contract and it is not a debt; it is a necessary incident of the marital relationship[9] and exists during the continuance of that relationship.[10] His duty is sometimes said to be a public one, owed not only to his wife and family, but to the state, to see that his wife and family do not fall into necessitous circumstances and thereby become charges of the state and a burden to the taxpayers.[11] In fact, the duty is based on considerations of public policy and the interest of the state in promoting and maintaining family stability and the economic independence of the basic family unit. The requirement that the husband shall support his wife in sickness and in health is grounded on principles of public policy; therefore, the husband cannot shirk it or transfer it to others, even by contract. While a husband and wife may contract with one another prior to marriage with respect to their mutual property rights, they cannot vary their personal duties and obligations to each other which ensue from the marital relationship itself. Thus, an antenuptial promise by a husband to care for, nurse, and support his wife after their marriage is a promise only to do that which the law requires of him in any event and is no consideration for an agreement by his wife to bequeath him her property.[12] A fortiori, a husband cannot by postnuptial contract relieve himself of the duty to support his family.[13] Although a husband may enter into contracts with

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statutes penalizing abandonment and nonsupport of the spouse. 3 VERNIER, AMERICAN FAMILY LAWS § 162 (1935). See, *e.g.*, N.C. GEN. STAT. § 14-325 (1953); N.C. GEN. STAT. § 14-322 (Supp. 1959). Others are "family responsibility" statutes. A family responsibility statute is a statute designed to alleviate the public burden of caring for the indigent by requiring those persons closely related to them by consanguinity or affinity to provide support for them. Such statutes are usually part of an overall legislative scheme to provide for aid to persons not covered by other public welfare measures—for example, old age assistance, aid to dependent children, and aid to the blind. American family responsibility laws are patterned after the Elizabethan Poor Laws: Poor Law, 1575, 18 Eliz. 1, c. 3, which required parents to support their illegitimate children in order to relieve the parish of that burden; Poor Law, 1597, 39 Eliz. 1, c. 3, which required parents and children to support each other lest the parish be burdened with their care; and Poor Law, 1601, 43 Eliz. 1, c. 2, § 7, which extended the duty to provide support to additonal relatives, lineal and collateral, who were poor and in need of support.

[9] Kearney v. Kearney, 178 Miss. 766, 174 So. 59 (1937); Haas v. Haas, 298 N.Y. 69, 80 N.E.2d 337 (1948); Cook v. Cook, 213 S.C. 247, 49 S.E.2d 9 (1948).

[10] Wohlfort v. Wohlfort, 116 Kan. 154, 225 Pac. 746 (1924). It is recognized that a husband's duty to support his wife may survive the termination of the marital relation where the wife obtains a decree for permanent alimony. However, a discussion of alimony is beyond the scope of this paper. See generally Note, 29 N.C.L. REV. 445 (1951); Note, 31 N.C.L. REV. 482 (1953); Note, 35 N.C.L. REV. 405 (1957).

[11] Clisby v. Clisby, 160 Ala. 572, 49 So. 445 (1909); Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945).

[12] Ryan v. Dockery, 134 Wis. 431, 114 N.W. 820 (1908), a case of first impression upon the right of a husband to recover on an antenuptial contract for the care and support of his wife.

[13] Long v. Crosson, 119 Ind. 3, 21 N.E. 450 (1889); Garlock v. Garlock, 279 N.Y. 337, 18 N.E.2d 521 (1939), *reversing* 255 App. Div. 88, 5 N.Y.S.2d 619 (1938), *reargument denied*, 225 App. Div. 752, 7 N.Y.S.2d 232 (1938); Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945).

others to make provisions for the support of his wife, he cannot by express contract with third persons or his wife relieve himself of the duty imposed by law to support her. In *Corcoran v. Corcoran*[14] the husband conveyed to his wife a house and lot in consideration of her promise to provide the family support and maintenance. Upon default by his wife, the husband sued her for damages for breach of contract. The court held the contract unenforceable. In the course of its opinion the court said:[15]

> The law makes it the duty of the husband not only to support himself, but his wife and children as well, and we know of no rule of law or of public policy which gives any countenance to an attempt by a husband to abdicate the duty which the law casts upon him, and impose it as an obligation upon his wife through the medium of an ordinary oral contract . . . .
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> Under the enlightened policy of modern legislation, married women have been relieved of many common law disabilities, but we have not yet progressed so far as to enable a married woman to bind herself by contract with her husband to assume his obligation to furnish support for both.[16]

As between the husband and wife, the husband and his wife's relatives, the husband and other third persons, and the husband and the state, he is primarily obligated to support his wife. The common law duty of support owed by the husband does not depend upon the adequacy or inadequacy of his wife's means,[17] her equal or superior ability to take care of herself,[18] the fact that she has a separate estate,[19] or a demand by her for support.[20] Even the fact that the husband is under a partial or total legal disability such as infancy,[21] insanity,[22] or imprisonment[23] does not relieve him of the obligation to support his wife. In *Reynolds v. Reynolds*[24] the North Carolina court held that the wife of an insane beneficiary of a trust agreement has the right to support and maintenance from the income of the trust when the income substantially exceeds the needs of the beneficiary in providing him with expert medical attention, care, and maintenance. The court cited *McLean v. Breece*,[25] where it was held that allowances may be made from the property of an insane person for his support and the support of his wife, on the principle that

[14] 119 Ind. 138, 21 N.E. 468 (1889). [15] *Id.* at 140, 21 N.E. at 468.

[16] This passage was quoted with approval in Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414, 416 (1945).

[17] Heflin v. Heflin, 177 Va. 385, 14 S.E.2d 317 (1941).

[18] Mengal v. Mengal, 201 Misc. 104, 103 N.Y.S.2d 992 (Dom. Rel. Ct. 1951).

[19] Rowe v. Rowe, 256 Ala. 491, 55 So. 2d 749 (1951).

[20] Caldwell v. J. A. Kreis & Sons, 227 Mo. App. 120, 50 S.W.2d 725 (1932).

[21] Fisher v. Drew, 247 Mass. 178, 141 N.E. 875 (1924).

[22] Reynolds v. Reynolds, 208 N.C. 254, 180 S.E. 70 (1935); Read v. Turner, 200 N.C. 773, 158 S.E. 475 (1931); Anderson v. Anderson, 183 N.C. 139, 110 S.E. 863 (1922); McLean v. Breece, 113 N.C. 391, 18 S.E. 694 (1893); McLean v. Breece, 109 N.C. 564, 13 S.E. 910 (1891); *In re* Latham, 39 N.C. 231 (1846).

[23] Ahern v. Easterby, 42 Conn. 546 (1875).

[24] 208 N.C. 254, 180 S.E. 70 (1935). [25] 113 N.C. 391, 18 S.E. 694 (1893).

an insane husband owes a legal duty of supporting and maintaining his wife, and that the court would not order payment of an insane person's debts if such an order would have the effect of depriving him or his family of maintenance.

Regardless of the seemingly unavoidable nature of the husband's duty of support, nevertheless, it is not an unqualified duty. Ordinarily, the husband's duty is to support his wife at the matrimonial domicile; and if the wife refuses to live with him without just cause, he is under no duty to support her.[26] However, the husband remains under an obligation to support his wife if they are living separate and apart by mutual agreement,[27] because the wife's health requires it, or because the husband's misconduct has forced the wife to seek shelter elsewhere.[28] On the other hand, the wife is not entitled to support during a separation due to her fault;[29] and she may forfeit her right to support by conduct constituting a matrimonial offense sufficient to entitle her husband to a divorce.[30] Furthermore, the support that the husband is legally required to furnish his wife and family is only to an extent commensurate with his means, earning capacity, and social position.[31] However, the fact that the husband is presently without means or is destitute does not discharge him from the duty to support his wife, although it may be some excuse for a present failure. In most cases in which the question of the effect of the poverty of the husband has arisen, it has been held that the absence of an estate or fixed income on the part of the husband is no defense to an action for support and does not relieve the husband of his personal duty to exert himself to support his wife and family.[32]

Extensive changes have been made in the law of domestic relations in every jurisdiction by statute. One need think only of the laws relating

[26] Pollard v. Pollard, 221 N.C. 46, 19 S.E.2d 1 (1942); Byrum v. Byrum, 207 N.C. 655, 178 S.E. 97 (1935); Byerly v. Byerly, 194 N.C. 532, 140 S.E. 158 (1927).

[27] Reardon v. Reardon, 210 Ala. 129, 97 So. 138 (1923).

[28] *Ibid.*

[29] State v. Newman, 91 Conn. 6, 98 Atl. 346 (1916).

[30] *In re* Barc's Estate, 177 Misc. 578, 31 N.Y.S.2d 139 (Surr. Ct. 1941), *aff'd*, 266 App. Div. 677, 41 N.Y.S.2d 213 (1943), *appeal denied*, 266 App. Div. 742, 41 N.Y.S.2d 953 (1943); Howell v. Howell, 223 N.C. 62, 25 S.E.2d 169 (1943).

[31] Garlock v. Garlock, 279 N.Y. 337, 18 N.E.2d 521 (1939), *reversing* 255 App. Div. 88, 5 N.Y.S.2d 619 (1938), *reargument denied*, 225 App. Div. 752, 7 N.Y.S. 2d 232 (1938); State v. Lucas, 242 N.C. 84, 86 S.E.2d 770 (1955); State v. Clark, 234 N.C. 192, 66 S.E.2d 669 (1951).

[32] Thomas v. Thomas, 211 Ala. 504, 100 So. 766 (1924). "The rule is well settled in this State, and elsewhere, that while the husband's current income is the primary fund looked to for his wife's support . . . nevertheless, the husband's property and capital assets and his capacity to earn the support awarded by diligent attention to business—his earning capacity or prospective earnings—are all proper elements for the court's consideration in fixing the amount of the award. . . . In Robbins v. Robbins, supra, 106 N.J. Eq. at p. 200, the court noted in this connection that ' * * * If it were otherwise, a husband by deliberate intent or disinclination to work, might defeat or avoid his marital obligation of support.' Parenthetically there is nothing in the record before us to indicate that the defendant is incapacitated nor otherwise incapable of working nor that his unemployment is other than temporary." Bonanno v. Bonanno, 4 N.J. 268, 271, 72 A.2d 318, 321 (1950).

to married women to realize how little is left of the common law in this field. Yet the branch of family law relating to the duty of the husband to support his wife has remained substantially the same as it was at common law. Indeed, legislative enactments in the law of family support have provided new and more effective methods of enforcing the husband's duty to support his wife and children. It is almost universally held that the Married Women's Acts, statutes freeing married women from most of their common law disabilities with respect to executing contracts and owning and disposing of property, have not abrogated the husband's duty to provide support.[33] Despite the fact that married women have moved into the labor market in increasingly large numbers and have attained a considerable degree of economic self sufficiency, most women are still primarily housewives performing the important function of running the household and looking after the welfare of the husband and children. Our highly mobile, fast moving, tension-ridden society has tended to produce an increasing number of irresponsible husbands and fathers who start family groups and then, under various pressures—social and economic—abandon them as public charges. Legislative attempts to alleviate the problems created by abandonment and nonsupport have had varying degrees of success.

Enforcement of the husband's obligation to support his wife and family has always been a major problem. The common law provided no direct means of compelling the husband to support his wife. Under the unity doctrine a wife could not sue her husband for any reason at common law.[34] However, a husband could be held liable to third persons who furnished necessaries—and under some circumstances, non-necessaries—to his wife; so, a wife's one recourse was to purchase such goods and services as she needed, leaving it to the person who furnished the goods and services to sue her husband. Although a wife has, by virtue

[33] French v. McAnarney, 290 Mass. 544, 195 N.E. 714 (1935); Bonanno v. Bonanno, 4 N.J. 268, 72 A.2d 318 (1950). "The mutual rights and duties growing out of the marital relationship are not affected by the statutes relating to the capacity of married women to contract and dispose of their property as if they were unmarried. G.S. § 52-10, *et seq.*; Bank v. Turner, 202 N.C. 162, 162 S.E. 221." Ritchie v. White, 225 N.C. 450, 452, 35 S.E.2d 414, 416 (1945).

[34] Thresher v. McElroy, 90 Fla. 372, 106 So. 79 (1925); Scholtens v. Scholtens, 230 N.C. 149, 52 S.E.2d 350 (1949); Davis v. Bass, 188 N.C. 200, 124 S.E. 566 (1924); 27 AM. JUR. *Husband and Wife* § 584 (1940); 41 C.J.S. *Husband and Wife* § 393 (1944); MADDEN, *op. cit. supra* note 4, §§ 54, 69. While equity recognized the duality of husband and wife and permitted them to sue each other for some purposes, particularly where property rights were involved, nevertheless, equity seized upon the unity concept, which it recognized as being based on sound public policy, as a ground for refusing to give relief for personal wrongs. 27 AM. JUR. *Husband and Wife* § 585 (1940); 41 C.J.S. *Husband and Wife* § 393 (1944). Almost everywhere now statutes authorize the maintenance of actions between husband and wife, at least as to some particular matters. The tendency has been, however, to construe such statutes strictly, as in derogation of the common law. See, for example, Scholtens v. Scholtens, *supra*; see also N.C. GEN. STAT. § 52-10.1 (Supp. 1959).

of the marital relationship alone, no authority to bind her husband by contracts generally,[35] she can bind him by making purchases or incurring other obligations on his credit in certain cases. (1) The wife may be the agent of her husband—in incurring debts for non-necessaries as well as necessaries—and, as such agent, may bind him. This agency arises from the authority of the husband expressly or impliedly conferred as in other cases of agency.[36] (2) *Jure mariti* the wife may pledge her husband's credit for the purpose of obtaining those necessaries which the husband himself has neglected or refused to furnish.[37] This is sometimes called an "agency in law" or an "agency of necessity," but that agency is not the proper basis of the liability is readily apparent from the established principle that even an express instruction by the husband to the third party not to furnish goods and services to the wife does not relieve him from liability.[38] Actually the husband's liability for necessaries is a rule of law grounded on public policy.[39] These indirect methods of enforcing the husband's duty to support his wife at common law are obviously crude, cumbersome and unsatisfactory. For example, the burden of proof is on the creditor attempting to hold a husband liable for necessaries to show that, among other things, (1) the husband refused or neglected to provide a suitable support for his wife, and (2) the articles furnished were necessaries.[40]

While these remedies are still available in most jurisdictions,[41] frequently by statute, [42] other more satisfactory methods of enforcing the

[35] Bergh v. Warner, 47 Minn. 250, 50 N.W. 77 (1891). "[A] wife is not the agent of her husband by force of the marital relationship between them." *In re* Will of Holmes, 224 N.C. 830, 833, 32 S.E.2d 614, 616 (1944).

[36] This is purely and simply a question of agency and the ordinary rules as to actual and apparent authority must be applied. Where the wife is living with her husband, she, as manager of the domestic establishment maintained by her husband, is presumed to have authority from him to order on his credit such goods and services as, in the ordinary management of her husband's household, are required for family use. Bergh v. Warner, *supra* note 35; Sibley v. Gilmer, 124 N.C. 631, 32 S.E. 964 (1899); Webster v. Laws, 89 N.C. 224 (1883); Cox v. Hoffman, 20 N.C. 319 (1838).

[37] Bergh v. Warner, 47 Minn. 250, 50 N.W. 77 (1891); Brown v. Brown, 199 N.C. 473, 154 S.E. 731 (1930); Sibley v. Gilmer, *supra* note 36; Berry v. Henderson, 102 N.C. 525, 9 S.E. 455 (1889); Pool v. Everton, 50 N.C. 241 (1858).

[38] MECHEM, OUTLINES OF AGENCY § 49 (4th ed. 1952). "The real foundation of the husband's liability in such cases is the clear legal duty of every husband to support his wife, and supply her with necessaries suitable to her situation and his own circumstances and condition in life." Bergh v. Warner, *supra* note 37 at 252, 50 N.W. at 78.

[39] MECHEM, *op. cit. supra* note 38, § 49.

[40] Bergh v. Warner, 41 Minn. 250, 50 N.W. 77, 78 (1891). "The term 'necessaries,' in its legal sense, as applied to a wife, is not confined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility, or even ornament, as are suitable to maintain the wife according to the estate and rank of her husband." Bergh v. Warner, *supra.*

[41] Brown v. Brown, 199 N.C. 473, 154 S.E. 731 (1930); Sibley v. Gilmer, 124 N.C. 631, 32 S.E. 964 (1899); Berry v. Henderson, 102 N.C. 525, 9 S.E. 455 (1889); Pool v. Everton, 50 N.C. 241 (1858); 41 C.J.S. *Husband and Wife* § 50 (1944).

[42] The commoh law liability of the husband for necessaries furnished to the

husband's duty to provide support are also avilable. For example, the duty may be enforced in an action for separate maintenance,[43] an action on a separation agreement,[44] by petitioning for alimony in an action for divorce (*a mensa et thoro*[45] or *a vinculo*[46]), by a criminal prosecution of the husband for abandonment and nonsupport,[47] or by a proceeding, civil or criminal, under the Uniform Reciprocal Enforcement of Support Act.[48]

II

WIFE'S DUTY TO SUPPORT HUSBAND

Although a married woman may be under a duty to render services to her husband,[49] she is under no duty at common law to support and

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wife is affirmed in whole or in part by statutes in California, Connecticut, District of Columbia, Georgia, Kentucky, Maryland, Minnesota, Montana, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas and West Virginia. 3 VERNIER, *op. cit. supra* note 8, § 153.

[43] The great majority of jurisdictions permit the wife, on a proper showing, to obtain an allowance for her separate support and maintenance in an independent equitable or statutory action brought for this purpose. 42 C.J.S. *Husband and Wife* § 610 (1944). In North Carolina alimony without divorce may be obtained in an independent action, Fogartie v. Fogartie, 236 N.C. 188, 72 S.E.2d 226 (1952), or by cross action in the husband's suit for divorce *a mensa et thoro* or *a vinculo*, Beeson v. Beeson, 246 N.C. 330, 98 S.E.2d 17 (1957), under N.C. Gen. Stat. § 50-16.

[44] A separation agreement, the cessation of cohabitation by mutual agreement, ordinarily provides for separation of the parties and frequently for the support of the wife or children, or both, during the separation. Such agreements are recognized in North Carolina as valid under certain conditions, Archbell v. Archbell, 158 N.C. 409, 74 S.E. 327 (1912), and enforceable like other contracts, Howland v. Stitzer, 236 N.C. 230, 72 S.E.2d 583 (1952).

[45] Permanent alimony, an allowance for the support of the wife out of the estate of the husband, may be obtained in an action for divorce *a mensa et thoro* under N.C. Gen. Stat. § 50-14. Rayfield v. Rayfield, 242 N.C. 691, 89 S.E.2d 399 (1955).

[46] Although permanent alimony cannot be obtained in North Carolina in connection with an absolute divorce, under N.C. Gen. Stat. § 50-11, as amended in 1953 and 1955, a wife's right to receive alimony previously established by decree will not be terminated upon absolute divorce except in cases where the husband gets the divorce on the ground of the wife's adultery, or the wife gets it on the ground of two years' separation.

[47] N.C. GEN. STAT. §§ 14-322 to -325 (1953), as amended N.C. GEN. STAT. § 14-322 (Supp. 1959); State v. Lucas, 242 N.C. 84, 86 S.E.2d 770 (1955); State v. Clark, 234 N.C. 192, 66 S.E.2d 669 (1951). See discussion of criminal sanctions for the enforcement of support in Part VI *infra*.

[48] Enacted in North Carolina in 1951, the Uniform Reciprocal Enforcement of Support Act, N.C. Gen. Stat., ch. 52A, creates an interstate procedure, by reciprocal legislation, for the enforcement of support, thereby increasing the effectiveness of civil and criminal remedies for that purpose. See discussion of the interstate attack on the problem of support in Part VIII *infra*.

[49] Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945); 26 AM. JUR. *Husband and Wife* § 9 (1940); 41 C.J.S. *Husband and Wife* § 17 (1944); MADDEN, *op. cit. supra* note 4, § 53. "Services" includes society, companionship, love and affection, and labor in the performance of household and domestic duties. See Hinnant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925). In the absence of statute, a husband is entitled to all the proceeds of his wife's industry. Under N.C. Gen. Stat. § 52-10, the earnings of a married woman are her sole and separate property. See also N.C. CONST. art X, § 36 and N.C. GEN. STAT. § 52-2 (1950). Apparently the duties of the wife to her husband are moral rather than legal. The husband is

maintain her husband[50] and family.[51] Even when the wife possesses a separate estate, she is not bound to support her husband; and there is no ground upon which the husband can compel his wife with independent means to furnish support for him and their family.[52] As a general rule, the husband has no right to resort to his wife's separate estate to support her and their family.[53] Further, the statutes enlarging the right of a married woman to contract and providing that she may deal with her separate property as if a feme sole do not impose upon the wife a duty to support her husband.[54]

In *Ritchie v. White*,[55] a case of first impression in North Carolina, it was held that a widow was not entitled to recover in quasi-contract or implied assumpsit the value of domestic services rendered and financial support furnished the decedent during his declining years and last illness under an express oral agreement that in exchange for her services

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entitled to such domestic services as his wife may choose to perform, and to her aid, comfort, society, and companionship. Ritchie v. White, *supra*; Helmstetler v. Duke Power Co., *supra*. Nevertheless during the continuance of the marital relation it seems that there is no way by which the husband can compel his wife to contribute to the marriage either domestic work or her outside earnings. Under the legal entity theory, neither husband nor wife can sue each other at common law. Alexander v. Alexander, 85 Va. 353, 7 S.E. 335 (1888). Equity has always recognized the right of husband and wife to sue each other. Dyett v. North American Coal Co., 20 Wend. (N.Y.) 570 (Ct. Err. 1838). However, as a general rule, equity takes cognizance of property rights *inter partes* and furnishes no relief for personal wrongs, either during coverture or after the dissolution of the marital relation.

[50] Atkins v. Curtis, 259 Ala. 311, 66 So. 2d 455 (1953); Phillips v. Phillips, 1 App. Div. 2d 393, 150 N.Y.S.2d 646 (1956), *aff'd*, 2 N.Y.2d 742, 138 N.E.2d 738, 157 N.Y.S.2d 378 (Ct. App. 1956); Nilsson v. Nilsson, 200 Misc. 841, 108 N.Y.S.2d 954 (Dom. Rel. Ct. 1951); 26 AM. JUR. *Husband and Wife* § 341 (1940); 41 C.J.S. *Husband and Wife* § 16 (1944); MADDEN, *op. cit. supra* note 4, § 62. The same rule prevails in equity. Lippincott v. Mitchell, 94 U.S. 767 (1876).

[51] The general duty to support the wife and family rests on the husband; and if he is derelict in his duty, he is liable to third persons who furnish necessaries to his wife and children. See notes 37, 38 and 39 *supra* and accompanying text. The inability of a married woman at common law to bind herself by contract precluded her liability on a contract for necessaries. Shaw v. Thompson, 33 Mass. 198 (1834); Bowen v. Daugherty, 168 N.C. 242, 84 S.E. 265 (1915); Murray v. Barlee, 3 Myl. and K. 209, 40 Eng. Rep. 80 (1834); 26 AM. JUR. *Husband and Wife* § 350 (1940); 41 C.J.S. *Husband and Wife* § 63 (1940); MADDEN, *op. cit. supra* note 4, §§ 58-60. However, she could charge her separate equitable estate with the payment of necessaries furnished to her. Frazier v. Brownlow, 38 N.C. 237 (1844).

[52] Dodge v. Knowles, 114 U.S. 430 (1885). "There is no doubt that in this state, as between husband and wife, the primary obligation to provide for the support of his wife and their children rests upon the husband, and that the wife is not bound to maintain her husband and children, even though she may have a separate estate." Young v. Valentine, 177 N.Y. 347, 352, 69 N.E. 643, 644 (1904). The wife may voluntarily use funds from her estate for the maintenance of the household. Mayers v. Kaiser, 85 Wis. 382, 55 N.W. 688 (1893). In that event she is not entitled to reimbursement from her husband or his estate. Spalding v. Spalding, 361 Ill. 387, 198 N.E. 136 (1935).

[53] McFerren v. Goldsmith-Stern Co., 137 Md. 573, 113 Atl. 107 (1921); Manufacturers Trust Co. v. Gray, 278 N.Y. 380, 16 N.E.2d 373 (1939); Bowen v. Daugherty, 168 N.C. 242, 84 S.E. 265 (1915).

[54] Lyon v. Lyon, 102 Ga. 453, 31 S.E. 34 (1897).

[55] 225 N.C. 450, 35 S.E.2d 414 (1945).

and care he would devise certain realty to her.[56] The court emphasized that although married couples are free to contract with each other concerning their property rights in the manner provided by statute,[57] they are not at liberty by private agreement to transfer from one to the other or to absolve either of the obligations which are imposed by the marital status. Quoting from the Alabama case of *Cragford Bank v. Cummings*,[58] the court pointed out that, " 'The husband, as head of the family, is charged with its support and maintenance, in return for which he is entitled to his wife's services in all those domestic affairs which pertain to the comfort, care, and well being of the family. Her labors are her contribution to the family support and care . . . .' "[59] Beyond this, the wife has no duty at common law to support and maintain her husband.[60]

The common law rule that a wife was under no duty to furnish support for her husband and family was the natural concomitant of the disabilities of the feme covert at common law and the doctrine of merger of the legal existence of the wife with that of her husband.[61] "The position of the wife has changed, however. Her role as a frail, sheltered ineffectual person—if ever authentic—is as much a thing of the past as her crinoline and whalebone. By statute she has been given exclusive right to hold her own property . . . and her coequal status with her husband has been recognized in law as well as in fact."[62] The almost total economic dependence of the woman that the common law rules on family support were designed to protect has given way to the economic self-sufficiency of the modern emancipated woman. With the changing social and legal status of women, particularly married women, have come concomitant responsibilities. To some extent these changes are reflected in statutes affecting married women.

By the weight of authority a so called Married Woman's Act,[63] in

[56] It was conceded that the particular agreement, as a parol promise to devise realty, was unenforceable under the statute of frauds, N.C. GEN. STAT. §22-2 (1953); consequently the plaintiff was remitted to the doctrine of quasi-contract or implied assumpsit.

[57] N.C. GEN. STAT. § 52-10 (1950); N.C. GEN. STAT. §§ 52-12, -13 (Supp. 1953).

[58] 216 Ala. 377, 379, 113 So. 243, 244 (1927).

[59] Ritchie v. White, 225 N.C. 450, 454, 35 S.E.2d 414, 416 (1945).

[60] Upon the husband's death, the duty to support minor children devolves upon the surviving widow. See discussion of parent's duty to support child in Part III *infra*.

[61] See Perry v. Stancil, 237 N.C. 442, 75 S.E.2d 512 (1953). "The very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband under whose wing, protection and cover, she performs everything . . . ." 1 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *442. See also 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW 520-33 (5th ed. 1942).

[62] Phillips v. Phillips, 1 App. Div. 2d 393, 150 N.Y.S.2d 646, 649 (1956), *aff'd*, 2 N.Y.2d 742, 138 N.E.2d 738, 157 N.Y.S.2d 378 (1956).

[63] A Married Woman's Act is any statute enlarging the right of the feme covert to contract, own and dispose of property, sue and be sued, and exercise any rights she was unable to exercise at common law. Such a statute is usually strictly construed as in derogation of the common law. Appeal of Garland, 126 Me. 84, 136 Atl. 459 (1927), *cert. denied sub nomine* Petition of Garland, 274 U.S. 759 (1927).

the absence of express provisions to that effect, does not impose on a married woman or her estate the duty to support her husband or family.[64] Nor does a "family expense statute"[65] impose a duty on the wife to support her husband, as such. However, the effect of this latter type of statute is to impose a duty on the wife to support herself, her husband and her family to the extent that such liability may be enforced by a creditor.[66] Under such a statute the wife's liability for family expenses is not dependent upon her consent; therefore she may be charged for goods bought for family use though sold to her husband on his individual credit.[67]

On the other hand, a substantial number of states[68] have enacted legislation expressly imposing upon the wife a duty to support her husband under varying circumstances, usually when the husband is incapacitated, in need, and unable to support himself. Such statutes are usually part of a scheme of family responsibility legislation and cover other obligations of support. For example, it is provided by statute in California that every woman shall support her child, her husband, and her parent when in need.[69] Some of the earlier cases arising under family responsibility laws which did not specifically name wives construed the laws as not imposing on married women a duty to provide support, although other female relatives such as mothers and grandmothers not under coverture were held to be within their coverage.[70] Many recent statutes are expressly applicable to wives as well as other female relatives.[71]

[64] Lyon v. Lyon, 102 Ga. 453, 31 S.E. 34 (1897); Robinson v. Foust, 31 Ind. App. 384, 68 N.E. 182 (1903); Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945); Wachovia Bank & Trust Co. v. Turner, 202 N.C. 162, 162 S.E. 221 (1932); 26 AM. JUR. *Husband and Wife* § 341 (1940); 41 C.J.S. *Husband and Wife* § 16 (1944).

[65] A family expense statute is a statute imposing liability on the husband and wife personally, or their property, for necessities furnished to the family, or for family expense. Such statutes, varying in scope and application, may be found in Arizona, Arkansas, California, Colorado, Connecticut, Illinois, Iowa, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oregon, Pennsylvania, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, and Wyoming. 3 VERNIER, AMERICAN FAMILY LAWS § 160 (1935). North Carolina does not have a family expense statute.

[66] 3 VERNIER, *op. cit. supra* note 65, § 161.

[67] Mandell Bros. v. Fogg, 182 Mass. 582, 66 N.E. 198 (1903) (Illinois statute); Dodd v. St. John, 22 Ore. 250, 29 Pac. 618 (1892).

[68] California, Connecticut, Idaho, Iowa, Kentucky, Louisiana, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, and Wisconsin.

[69] CAL. CIV. CODE § 243.

[70] In Gleason v. City of Boston, 144 Mass. 25, 10 N.E. 476 (1887), it was held that a wife was not liable for the support of her minor children. The courts took this narrow view in spite of the fact that the family responsibility laws were based on the Elizabethan Poor Law of 1601, which was clearly intended to change the common law relating to duties of support. Massachusetts enacted a statute in 1955 which imposes upon both parents a duty to support their minor children. MASS. GEN. LAWS ANN. ch. 201, § 40 (1955).

[71] See, for example, N.Y.C. DOM. REL. CT. ACT § 92. The Domestic Relations

The conclusion is inescapable, however, that while there have been statutory modifications of the wife's duties to her husband and family, the changes have been made on a piecemeal basis, and the ancient concept of the husband as the legal personification of the family unit, and therefore under an unqualified duty to support it, has remained largely unchanged.

III

Parent's Duty To Support Child

The authorities are conflicting on the question of whether at common law independently of statute a parent is under a legal duty to support and maintain his minor child.[72] A few early American cases,[73] following English precedents,[74] have held that a parent may be morally obligated to support his minor child, but that he is not legally obligated to do so in the absence of statute. Courts following this view refused to hold a father liable for necessaries furnished to his minor child in the absence of an agreement, express or implied, to pay for them.[75] However, this doctrine is generally regarded as contrary to the basic principles of modern society and has been repudiated in almost every jurisdiction. It is, of course, universally acknowledged that there is a moral obligation on the part of a parent to support his child; and the overwhelming

Court is empowered "to make an order requiring a wife, if she is of sufficient means, to support or contribute to the support of the husband who is or is likely to become a public charge." Under § 92-A, "The Commissioner of Welfare of the City of New York, in an appropriate case, may file with the court a petition against a wife who has sufficient means, for the support of the husband who is or who is likely to become a public charge." Under § 101, "A wife is hereby declared to be chargeable with the support of her husband who is or is likely to become a public charge, and if possessed of sufficient means may be required to pay such sum, or any part thereof, as may be necessary to prevent his being or becoming a public charge." See also Pa. Stat. Ann. tit. 62, § 1972 (Supp. 1957). In Kinsey v. Kinsey, 200 Misc. 760, 107 N.Y.S.2d 212, 221 (Dom. Rel. Ct. 1951), the court (applying New York family responsibility laws), held that where an adult son, though industrially disabled by mental deficiency and epilepsy, was married and lived with his wife on her earnings supplemented by his occasional employment, and the son was not receiving, or eligible for or in need of, public assistance, there was no jurisdictional basis for an order requiring the father to support the son. The court ordered the proceeding terminated, but without prejudice to the filing of new petitions when and if the son in the future became a recipient of public assistance or was likely to become in need thereof. The court left undecided the question whether the statutory obligation of a wife for support of a "poor relative" husband is primary and the obligation of the parents and children for such support, under N.Y.C. Dom. Rel. Ct. Act §§ 92(9) and 101(4), is secondary, or whether they are concurrent and the burden apportionable.

[72] Madden, Persons and Domestic Relations § 110 (1931).

[73] Hunt v. Thompson, 4 Ill. 179 (1841); White v. Mann. 110 Ind. 74, 10 N.E. 629 (1887); Kelley v. Davis, 49 N.H. 187 (1870).

[74] "It is now well established that, except under the operation of the poor law, there is no legal obligation the part of the father to maintain his child, unless, indeed, the neglect to do so should bring the case within the criminal law. Civilly there is no such obligation." Bazeley v. Forder, [1868] 3 Q.B. 559, 565.

[75] Hunt v. Thompson, 4 Ill. 179 (1841); Kelley v. Davis, 49 N.H. 187 (1870).

majority view in the United States today is that a parent is also under a legal duty to support his child, regardless of statute.[76]

As to the basis of the parental duty of support, there is a diversity of opinion. It has been said that the rule is required by principles of natural law and justice;[77] by necessity, from the fact that a child is, by the nature of things, unable to support and maintain itself;[78] by the state, as *parens patriae*;[79] and because the state is concerned that the child should not become a burden to the taxpayers.[80] Some courts simply state the rule, that a parent is under a duty to support his child, as axiomatic: it arises from parenthood itself.[81] In any event, there are now in almost every American jurisdiction civil statutes which impose upon a parent an obligation to support his minor child;[82] and in every jurisdiction there is criminal liability for desertion and nonsupport of a minor child.[83] The policy of most of the criminal statutes is not merely that of punishing a parent for deserting and failing to support his child, but that of enforcing the parent's duty of support in order to relieve the public from the burden of supporting the child. This is usually done by providing for the suspension of sentence, stay of execution, and probation of the defendant upon his entering into an undertaking to comply with a court order to support or contribute to the support of his child.[84]

Primarily, it is the father who has the duty to support and educate his minor children,[85] and in the absence of statute, the mother is not bound to support the children during the father's lifetime.[86] However,

[76] "There can be no controversy that the father is under a legal as well as a moral duty to support his infant children, . . . and, . . . if he has the ability to do so, whether they have property or not." Sanders v. Sanders, 167 N.C. 319, 83 S.E. 490, 491 (1914). *Accord,* Lee v. Coffield, 245 N.C. 570, 96 S.E.2d 726 (1957); State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956); Pace v. Pace, 244 N.C. 698, 94 S.E.2d 819 (1956); Wells v. Wells, 227 N.C. 614, 44 S.E.2d 31 (1947); Maryland Cas. Co. v. Lawing, 225 N.C. 103, 33 S.E.2d 609 (1945); White v. Holding, 217 N.C. 329, 7 S.E.2d 825 (1940); *In re* Tenhoopen's Custody, 202 N.C. 223, 162 S.E. 619 (1932); State v. Jones, 201 N.C. 424, 160 S.E. 468 (1931); Thayer v. Thayer, 189 N.C. 502, 127 S.E. 553 (1925); State v. Bell, 184 N.C. 701, 115 S.E. 190 (1922); Burton v. Belvin, 142 N.C. 151, 55 S.E. 71 (1906); 39 AM. JUR. *Parent and Child* § 35 (1942); 67 C.J.S. *Parent and Child* § 15 (1950).

[77] Buchanan v. Buchanan, 170 Va. 458, 197 S.E. 426 (1938).

[78] *Ibid.*

[79] Geary v. Geary, 102 Neb. 511, 167 N.W. 778 (1918).

[80] Willits v. Willits, 76 Neb. 228, 107 N.W. 379 (1906).

[81] Barrett v. Barrett, 44 Ariz. 509, 39 P.2d 621 (1934); Wells v. Wells, 227 N.C. 614, 44 S.E.2d 31 (1947). See other North Carolina cases cited note 76 *supra.*

[82] 4 VERNIER, *op. cit. supra* note 65, § 234. The majority of these statutes are family responsibility laws resigned to prevent persons who are unable to provide for themselves from becoming public charges.

[83] 4 VERNIER, *op. cit. supra* note 65, § 234.

[84] See, *e.g.,* N.C. GEN. STAT. §§ 14-324, -325 (1953).

[85] Wells v. Wells, 227 N.C. 614, 44 S.E.2d 31 (1947). "We do not understand that a *married woman* is under the same legal obligation to provide for her children as the husband to his wife and children—the husband is under compulsion of law to support the wife and children. . . ." Wise v. Raynor, 200 N.C. 567, 573, 157 S.E. 853, 856 (1931). (Emphasis added.)

[86] Welch v. Welch, 261 App. Div. 271, 25 N.Y.S.2d 838 (1941).

it is generally the rule that the mother is liable upon the death of the father.[87] Here again statutes in a number of jurisdictions have made the mother secondarily or equally liable for the support and maintenance of her minor children. As between the state and the mother, the mother is primarily responsible for supporting her children.[88]

Generally, a person who stands in loco parentis to a child has the same rights and is subject to the same duties with respect to the child as a natural parent. Therefore, while that relation continues, he is bound for the maintenance, care, and education of the child to the same extent as a natural parent.[89] Legal adoption was unknown at common law; and it was not until as late as 1926 that England enacted an adoption statute.[90] All American jurisdictions have statutes permitting the adoption by one person of the off-spring of another.[91] Generally, in the absence of statutory provisions to the contrary, the rights, duties, and obligations arising from the artificial parent-child relationship created by adoption are substantially the same as those arising from the natural parent-child relationship. Therefore, it follows that an adoptive parent is under the same duty to support his adopted child as any other parent. Few cases arise, of course, involving the question of the duty to support an adopted child. This is natural in view of the fact that adoption is a voluntary procedure, that persons who adopt a child usually want the child and decide to adopt a child only after they become financially able to do so, and that the courts in adoption proceedings[92] only approve adoptions by families financially able to care for a child and provide for its welfare.

While the chief ground of the parents' liability for the support of their children is widely acknowledged to be parentage, nevertheless, illegitimate children do not stand on the same footing as legitimate children with respect to support and maintenance. At common law the relationship between an illegitimate child and his parent simply did not give rise

[87] "The law in this state imposes a duty on both parents to provide, within their means, for the necessary support of their minor children. This is primarily an obligation of the father. . . . The fact that the father, during life, is primarily responsible for the support, maintenance, and education of his minor children does not relieve the mother of her responsibility. Upon the death of the father, a duty rests on the mother to the best of her ability to provide for the support of her children. This we conceive to be the common law adopted in North Carolina." Lee v. Coffield, 245 N.C. 570, 572, 96 S.E.2d 726, 728 (1957).

[88] Benedict v. Benedict, 200 Misc. 286, 115 N.Y.S.2d 352 (Dom. Rel. Ct. 1952).

[89] Waldrup v. Crane, 203 Ga. 388, 46 S.E.2d 919 (1948). It is practically the universal rule that a stepfather who places himself in loco parentis to his wife's child by taking the child into his home under his care assumes the obligation to support the child and acquires a correlative right to the child's services. MADDEN, *op. cit. supra* note 72, §§ 110-11; see also Hussey v. Roundtree, 44 N.C. 110 (1852).

[90] The Adoption of Children Act, 1926, 16 & 17 Geo. 5, c. 29.

[91] See N.C. GEN. STAT. §§ 48-1 to -35 (1950), as amended, N.C. GEN. STAT. §§ 48-2 to -29 (Supp. 1959).

[92] In North Carolina adoption of a child is accomplished through a special proceeding before the clerk of the Superior Court. N.C. GEN. STAT. § 48-12 (1950).

to the same rights and duties as that between a legitimate child and his parent.[93] In the absence of statute an illegitimate child is regarded as *nullius filius*,[94] and his parent is under no legal obligation to support him.[95] Moreover, statutes imposing upon parents and others the duty of supporting minor children, and which do not specifically refer to illegitimate children, have been generally construed to apply only to legitimate children.[96]

On the other hand, the father of an illegitimate child, who is scarcely recognized as such for any purpose at common law, may be held liable on an express promise to pay for the support of his child,[97] or on an implied promise where he has adopted the child as his own and has acquiesced in the disposition of it.[98] And further, it has been held that the mother of an illegitimate child is legally bound to support it even in the absence of statute.[99]

Almost all states now have civil or criminal statutes which in some way impose on the father or mother, or both, the duty to support an illegitimate child.[100] Some of these statutes are of the "poor law" type requiring the support of indigent relatives;[101] others are criminal statutes penalizing abandonment and nonsupport of children, including illegitimate children;[102] still others are of the type known as "bastardy laws," providing for a determination of paternity and the enforcement of a duty

[93] MADDEN, *op. cit. supra* note 72, § 105. It has been said that neither parent of an illegitimate child owed it any duty of support at common law. Murrell v. Industrial Comm'n, 291 Ill. 334, 126 N.E. 189 (1920). However, some courts have held that the mother had a duty to maintain such a child at common law. *In re* Vieweger, 93 N.J. Eq. 291, 117 Atl. 291 (Ch. 1922).

[94] Todd v. Weber, 95 N.Y. 181 (1884); Allen v. Hunnicutt, 230 N.C. 49, 52 S.E.2d 18 (1949).

[95] See Annot., 30 A.L.R. 1069 (1924). But see Sanders v. Sanders, 167 N.C. 319, 83 S.E. 490, 491 (1914), where the court said: "There can be no controversy that the father is under a legal as well as moral duty to support his infant children, . . . and if he has the ability to do so, whether they have property or not. . . . There is a natural obligation to support even illegitimate children which the law not only recognizes, but enforces. Burton v. Belvin, 142 N.C. 153. . . . Besides, the failure to support his children is a crime." See also Burton v. Belvin, 142 N.C. 151, 55 S.E. 71 (1906); Kimbrough v. Davis, 16 N.C. 71 (1827).

[96] Beaver v. State, 96 Tex. Crim. 179, 256 S.W. 929 (1923).

[97] A promise by the reputed father of an unborn child conceived out of wedlock to the mother, to support and educate the child, is not contrary to law or founded on an immoral consideration, and it may be enforced in an action by the child on a third party beneficiary theory. Conley v. Cabe, 198 N.C. 298, 151 S.E. 645 (1930); Redmon v. Roberts, 198 N.C. 161, 150 S.E. 881 (1929); Thayer v. Thayer, 189 N.C. 502, 127 N.C. 553 (1925). And a contract to provide for an illegitimate child given upon condition that bastardy proceedings against the reputed father and obligor in the contract shall be commenced, or shall be discontinued, is not void as a contract to compound a criminal offense. Burton v. Belvin, 142 N.C. 151, 55 S.E. 71 (1906).

[98] Burton v. Belvin, *supra* note 97.

[99] *In re* Vieweger, 93 N.J. Eq. 527, 117 Atl. 291 (Ch. 1922); Friesner v. Symonds, 46 N.J. Eq. 521, 20 Atl. 257 (Prerogative Ct. 1890).

[100] 10 C.J.S. *Bastards* § 18 (1938); see also Note, 28 N.C.L. REV. 119, 121 (1949).

[101] See, *e.g.*, IOWA CODE ANN. § 252.3 (1949); N.D. REV. CODE § 32-3601 (1943).

[102] 4 VERNIER, *op. cit. supra* note 65, § 234.

of support against the person found to be the father of the child.[103] The use of criminal sanctions to compel the parents of illegitimate children to support them will be considered in a later portion of this article.

The fact that a minor child has independent means and an estate of its own ordinarily will not relieve a parent of his obligation to support the child.[104] However, the parental obligation of support is not unqualified. A parent is expected to support his child to the extent of his ability to do so; and as a practical matter the courts, in determining the parent's ability, consider his means, his health, and his station in life. In *Maryland Cas. Co. v. Lawing*[105] a widowed mother, the natural and *de facto* guardian of the minor children, made disbursements in good faith from the estate prior to her appointment as legal guardian. Holding that the disbursements would not be disallowed, the court said: "While it is the primary duty of a parent to support his child whether the child has an estate or not this obligation may be qualified by the parent's ability . . . . And when the parent has not means sufficient to provide necessary maintenance he should have reasonable allowance for lawful disbursements from the child's estate for that purpose."[106]

When a parent is unable to support his child and the child has property of its own, equity will make allowances to the parent from the child's estate for its past or future maintenance. However, it is well settled that equity will grant such allowances only when the parent is incapable of furnishing adequate support, the child's fortune exceeds that of its parents, and it would be for the benefit of the child to order such allowances to be made from its estate.[107]

As a general rule the common law duty of the parent to support his child terminates when the child reaches his majority (arbitrarily set at twenty-one years of age),[108] or upon the child's complete emancipation prior to maturity.[109] However, there is a well recognized exception to

[103] See, *e.g.*, N.C. GEN. STAT. §§ 49-2 to -13 (1950), as amended, N.C. GEN. STAT. §§ 49-2 to -13 (Supp. 1959); see also Note, 28 N.C.L. REV. 119, 121 (1949).

[104] "The North Carolina court early recognized as a legal duty on the father to maintain his children, even when they had separate estates of their own. Walker v. Crowder, 37 N.C. 478 (1843)." Note, 26 N.C.L. REV. 202 (1948), n. 3; see also Maryland Cas. Co. v. Lawing, 225 N.C. 104, 33 S.E.2d 609 (1945); 67 C.J.S. *Parent and Child* § 15 (1950).

[105] 225 N.C. 103, 33 S.E.2d 609 (1945). [106] *Id.* at 107, 33 S.E.2d at 612.

[107] The property of minors can only be used for their support when the parents are unable to provide properly such support. Lee v. Coffield, 245 N.C. 570, 96 S.E.2d 726 (1957); see also Annot., 121 A.L.R. 176 (1939).

[108] Dunbar v. Dunbar, 190 U.S. 340 (1903); Humboldt County v. Biegger, 232 Iowa 494, 4 N.E.2d 422 (1942); Wells v. Wells, 227 N.C. 614, 44 S.E.2d 31 (1947). The North Carolina statutes imposing criminal liability for abandonment, neglect, and nonsupport of children all set maximum ages at less than twenty-one years: N.C. GEN. STAT. § 14-322 (Supp. 1959) (eighteen years); N.C. GEN. STAT. § 14-326 (1953) (sixteen years); N.C. GEN. STAT. § 49-2 (Supp. 1959) (eighteen years).

[109] James v. James, 226 N.C. 399, 38 S.E.2d 168 (1946); Holland v. Hartley, 171 N.C. 376, 88 S.E. 507 (1916); Lowrie v. Oxendine, 153 N.C. 267, 69 S.E. 131 (1910).

the general rule. Where a child is physically or mentally defective, is unable to support himself after coming of age, and remains unmarried and in the parental home, the parent's obligation to support him continues until the necessity for support ceases.[110] In *Wells v. Wells*,[111] a case of first impression in North Carolina, the mother of an adult child brought an action against the father (the parents were separated) to recover the value of necessaries furnished and services rendered to their adult son. She alleged that the defendant had separated himself from his family, that the son continued to live with the plaintiff, his mother, before and after reaching his majority, and that before and after majority the son was insolvent, unmarried, and so physically and mentally handicapped as to be incapable of supporting himself. The North Carolina Supreme Court, reversing the judgment below, held that the complaint stated a good cause of action.[112]

That the death of the parent also terminates the parent's liability for the support of the child at common law[113] is clear; but the rule is severely criticized and some courts have refused to follow it, especially in cases involving court decrees for support, separation agreements, and other contracts.[114] The question of whether a parent's duty to support his child is terminated by the death of the parent was presented to the North

[110] Zakroki v. Zakroki, 115 Ind. App. 556, 60 N.E.2d 745 (1945); Breuer v. Dowden, 207 Ky. 12, 268 S.W. 541 (1925); Crain v. Mallone, 130 Ky. 125, 113 S.W. 67 (1908); Wells v. Wells, 227 N.C. 614, 44 S.E.2d 31 (1947); Schultz v. Western Farm Tractor Co., 111 Wash. 351, 190 Pac. 1007 (1920). Some cases in imposing liability on a parent for an incapacitated adult child make a qualification that the child for whom support is sought after majority must have been incapacitated at the time of reaching majority. See, *e.g.*, Breuer v. Dowden, *supra*; Crain v. Mallone, *supra*. *Contra, In re* Van Denburgh, 178 App. Div. 237, 164 N.Y. Supp. 966 (1917); Alger v. Miller, 56 Barb. (N.Y.) 227 (1868); Cromwell v. Benjamin, 41 Barb. (N.Y.) 558 (1863).

[111] 227 N.C. 614, 44 S.E.2d 31 (1947).

[112] "In the light of the public policy of this State, and in keeping with the dictates of humanity, the principles of law enunciated in these authorities [cases holding parents liable for support of incapacitated adult child] are persuasive and convincing. Hence, we hold that ordinarily the law presumes that when a child reaches the age of twenty-one years he will be capable of maintaining himself, and in such case the obligation of the father to provide support terminates. But where this presumption is rebutted by the fact of mental or physical incapacity, it no longer obtains, and the obligation of the father continues." *Id.* at 619-20, 44 S.E.2d at 35.

[113] Blades v. Szatai, 151 Md. 644, 135 Atl. 841 (1927); Rice v. Andrews, 127 Misc. 826, 217 N.Y. Supp. 528 (Sup. Ct. 1926); Silberman v. Brown, 34 Ohio Op. 295, 72 N.E.2d 267 (1946); Robinson v. Robinson, 131 W. Va. 160, 50 S.E.2d 455 (1948), 62 HARV. L. REV. 1079 (1949); MADDEN, *op. cit. supra* note 72, § 115.

[114] *In re* Van Arsdale's Will, 190 Misc. 968, 75 N.Y.S.2d 487 (Surr. Ct. 1947) (contract for support, independent of divorce decree, survived father's death); Stone v. Bagley, 75 Wash. 184, 130 Pac. 820 (1913) (property settlement providing for support of minor children survived father's death); Edelman v. Edelman, 65 Wyo. 271, 203 P.2d (1949) (divorce decree based on agreement survived the father's death). In the *Bagley* case, *supra*, the Washington court questioned the common law rule as a matter of public policy, and other courts have felt that the justice of the case calls strongly for a holding that the obligation for support continues after the father's death. See, *e.g.*, *In re* Smith's Estate, 200 Cal. 654, 254 Pac. 567 (1927); see also Annot., 18 A.L.R.2d 1126 (1951).

Carolina Supreme Court for the first time in 1952 in the case of *Elliott v. Elliott*.[115] In that case the father had been married twice and was living with his second wife and their children at the time of his death. He left a will devising the bulk of his real property to the six adult children of his first marriage and bequeathing only ten dollars to the six children, including one *en ventre sa mere,* of his second marriage, although his personal estate was worth almost six thousand dollars. The minor children of his second marriage brought an action against the executor of their father's estate to recover such sums as would be reasonable for their support until they reached their majority. The court, in affirming the judgment below sustaining the defendant's demurrer, held, in substance, that the common law obligation of a father to support his minor children is not a property right but a personal duty which is terminated by the death of the father and cannot be made the basis of a claim against the estate of the father who has disposed of his property by will without providing for the support of his minor children. In view of the fact that North Carolina has no statute on this point and the common law is in effect,[116] perhaps no other result could have been reached by the court. However, the problem posed by the *Elliott* case clearly seems to be one in which a sense of justice demands a different, more equitable rule.

The divorce *a mensa et thoro* or *a vinculo* of a child's parents does not, by the weight of authority, terminate the father's duty to support or contribute to the support of the child; and the fact that custody was awarded to the mother does not change the rule.[117] A divorce decree does not *ipso facto* terminate or diminish the father's liability for the support of his child. On the contrary, it usually makes provisions for the support of children of the marriage. His obligation continues and may be enforced by his former wife or the child.[118] It has also been held that the father's duty is not terminated by the fact that the child does not live in the parental home, if separation is the result of the parents' consent or of their wrongful conduct in driving him from the home by

[115] 235 N.C. 153, 69 S.E.2d 224 (1952), 30 N.C.L. REV. 417 (1952).

[116] N.C. GEN. STAT. § 4-1 (1953).

[117] "The liability of the father primarily to support the children remains as well after as before divorce, and even when the custody of the children has been awarded to the mother." Green v. Green, 210 N.C. 147, 149, 185 S.E. 651, 652 (1936). *Accord,* Pickelsimer v. Critcher, 210 N.C. 779, 188 S.E. 313 (1936); Sanders v. Sanders, 167 N.C. 319, 83 S.E. 490 (1914). When the wife institutes a suit for divorce, either absolute or from bed and board, she may compel the husband to provide support for any minor child of the marriage by a motion in the cause, under N.C. Gen. Stat. § 50-13, which may be filed before or after final judgment. A wife may also obtain support for herself and the children of the marriage in a proceeding for alimony without divorce under N.C. Gen. Stat. § 50-16. A discussion of the problem of child support as it arises in actions for divorce and alimony is beyond the scope of this article.

[118] Green v. Green, *supra* note 117; Pickelsimer v. Critcher, *supra* note 117.

abuse and maltreatment.[119] Finally, there is the practical problem of enforcing the duty of parents to provide support for their minor children. While there is a sharp split in the authorities on the question of the child's right to sue its parent for support, it has more frequently been held that, in the absence of statute, a direct action against the father for support may not be maintained by the child or his mother in law or in equity.[120] The rationale of this rule is said to be that as a matter of public policy actions which tend to destroy family harmony and discipline and promote domestic discord should not be permitted. But *quaere* as to whether there is any family harmony to be preserved when the normal parental desire to nurture and care for a child has deteriorated to such an extent that the child must resort to legal proceedings to compel the parent to provide for his maintenance. The conception of the common law seems to have been that the parental duty of support could be enforced indirectly by permitting third parties to sue the parent for the value of necessaries furnished to the child.[121] This method of compelling support, inadequate though it may be, is available in all jurisdictions; so ordinarily a third person[122] may recover from the father for necessaries furnished to a minor child under proper circumstances.[123] The ineffectiveness of this method[124] of enforcing liability has led many courts to permit the child, under varying circumstances, to maintain an action directly against the parent to compel him to support the child.[125] Some of these courts have taken the position that the right in the child to support is correlative to the duty of the parent to furnish it, and the enforcement of the obligation should not be left to the indirect method of an action by a creditor against the parent for necessaries furnished the

[119] P. J. Hunycutt & Co. v. Thompson, 159 N.C. 29, 74 S.E.2d 628 (1912).

[120] Bedrick v. Bedrick, 151 Misc. 4, 270 N.Y. Supp. 566 (Sup. Ct. 1933), *aff'd*, 241 App. Div. 807, 271 N.Y. Supp. 949 (1934); MADDEN, *op. cit. supra* note 72, § 112; 67 C.J.S. *Parent and Child* § 20 (1950); see generally Annot., 13 A.L.R.2d 1142 (1950).

[121] MADDEN, *op. cit. supra* note 72, §§ 111-12.

[122] The mother has the same right as other relatives and strangers to recover from the father for necessaries furnished to the child, in the absence of any equitable reason for imposing on her the father's primary obligation to support the child. 67 C.J.S. *Parent and Child* § 16 (1950).

[123] Blue Ridge Park Nurseries v. Owen, 41 Ga. App. 98, 152 S.E. 485 (1930); State v. Walker, 246 Iowa 932, 70 N.W.2d 177 (1955); Glaze v. Hart, 225 Mo. App. 1205, 36 S.W.2d 684 (1931); O'Brien v. Springer, 202 Misc. 210, 107 N.Y.S. 2d 631 (Sup. Ct. 1951); Saracco v. Corelli, 268 App. Div. 34, 48 N.Y.S.2d 434 (1944); Cole v. Wagner, 197 N.C. 692, 150 S.E. 339 (1929) (dictum).

[124] To a great extent its effectiveness depends upon the willingness of relatives, merchants and other strangers to supply the child with goods and services under admittedly discouraging conditions, one of the discouraging conditions being the almost certain refusal of the father to pay out anything until compelled to do so by legal action.

[125] Simonds v. Simonds, 154 F.2d 326 (D.C. Cir. 1946); Upchurch v. Upchurch, 196 Ark. 324, 117 S.W.2d 339 (1938); Paxton v. Paxton, 150 Colo. 667, 89 Pac. 1083 (1907); Bryant v. Bryant, 212 N.C. 6, 192 S.E. 864 (1937); Pickelsimer v. Critcher, 210 N.C. 779, 188 S.E. 313 (1936); Green v. Green, 210 N.C. 147, 185 S.E. 651 (1936); Campbell v. Campbell, 200 S.C. 67, 20 S.E.2d 237 (1942).

child, but the child should be permitted to enforce the obligation in a direct action against the parent. North Carolina is one of the states which, under varying circumstances, allows a direct action by the child against the parent. In *Green v. Green*[126] the North Carolina Supreme Court held that a six-year-old infant, appearing by her next friend, could maintain an action against the father for support and maintenance, notwithstanding the fact that the bonds of matrimony between the parents had been dissolved. In fact, the dissolution of the family relationship by divorce served as the basis for distinguishing this case from others in which the child was not permitted to sue its parents directly for support on the ground that to permit such a suit would destroy family harmony and be detrimental to the integrity of the home. Here, as the court pointed out,[127] there was no family harmony to be endangered by the child's suit against its father. The home had already been disrupted by divorce, abandonment, and nonsupport.

While the cases in which the North Carolina court has permitted the child to sue its parent for support have involved actions by the child of divorced parents,[128] nevertheless, it is submitted that a direct action by the child as the most effective means of enforcing the parent's obligation should be permitted in all cases. When the necessity for legal action to compel a parent to support its child arises, family life has already deteriorated to such an extent that there is apparently no harmony to preserve, even though the family ties have not yet been legally dissolved by a formal divorce.

There have been intimations in several North Carolina cases that an illegitimate child would also be permitted to enforce its now generally recognized right to receive support and maintenance from its putative father.[129] However, in an action based solely upon the alleged relation-

[126] 210 N.C. 147, 185 S.E. 651 (1936).

[127] "It was held in *Small v. Morrison,* 185 N.C. 577, that an unemancipated child could not sue the father for a tort (there the alleged negligent operation of an automobile). Recovery was denied in that case upon the sound principle of the necessity of preserving the peace and privacy of the home and maintaining harmony in the domestic relations and family life. The ground upon which the right of action for tort by a child against a parent has been generally denied has been that, the family being the social unit, such actions would tend to undermine the influence of the home and were inconsistent with the family relation while it existed. . . . But, as pointed out in . . . *Small v. Morrison* . . . a distinction is made where the family relation had already been dissolved or disturbed and its harmony rudely shattered by the action of the father . . . . Here it is alleged that defendant had obtained a divorce from plaintiff's mother, had abandoned the plaintiff to the precarious support of charity, and denied her paternity. There was no family life to be preserved." Green v. Green, 210 N.C. 147, 149, 185 S.E. 651, 652 (1936), 15 N.C.L. REV. 67 (1936).

[128] Thomas v. Thomas, 248 N.C. 269, 103 S.E.2d 371 (1958); Mahan v. Read, 240 N.C. 641, 83 S.E.2d 706 (1954); Bryant v. Bryant, 212 N.C. 6, 192 S.E. 864 (1937); Pickelsimer v. Critcher, 210 N.C. 779, 188 S.E. 313 (1936); Green v. Green, 210 N.C. 147, 185 S.E. 651 (1936).

[129] Pickelsimer v. Critcher, *supra* note 128; Green v. Green, *supra* note 128; Conley v. Cabe, 198 N.C. 298, 151 S.E. 645 (1930); Redman v. Roberts, 198 N.C.

ship and presenting directly the question of whether an illegitimate child may maintain a civil action to establish its paternity and compel its putative father to furnish it support, the court answered in the negative, holding that an illegitimate child may not maintain a civil action against its father to compel the father to provide for its support.[130] "Such rights as it may have,"[131] said the court, can only be enforced in accordance with the procedure set out in the statutes, which provide an exclusive remedy for the enforcement of the right of an illegitimate child to support by his putative father. Unfortunately, the only means available to the illegitimate child for enforcing its statutory rights is an indirect one—namely, a criminal prosecution, which apparently may be instituted only by the child's mother or her personal representative or the superintendent of public welfare.[132] Furthermore, since the only remedy the illegitimate child has is under the bastardy statute and since the time limitations for bringing an action under that statute are rather strict,[133] the illegitimate child may find himself without any remedy at all.

In addition to the remedies of an indirect action by third parties to recover for necessaries furnished the child and the direct civil action by the child against the parent (permitted under limited circumstances), the other remedies available to the legitimate child to compel his parent to support him are a civil action brought by the mother,[134] a motion in the cause made by the mother in a divorce proceeding,[135] criminal prosecution of the offending parent for abandonment, neglect, and nonsupport,[136] and the remedies available under the Uniform Reciprocal Enforcement of Support Act.[137] The provisions of the Uniform Act and the use of criminal sanctions to compel a parent to support his child will be discussed further in this article.

161, 150 S.E. 881 (1929); Hyatt v. McCoy, 195 N.C. 762, 143 S.E. 518 (1928); Thayer v. Thayer, 189 N.C. 502, 127 S.E. 553 (1925); Sanders v. Sanders, 167 N.C. 319, 83 S.E. 490 (1914); Burton v. Belvin, 142 N.C. 150, 55 S.E. 71 (1906); Kimborough v. Davis, 16 N.C. 71 (1827).

[130] Allen v. Hunnicutt, 230 N.C. 49, 52 S.E.2d 18 (1949).

[131] The only rights an illegitimate child has, relative to its support are those created by the statutes, N.C. GEN. STAT. §§ 49-1 to -13 (1950), as amended, N.C. Gen. Stat. §§ 49-2 to -13 (Supp. 1959), and N.C. GEN. STAT. § 7-103 (Supp. 1959), and those based on contract. As to its right to sue on a contract made for its benefit see cases cited note 129 *supra*.

[132] N.C. GEN. STAT. § 49-5 (1950). Whether the illegitimate child may institute the criminal prosecution has not yet been determined by the North Carolina court.

[133] N.C. GEN. STAT. § 49-4 (Supp. 1959); State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956); Note, 26 N.C.L. REV. 305 (1948); Note, 28 N.C.L. REV. 119 (1949).

[134] Wells v. Wells, 227 N.C. 614, 44 S.E.2d 31 (1947), 26 N.C.L. REV. 202 (1948); see also note 122 *supra*.

[135] N.C. GEN. STAT. § 50-13 (Supp. 1959); Winfield v. Winfield, 228 N.C. 256, 45 S.E.2d 259 (1947).

[136] N.C. GEN. STAT. §§ 14-322 to -326 (1950), as amended, N.C. GEN. STAT. §§ 14-322 to -326.1 (Supp. 1959).

[137] N.C. GEN. STAT. §§ 52A-1 to -20 (Supp. 1959).

IV

CHILD'S DUTY TO SUPPORT PARENT

At common law an adult child is under no legal obligation to support his parents, regardless of the fact that they are old, incapacitated, or destitute.[138] A fortiori, a minor child is under no duty to support his parents even though he has an estate in his own right and a personal fortune that far exceeds that of his parents.[139] Although the parent is entitled to any wages earned by an unemancipated child during its minority,[140] this right of the parent is everywhere regarded as correlative to the duty of the parent to support the child, not as arising out of any duty on the part of the child to provide for its parents.[141]

An adult child may assume by express contract an obligation to support his parents[142] or to pay for necessaries furnished to them by third parties;[143] and under some circumstances he may be liable on an implied contract to support them. For example, if one child provides care and maintenance for his parents at the request of his brothers and sisters, he may recover from them their share of the expense on their implied promise to pay for the parents' support.[144]

The common law rules have been modified or abrogated entirely by statutes, civil and criminal, in many jurisdictions. In fact, most states have enacted laws requiring persons in various degrees of kinship to

[138] Duffy v. Yordi, 149 Colo. 140, 84 Pac. 838 (1906); Wood v. Wheat, 226 Ky. 762, 11 S.W.2d 916 (1928); Thornsberry v. State Dept. of Pub. Health & Welfare, 365 Mo. 1217, 295 S.W.2d 372 (1956) (moral rather than legal obligation); Howlett v. Social Security Comm'n, 347 Mo. 784, 149 S.W.2d 806 (1941); Couteau v. Couteau, 192 Misc. 736, 77 N.Y.S.2d 113 (Dom. Rel. Ct. 1948); 39 AM. JUR. *Parent and Child* § 70 (1942); 67 C.J.S. *Parent and Child* § 24 (1950); MADDEN, PERSONS AND DOMESTIC RELATIONS § 141 (1931).

[139] As has been seen above equity will sometimes make allowances to a parent from the child's estate. See note 107 *supra* and accompanying text. However, this is done only in exceptional cases where the parent is unable to support his child or where the child's personal fortune warrants expenditures for its maintenance and education on a scale beyond that possible on the parent's meager resources. Lee v. Coffield, 245 N.C. 570, 96 S.E.2d 726 (1957). It will be noted, however, that such an allowance is for the support of the child, not the parent. There are a few early English cases in which the Court of Chancery allowed maintenance to the parent from the child's estate. Roach v. Garvan, 1 Ves. Sen. 157, 27 Eng. Rep. 954 (Ch. 1748); Heysham v. Heysham, 1 Cox 179, 29 Eng. Rep. 1117 (Ch. 1785). See also *In re* Connolly's Estate, 88 Misc. 405, 150 N.Y. Supp. 559 (Surr. Ct. 1914), where the New York court, relying on precedents in equity, held, in the absence of a statute covering the point, that the estate of an infant could be charged by its general guardian with the burial expenses of the infant's mother, on the ground that equity would enforce the moral duty of a child to support or bury its parent.

[140] White v. Holding, 217 N.C. 329, 332, 7 S.E.2d 825, 827 (1940); Daniel v. Atlantic Coast Line R.R., 171 N.C. 23, 86 S.E. 174 (1915).

[141] Ulrich v. Ulrich, 136 N.Y. 120, 32 N.E. 606 (1892).

[142] *Ibid.*

[143] See Note, 117 Am. St. Rep. 128 (1908); Note, 9 Ann. Cas. 1019 (1908). No promise to pay for necessaries furnished to the parents will be implied from a mere showing of the parent-child relationship. MADDEN, *op. cit. supra* note 138, § 141.

[144] Wyman v. Passmore, 146 Iowa 186, 125 N.W. 213 (1910).

support their indigent relatives.[145] These enactments, known as family responsibility laws, are designed to relieve the taxpayers from the burden of supporting poor persons who have relatives financially able to care for them; some of them have criminal as well as civil sanctions for their enforcement.[146] Such statutes are frequently treated as part of the "poor laws" of the state, strengthening family responsibility for those persons in need of general assistance.[147] This type of legislation is not entirely a modern development, nor a reaction to the concept of the welfare state. The precursors of American family responsibility laws were the "poor laws of England, especially the Elizabethan Poor Law,[148] which imposed a duty of maintaining a needy person upon his parents, children, and grandparents. The range of relatives covered by the American statutes varies from state to state. The obligation to support needy relatives has been extended beyond those persons who had duties of support at common law. Some of the statutes have added grandchildren, brothers and sisters, and husbands and wives to the parents, children, and grandparents of the original Elizabethan statutes.[149]

[145] *E.g.*, CAL. CIV. CODE § 206; CAL. WELFARE & INST. CODE § 2576; GA. CODE ANN. § 23-2302 (1936); N.Y. CRIM. CODE § 914; N.Y.C. DOM. REL. CT. ACT §§ 92, 101; N.Y. SOC. WELFARE LAW § 101; S.C. CODE § 71-131 (1952).

[146] Cal. Civ. Code § 206 provides: "It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessaries previously furnished to such parent is binding." Cal. Pen. Code § 270(c) provides: "[E]very adult child who, having the ability to do so, fails to provide necessary food, clothing, shelter, or medical attendance for an indigent parent, is guilty of a misdemeanor." For a comprehensive and exhaustive study of this type of legislation, see Mandelker, *Family Responsibility Under the American Poor Laws*, 54 MICH. L. REV. (pts. 1, 2) 497, 607 (1956).

[147] The legislative programs, federal and state, providing public aid to those in need have come to be known in the social welfare field as "public assistance." There are two types of public assistance: (1) general assistance, aid to needy persons generally, and (2) special or categorical assistance, aid to particular classes of needy persons, namely, dependent children, the blind, the aged and the permanently and totally disabled.

[148] The Elizabethan Poor Law, 1601, 43 Eliz. 1, c. 2. The statute of 1601, which became widely known as the Elizabethan Poor Law, was actually a re-enactment, with some modifications, of a 1597-98 codification of English poor relief laws. The 1601 statute provided, in part, as follows: "VII. And be it further enacted, That the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other poor persons not able to work, being of a sufficient ability, shall, at their own charges, relieve and maintain every such poor persons in that manner, and according to that rate, as by the justices of the peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter-sessions shall be assessed . . . ."

[149] Originally, husbands and wives were not included in the Elizabethan Poor Law of 1601. Later acts remedied the omission. Poor Law Amendment, 1868, 31 & 32 Vict. c. 122, § 33; Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, § 20. It is interesting to note that Blackstone considered the poor laws as merely declaratory of general principles of law, but Kent regarded the primary purpose of the legislation as that of protecting the public purse. *Compare* 1 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *448 *with* 2 KENT, COMMENTARIES ON AMERICAN LAW 191 (12th ed. 1873).

For an example of an American statute of this type, see NEB. REV. STAT. § 68-102 (Reissue 1958), which provides: "The children shall first be called upon to

The family responsibility laws have not been used so much to enforce the support duties that were recognized at common law and that are now incorporated into statutory law in most jurisdictions; but they have been used primarily to compel adult children to support their needy parents, and to compel some collateral relatives, such as brothers and sisters, to support each other. The statutory extensions of support duties seem to be based on the theory that as between the state and members of the family of a needy person the members of his family should be primarily responsible for his care and maintenance if they have sufficient means to provide for him. Whether it is socially desirable to compel, by court process, persons to maintain their indigent relatives (particularly collateral relatives) who are not a part of the usual interdependent family unit is open to serious question.

North Carolina is one of the few remaining states[150] without family responsibility laws. However, North Carolina passed an act[151] in 1955 requiring children to support their needy parents under penalty of criminal prosecution for failure to do so and providing for contribution among the several children of the same parent. Thus the common law rule has been changed by statute in North Carolina: an adult child is now required to support his needy parent.

V

Abandonment, Desertion, Neglect and Nonsupport As Common Law Criminal Offenses

Most authorities agree that abandonment, desertion, neglect and nonsupport, as such, are not crimes at common law.[152] However, there is

support parents, if there be children of sufficient ability; and if there be none of sufficient ability, the parents of such persons shall next be called upon; and if there be no parents nor children, the brothers and sisters shall be next called upon; and if there be no brothers nor sisters, the grandchildren of such poor person shall next be called upon, and then the grandparents; *Provided,* married females, while they live with their husbands, shall not be liable to a suit for maintenance beyond the interest or income of the estate of such married female in her own right." See also N.Y. Soc. Welfare Law § 101; N.Y.C. Dom. Rel. Ct. Act. §§ 92, 101.

[150] Florida, Kansas, Kentucky, New Mexico, North Carolina, Tennessee, Texas, Washington, and Wyoming.

[151] N.C. Gen. Stat. § 14-326.1 (1953), provides: "If any person being of full age, and having sufficient income after reasonably providing for his or her own immediate family shall, without reasonable cause, neglect to maintain and support his or her parents, if such parent or parents be sick or not able to work and have not sufficient means or ability to maintain or support themselves, such person shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined or imprisoned in the discretion of the court. If there be more than one person bound under . . . these provisions . . . to support the same parent or parents, they shall share equitably in the discharge of such duty."

[152] *Abandonment* is a willful leaving of a child by its parent, or one spouse by another, with an intention to cause a perpetual separation. *In re* Kronjaeger, 166 Ohio St. 172, 140 N.E.2d 773 (1957). To constitute abandonment there must be an actual desertion, accompanied by an intention to sever, so far as it is possible to do so, the parental or marital relation and throw off all obligations growing out

some authority to the contrary on the point, constituted for the most part of dicta in a few cases. For example, in an old Nebraska case,[153] where a wife brought suit in equity for maintenance and support without a prayer for divorce *a mensa et thoro* or *a vinculo,* the court overruled a demurrer to the complaint and said in passing that "at common law, where the husband heedlessly and wantonly, and from improper motives, refused a wife the necessary comforts of life and refused to provide for her, a criminal prosecution, with recognizance, was sometimes resorted to, for the purpose of compelling a competent husband to support his family."[154] The only authority cited by the court to support this proposition was Schouler.[155]

Under some circumstances the neglect of a parent to provide for

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of the relation, and it is not committed under circumstances of coercion. *In re* Jones, 131 Cal. App. 2d 831, 281 P.2d 310 (1955). Willfully forsaking and deserting the duties of parenthood, and leaving a minor child in a dependent condition, constitute essential elements of the offense of abandonment of a minor child. Cox v. State, 85 Ga. App. 702, 70 S.E.2d 100 (1952). "Abandonment" is used synonymously with "desertion." Abandonment is desertion, an unjustifiable separation coupled with discontinuance of marital obligation to support, and does not embrace separation by consent. State v. Carson, 228 N.C. 151, 44 S.E.2d 721 (1947).

Desertion is the willful forsaking of duties. There is desertion when a parent quits the society of his child and renounces the duties he owes it. State v. Clark, 148 Minn. 389, 182 N.W. 452 (1921). Desertion means a separation from wrongfully, without intention of again resuming marital relations. People v. Stickle, 156 Mich. 557, 121 N.W. 497 (1909). Desertion or abandonment of child or spouse may be actual or constructive. It is constructive when the child or spouse is excluded from the parental or marital domicile by the parent or other spouse willfully and without justification. See Danzi v. Danzi, 185 Pa. Super. 111, 137 A.2d 809 (1958).

Neglect is a designed refusal or unwillingness to perform one's duty. It is a disregard of duty from indifference or willfullness. *In re* Masters, 165 Ohio St. 503, 137 N.E.2d 752 (1956). While abandonment and desertion import separation, quitting absolutely, neglect does not have that connotation. To constitute an abandonment of a child, there must be a willful leaving of a child by his parent with an intention to cause perpetual separation, and to constitute neglect of a child, there must be a willful or indifferent disregard of the duty owed by a parent to his child. *In re* Kronjaeger, 166 Ohio St. 172, 140 N.E.2d 773 (1957).

Nonsupport is the failure to perform the duties, imposed by common law or statute, to provide for the care and maintenance of the persons to whom the duties are owed. It is the failure to contribute to the maintenance and material well being of a child. *In re* Musczak's Estate, 196 Misc. 364, 92 N.Y.S.2d 97 (Surr. Ct. 1949). It is the failure to provide the necessities for subsistence: food, shelter, clothing, medical attention, and education, and the ordinary comforts of life.

While at common law there was criminal liability for a negative act (failure to take action where there was a legal duty imposed by law or contract to take positive action, sometimes referred to as a "forbearance" if intentional and an "omission" if unintentional or negligent), nevertheless, the particular negative acts enumerated above were not, without more, criminal. Brooke v. State, 99 Fla. 1275, 128 So. 814 (1930); Stedman v. State, 80 Fla. 547, 86 So. 428 (1920); *In re* Ryder's Petition, 4 Edw. Ch. 338, *aff'd,* 11 Paige (N.Y.) 185 (1844); State v. Manon, 204 N.C. 52, 167 S.E. 493 (1933); 27 AM. JUR. *Husband and Wife* § 435 (1940); 39 AM. JUR. *Parent and Child* § 103 (1942); 42 C.J.S. *Husband and Wife* § 630 (1944); 67 C.J.S. *Parent and Child* § 91 (1950); 3 BURDICK, LAW OF CRIME § 851 (1946).

[153] Earle v. Earle, 27 Neb. 277, 43 N.W. 118 (1889).

[154] *Id.* at 278, 43 N.W. at 119.

[155] SCHOULER, HUSBAND AND WIFE § 66 (6th ed. 1921).

his infant child of tender years who is incapable of providing for himself is an indictable misdemeanor where the child is seriously harmed as a consequence of the neglect.[156] In the early English case of *Regina v. Hogan*[157] a mother was indicted for unlawfully abandoning her bastard child of tender age without having provided means for its support and with the unlawful intent of burdening the parish with its care. Pollock, J., in quashing the conviction, said:

> We are all of the opinion that this indictment cannot be sustained. No doubt, to neglect a child so as to injure its health is an offence in the person whose duty it is to take care of it; but here there is no allegation of any injury to the child, nor that the mother had the means of supporting it. As to the supposed injury to the parish, we are not disposed to go beyond the authorities, and there is no authority for saying that any person is indictable who occasions loss to a parish by throw-upon it the maintenance of a child as casual poor.[158]

On the other hand, the parent or husband who neglects his duty to provide food, shelter, clothing and medical attention for a child or wife, thereby causing the death of the child or wife, is criminally liable for the homicide at common law, and may be convicted of murder or manslaughter, depending upon the circumstances under which the death occurred. One of the leading cases on this point is *Regina v. Conde*,[159] where a man and his wife were indicted for the murder of their little son who died from starvation. The court in summing up the case to the jury, directed them as follows:

> If the prisoners or either of them wilfully withheld necessary food from the deceased, with a wilful determination by withholding sustenance which was requisite to cause his death, then the party so withholding such food is guilty of murder. If, however, the prisoner had the means to supply the necessaries, the want of which had led to the death of the deceased, and having the means to supply such necessaries, negligently, though not wilfully, withheld food which, if administered, would have sustained life, and so caused the death of the deceased, then that would amount to the crime of manslaughter in the person so withholding the food.[160]

The mother was found guilty of manslaughter; the father was aquitted.

The rule of law applied in the type of case where death resulted from the unintentional failure to provide food and other necessities for a child

[156] Reg. v. Conde, 10 Cox Crim. Cas. 547 (1867); Reg. v. Renshaw, 2 Cox Crim. Cas. 285 (1847). Although the courts recognized that the duty owed by the father to provide his infant child with food, clothing, and shelter, and to take special care of him if he became ill, was legal as well as moral, nevertheless, they universally held that, in the absence of statute, the failure of the father to make such provisions was not indictable if no serious harm resulted.

[157] 5 Cox Crim. Cas. 255, 169 Eng. Rep. 504 (1851).

[158] *Id.* at 257-58, 169 Eng. Rep. at 505.

[159] 10 Cox Crim. Cas. 547 (1867). [160] *Id.* at 549.

or other helpless person was clearly and explicitly stated in *Regina v. Nicholls*[161] as follows:

> If a grown person chooses to undertake the charge of a human creature helpless either from infancy, simplicity, lunacy, or other infirmity, he is bound to execute that charge without (at all events) *wicked* negligence; and if a person who has chosen to take charge of a helpless creature lets it die by wicked negligence, that person is guilty of manslaughter. Mere negligence will not do, there must be wicked negligence, that is, negligence so great, that you must be of opinion that the prisoner had a wicked mind, in the sense that she was reckless and careless whether the creature died or not.[162]

Thus it was well settled at common law that neglect of duty by one under a legal duty to provide for the care and maintenance of a person in his charge, particularly a child or wife, resulting in death, rendered him criminally liable for the homicide, which was manslaughter when the neglect was due to culpable negligence and murder when the neglect was willful and intentional; and neglect of duty resulting in harm short of death was assault when the neglect was due to culpable negligence, and attempted murder or assault when the neglect was willful and intentional.[163] On the other hand, abandonment of and failure to provide support and maintenance for a child or wife where no harm ensued was not indictable as a criminal offense.[164]

VI

Abandonment and Nonsupport As Statutory Offenses: Criminal Sanctons for the Enforcement of Support

In any event, the question of whether abandonment, desertion, neglect and nonsupport are crimes at common law is largely academic. Statutes have been enacted in almost every jurisdiction making it a crime for a husband or father to abandon and fail to support his wife and children.[165]

[161] 13 Cox Crim. Cas. 75 (1874).

[162] *Id.* at 76. See also Reg. v. Walters, Car. & Mar. 164, 174 Eng. 455 (1841); Reg. v. Smith, 10 Cox Crim. Cas. 82, 169 Eng. Rep. 1533 (1865).

[163] Reg. v. Conde, 10 Cox Crim. Cas. 547 (1867); Pallis v. State, 123 Ala. 12, 26 So. 339 (1899).

[164] Floyd v. State, 115 Fla. 625, 155 So. 794 (1934); State v. Manon, 204 N.C. 52, 167 S.E. 493 (1933).

[165] The nature and elements of the nonsupport offenses vary from state to state. With respect to the wife, under most of the statutes, the husband may be prosecuted for abandoning his wife without providing her with adequate support. See, *e.g.*, N.C. Gen. Stat. § 14-322 (Supp. 1959). Under other statutes, abandonment or desertion on the one hand, and nonsupport on the other, may constitute separate, independent crimes. *E.g.*, in North Carolina the failure of a husband, living with his wife, to provide adequate support for the wife and children is an offense under N.C. Gen. Stat. § 14-325 (1953). With respect to a child under many statutes, neglect or failure to provide adequate support for the child on one hand, and abandonment or desertion of the child on the other, may consitute separate, distinct offenses. *E.g.*, N.C. Gen. Stat. § 14-322 (Supp. 1959) (neglect or failure to

Indeed, statutes in many states have extended criminal liability for abandonment and nonsupport to mothers, children and other persons. In some states abandonment and nonsupport are felonies;[166] in others, including North Carolina, they are misdemeanors.[167] The criminal statutes go beyond the family responsibility statutes and other statutes for the relief of the poor. They are designed to supplement the civil remedies which are available to those to whom a duty of support is owed, to discourage and prevent violation of the duty to support by instilling fear of prosecution and punishment in those persons who owe a duty, and to prevent abandoned and unsupported wives and children from becoming public charges.

The courts unanimously have taken the view that statutes declaring abandonment and nonsupport of a wife or child to be criminal offenses are within the police power of the state, and are, therefore, vaild.[168] The performance by a husband and father of the legal duties which he voluntarily assumed in contracting marriage is a matter affecting the general public welfare. In a leading Arkansas case[169] upholding the constitutionality of an abandonment statute, the court said:

> It is a little difficult to determine the extent to which the lawmakers may go, for the protection of society at large, in creating public offenses based upon the conduct of those joined together in marriage contract; but we entertain no doubt that willful desertion of the wife by the husband "without good cause" may be made a criminal offense. Certainly society at large is interested in preventing such conduct, and the fidelity to the marriage vows is a moral obligation, the violation of which may be made a public offense.[170]

Undoubtedly, cases involving the duty to protect and provide for one's family reach far beyond the concern of the immediate parties, for they affect the status of the family as the very foundation of society and hence are, in a very certain sense, of wide public concern.

The ground upon which the constitutionality of abandonment and nonsupport statutes is frequently challenged is that such statutes are

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support a child, whether or not the child is abandoned); N.C. GEN. STAT. § 49-2 (Supp. 1959) (neglect or failure to support an illegitimate child); N.C. GEN. STAT. § 14-326 (1953) (abandonment of any child by its mother). It should be noted that all of the statutes require a criminal intent. In North Carolina abandonment and nonsupport must be willful to be punishable.

[166] CONN. GEN. STAT. §§ 53-304, -309 (1958).

[167] N.C. GEN. STAT. § 14-322 (Supp. 1959); N.C. GEN. STAT. 14-325, -326 (1953); N.C. GEN. STAT. §§ 49-2 (Supp. 1959).

[168] Sellers v. Murphy, 207 Ala. 290, 92 So. 661 (1922); Murphy v. State, 171 Ark. 620, 286 S.W. 871 (1926); *Ex parte* Mitchell, 19 Cal. App. 567, 126 Pac. 856 (1912); State v. Cucullu, 110 La. 1087, 35 So. 300 (1903); State v. English, 101 S.C. 304, 85 S.E. 721 (1915); State v. Latham, 136 Tenn. 30, 188 S.W. 534 (1916); *Ex parte* Strong, 95 Tex. Crim. 250, 252 S.W. 767 (1923); Spencer v. State, 132 Wis. 509, 112 N.W. 462 (1907).

[169] Murphy v. State, 171 Ark. 620, 286 S.W. 871 (1926).

[170] *Id.* at 623-24, 286 S.W. at 872.

violative of the constitutional guaranty against imprisonment for debt. The attack upon this ground has been entirely unsuccessful. The courts are in accord in holding that a man's liability to support his family is not a debt within the contemplation of the constitutional guaranty against imprisonment.[171] This was explicitly stated by the North Carolina court in *Ritchie v. White*,[172] although in that case the court was not construing the validity of any North Carolina support statutes.

The North Carolina statutes making abandonment and nonsupport criminal offenses were enacted in 1868.[173] The first section of the original act is now codified in N.C. Gen. Stat. section 14-322. This section, relating to abandonment and failure to support by husband and parent, has been amended and re-written several times. It was last rewritten in 1957.[174] Formerly, it provided as follows: "[I]f any husband shall willfully abandon his wife without providing adequate support for such wife, and the children he has begotten upon her, he shall be guilty of a misdemeanor."[175] The North Carolina Supreme Court decided in *State v. Bell*[176] that this statute created two separate and distinct offenses. It construed the statute as if it read as follows: "If any husband shall willfully abandon his wife without providing adequate support for such wife, he shall be guilty of a misdemeanor, and if he shall willfully abandon the children which he may have begotten upon her without providing adequate support for such children, he shall be guilty of a misdemeanor." Applying this construction of the statute, the court concluded that the defendant could be convicted for the abandonment and nonsupport of his children as separately charged in the first count of the three-count indictment, notwithstanding the fact that prior to the commencement of the criminal proceedings his wife had obtained a divorce *a vinculo* from him with the result that he no longer owed her any duty of support. The duty of the defendant to support his children, however, was not affected by the divorce decree; his obligation to support them continued after the marital relationship between him and his wife was severed by the law.

The abandonment and nonsupport statute now codified as N.C. Gen. Stat. section 14-322 was amended in 1925 by adding a proviso to the

[171] People v. Champion, 30 Cal. App. 463, 158 Pac. 501 (1916); Martin v. People, 69 Colo. 60, 168 Pac. 1171 (1917); State v. English, 101 S.C. 304, 85 S.E. 721 (1915); State v. Dixon, 138 Tenn. 195, 196 S.W. 486 (1917).

[172] 225 N.C. 450, 35 S.E.2d 414 (1945).

[173] N.C. GEN. STAT. § 14-322 (Supp. 1959); N.C. GEN. STAT. §§ 14-323, -325 (1953).

[174] N.C. Gen. Stat. § 14-322 now reads as follows: "If any husband shall wilfully abandon his wife without providing her with adequate support or if any father or mother shall wilfully neglect or refuse to provide adequate support for his or her child or children, whether natural or adopted, whether or not he or she abandons said child or children, he or she shall be guilty of a misdemeanor; and such wilful neglect or refusal shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child shall arrive at the age of eighteen (18) years."

[175] N.C. Pub. Laws 1868-69, ch. 209, § 1. [176] 184 N.C. 701, 115 S.E. 190 (1922).

effect that abandonment of the children by the father should constitute a continuing offense not barred by any statute of limitations until the youngest child reached eighteen years of age.[177] As re-written in 1949, the statute was extended to protect adopted children, to make the mother as well as the father guilty of a misdemeanor for the willful abandonment of children under eighteen years of age, to provide that the abandonment of children by father or mother shall constitute a continuing offense not barred by any statute of limitations until the youngest child reaches eighteen years of age, and to incorporate the construction put on it by the court in the *Bell* case, as creating two separate offenses.[178] In 1957 the statute was rewritten again. As to the children, it now provides, in effect, that the willful neglect or refusal by either parent to provide adequate support for them shall constitute a misdemeanor, whether or not the children are abandoned.[179]

The cases decided prior to the 1957 re-writing of the statute made it indisputably clear that section 14-322 set out two distinct offenses: (1) willful abandonment of the wife without adequate support, and (2) willful abandonment of the children without adequate support,[180] and that each of these offenses is comprised of two elements: (1) willful abandonment, and (2) willful failure to provide adequate support.[181]

Several cases, all decided before 1957, have dealt with the requisites of the abandonment and nonsupport offenses and the sufficiency of warrants and indictments to charge those offenses. It has been held that since the abandonment and nonsupport of the wife on one hand and the children on the other constitute two distinct offenses, the state, if it wishes to prosecute for both offenses, must clearly set out each offense in separate bills of indictment (which may be consolidated for trial) or in separate counts of the same bill.[182] Moreover, the indictment or warrant, in order to charge an offense under section 14-322, must allege every

[177] N.C. Pub. Laws 1925, ch. 290. [178] N.C. Sess. Laws 1949, ch. 810.

[179] Thus it would seem that there are three possible offenses under N.C. Gen. Stat. § 14-322 as now constituted: (1) abandonment and nonsupport of the wife; (2) abandonment and nonsupport of the children; and (3) nonsupport of the children.

[180] State v. Outlaw, 242 N.C. 220, 87 S.E.2d 303 (1955); State v. Lucas, 242 N.C. 84, 86 S.E.2d 770 (1955); State v. Johnson, 194 N.C. 378, 139 S.E. 697 (1927); State v. Bell, 184 N.C. 701, 115 S.E. 190 (1922). If the mother is guilty of nonsupport, N.C. Gen Stat. § 14-322 provides a remedy and the remedy is exclusive. Henson v. Thomas, 231 N.C. 173, 56 S.E.2d 432 (1949).

[181] State v. Outlaw, *supra* note 180; State v. Lucas, *supra* note 180; State v. Smith, 241 N.C. 301, 84 S.E.2d 913 (1954); State v. Campo, 233 N.C. 79, 62 S.E.2d 500 (1950); State v. Carson, 228 N.C. 151, 44 S.E.2d 721 (1947); Hyder v. Hyder, 215 N.C. 239, 1 S.E.2d 540 (1939); State v. Johnson, *supra* note 180; State v. Beam, 181 N.C. 597, 107 S.E. 429 (1921); State v. Toney, 162 N.C. 635, 78 S.E. 156 (1913). The husband's or father's abandonment is willful when he intentionally and without good excuse or justification separates himself from his wife or children; his failure to support is willful when he intentionally and without just cause or excuse, ceases to provide adequate support for his wife or children according to his means or station in life. State v. Carson *supra*.

[182] State v. Lucas, 242 N.C. 84, 86 S.E.2d 770 (1955).

element of the offense. Thus, in *State v. Lucas*,[183] where the indictment charged that the defendant "unlawfully and willfully did abandon his wife, one Eunice Lucas, without providing adequate support for her, the said Eunice Lucas and minor child, namely Marie Lucas . . . ," the court held that although the indictment was sufficient to charge the defendant for the willful abandonment of his wife without providing adequate support for her, it was not sufficient to charge him for the offense of willfully abandoning his child without providing adequate support for her. And in *State v. Outlaw*[184] the court allowed a motion in arrest of judgment upon a warrant charging that defendant willfully failed to provide adequate support for his wife and children, but failing to charge that he willfully abandoned either, on the ground that the warrant was insufficient to charge any offense under section 14-322. The warrant in the *Outlaw* case was also insufficient to charge an offense under section 14-325, which punishes the willful neglect of a husband to provide adequate support for his wife and children while living with his wife, because the warrant failed to allege that the defendant committed the offense while living with his wife.[185] In *State v. Smith*[186] a warrant charging that the defendant willfully failed and refused to provide adequate support for his children in violation of section 14-322 was held to be fatally defective because it failed to allege the essential element of willful abandonment of the children. On the other hand, an indictment which merely charged the defendant with the abandonment of his wife and children was held, in *State v. May*,[187] to be insufficient for the reason that it did not allege a failure to support them.[188]

It should be noted, of course, that the 1957 amendement of section 14-322 would change the result of these cases in so far as they apply to the

[183] *Ibid.* [184] 242 N.C. 220, 87 S.E.2d 303 (1955).

[185] For other decisions on the sufficiency of the warrant or indictment to charge an offense under N.C. Gen. Stat. § 14-325, see State v. Stone, 231 N.C. 324, 56 S.E.2d 675 (1949), where the court held that the trial court had the authority to permit the solicitor to amend a warrant charging the defendant with willful neglect to support his wife and children by inserting the words, "while living with his wife," to conform to the language of N.C. Gen Stat § 14-325, and that as amended the warrant was sufficient to charge the defendant with an offense under that section; State v. Kerby, 110 N.C. 558, 14 S.E. 856 (1892), where it was held that a warrant which followed the words of the statute was sufficient.

[186] 241 N.C. 301, 84 S.E.2d 913 (1954).

[187] 132 N.C. 1020, 43 S.E. 819 (1903). In the *May* case, the indictment contained two counts, one charging defendant with abandoning his wife and children and another charging him with failing to support them. However, the court said that it was evident from the record that the defendant was tried on the first count alone, so under the familiar principle that each count in an indictment must be complete in itself and contain all the essential elements of the offense charged therein, the indictment had to be regarded as defective and the judgment arrested.

[188] Except for the abandonment of a child under sixteen years of age by its mother, which is an offense under N.C. Gen. Stat. 14-326, *In re* Adoption of Doe, 231 N.C. 1, 56 S.E.2d 8 (1940), abandonment alone is not a crime in North Carolina. Fowler v. Ross, 196 F.2d 25 (D.C. Cir. 1952). The law does not require a man to live with his wife and children, but it does require him to support them. Hyder v. Hyder, 215 N.C. 239, 1 S.E.2d 540 (1939).

offense against the children, because the willful neglect or refusal to provide adequate support for the children, whether or not they have been abandoned, is now an offense under that section. Consequently, an indictment or warrant alleging the willful neglect or refusal to support the children would be sufficient.

It should be noted also that the cases hold that the two-year statute of limitations applicable to prosecutions of misdemeanors[189] is applicable to the first part of the statute, making willful abandonment and nonsupport of the wife a misdemeanor. It has been said that the crime of willfull abandonment by the husband of the wife is not a continuing offense, day by day, and where there has been a complete act of abandonment and no renewal of the marital association, the abandonment must have occurred within two years prior to the date of the return of the indictment.[190] However, renewal of cohabitation tolls the statute of limitations; therefore where a man willfully abandons his wife, then later sends remittances for her support, returns and cohabits with her for awhile and again abandons her, his willfully leaving her the second time without providing an adequate support for her is a new abandonment and failure to support, and an indictment found within two years from the date of the second abandonment is not barred by the statute of limitations.[191]

On the other hand, the statute in express terms makes the abandonment and nonsupport of the children by the father or the mother a continuing offense until the children reach the age of eighteen, so a prosecution for this offense does not bar a subsequent prosecution for a subsequent violation of the statute.[192] The prosecution of an offense of this nature is a bar to a subsequent prosecution for an offense alleged to have been committed at any time before the institution of the first prosecution; but it is not a bar to a subsequent prosecution for continuing the offense thereafter, as this is a new violation of the law.[193] Because of the continuing nature of this offense, a defendant arrested in Georgia was extraditable to North Carolina where it appeared that he temporarily came into North Carolina, although for an innocent purpose, after the commission of the crime. He was a fugitive from justice when he again departed from the State of North Carolina.[194] In *State v. Smith*,[195] where defendant's motion in arrest of judgment was allowed because the warrant

[189] N.C. GEN. STAT. § 15-1 (1953).
[190] State v. Hedden, 187 N.C. 803, 123 S.E. 65 (1924); State v. Hooker, 186 N.C. 761, 120 S.E. 449 (1913); State v. Hannon, 168 N.C. 215, 83 S.E. 701 (1914).
[191] State v. Beam, 181 N.C. 597, 107 S.E. 429 (1921); State v. Hannon, *supra* note 190.
[192] State v. Lucas, 242 N.C. 84, 86 S.E. 2d 770 (1955); State v. Smith, 241 N.C. 301, 84 S.E. 2d 913 (1954).
[193] State v. Hinson, 209 N.C. 187, 183 S.E. 397 (1936); State v. Jones, 201 N.C. 424, 160 S.E. 468 (1931).
[194] Daugherty v. Hornsby, 151 F.2d 799 (5th Cir. 1945).
[195] 241 N.C. 301, 84 S.E.2d 913 (1954).

was fatally defective in failing to aver that defendant had willfully abandoned his children, the court pointed out that since section 14-322 makes the abandonment of children a continuing offense not barred by any statute of limitations, defendant was amenable to further prosecution on the same charge by the state.

The correctness of the court's decision that the two-year statute of limitations applies to the offense of abandonment and nonsupport of the wife may be open to question,[196] particularly in view of the fact that the court has consistently held that the offense is comprised of two elements, abandonment and failure to support. While some of the earlier decisions held that abandonment was the act to be punished, nevertheless, the later cases, especially since *State v. Bell*,[197] have indicated that the intent of the legislature was not to punish for abandonment as such, for which no penalty was prescribed, but primarily to punish for the failure to provide for the support of wives and children. Abandonment generally is not a continuing offense in the sense that it constitutes a new offense each day it continues; but as the husband's duty to support is a continuing one,[198] it would seem that after the husband has abandoned his wife without making any provisions for her support, he should remain amenable to prosecution for that dual-element offense as long as his failure to support his wife continues, in the absence of a termination of the duty to support her by divorce *a vinculo*, death or otherwise, or in the absence of a clear waiver by the wife of her right to support. However, the proviso which was added to section 14-322 in 1925 by its terms denominates as a continuing offense the abandonment of children and under the rules of statutory construction, it seems, cannot be construed to apply to the offense of abandonment and nonsupport of wives.[199]

Most statutes making abandonment or nonsupport of a wife an offense do so only where the abandonment or nonsupport is willful, that is, without good cause or justification. There is, however, no universal rule as to what constitutes good cause or justification within the meaning of the statute. What, then, are the defenses available to one accused of willful abandonment and nonsupport? Condonation, while a defense to an action for divorce, is no defense to a prosecution under section 14-322. Abandonment of the wife is a statutory offense, and it is not condoned, so far as the state's right to prosecute is concerned, by a subsequent

[196] See the concurring opinion of Clark, C. J., in State v. Bell, 184 N.C. 701, 710, 115 S.E. 190, 194 (1922). Admittedly, however, the court was probably construed N.C. Gen. Stat. § 14-322 in the only way in which it could be construed under the wording of the statute. Therefore, the criticism of the court may be misplaced; it should be directed toward the legislature instead.

[197] 184 N.C. 701, 115 S.E. 190 (1922).

[198] State v. Beam, 181 N.C. 597, 107 S.E. 429 (1921).

[199] This statute, being penal, must be strictly construed. State v. Carson, 228 N.C. 151, 44 S.E.2d 721 (1947); State v. Gardner, 219 N.C. 331, 13 S.E.2d 529 (1941).

resumption of the marital relation.[200] Consent, on the other hand, is a good defense, for separation by consent is not an abandonment within the meaning of the statute.[201]

Adultery is a good defense to a prosecution for abandonment and nonsupport. Where a wife is guilty of adultery, her husband is not liable to prosecution for abandonment;[202] and an instruction to the jury which deprives the defendant of this defense is reversible error.[203] In order to avail himself of this defense, however, the defendant, where his evidence tends to establish his wife's adultery, will have to request the court to instruct the jury on this phase of his case.[204]

Denial of paternity of the child defendant is charged with abandoning is also a defense. Where the husband in an action for nonsupport of a child admits the nonsupport, but denies that he is the father, and introduces evidence in support of his contention, an instruction that withdraws the question of the paternity of the child from the jury is reversible error.[205]

Desertion of the husband by the wife is a defense to a husband charged with abandonment and nonsupport of his wife. The wife's desertion or abandonment of her husband, if without just cause or good excuse, is a justification or lawful reason for him not to support her. He is not required to support her if she unjustifiably refuses to live with him; but his offer to provide a home for her is not a defense if made in bad faith.[206]

While divorce is no defense to a prosecution under this section for abandonment and nonsupport of the children,[207] it may be a defense to a prosecution for abandonment and nonsupport of his wife, depending upon such factors as the divorce decree and the time the alleged abandonment was committed. Where the husband has been indicted, tried, and convicted for the criminal abandonment of his wife under this section, and upon appeal he has been granted a new trial, the fact that since his former conviction his wife has obtained a divorce *a vinculo* from him will not constitute a defense to him.[208]

Former jeopardy, autrefois convict, and autrefois acquit are good defenses to a prosecution for abandonment and nonsupport of the wife

[200] State v. Manon, 204 N.C. 52, 167 S.E. 493 (1933).

[201] State v. Carson, 228 N.C. 151, 44 S.E.2d 721 (1947); State v. Smith, 164 N.C. 475, 79 S.E. 979 (1913). The resumption of the conjugal relation ordinarily rescinds a separation agreement; therefore when the defendant renews the relationship by intermittent visits to his wife and subsequently fails to support her, the separation agreement is no longer available to him as a defense. State v. Gossett, 203 N.C. 641, 166 S.E. 754 (1932).

[202] State v. Hopkins, 130 N.C. 647, 40 S.E. 973 (1902).

[203] State v. Johnson, 194 N.C. 378, 139 S.E. 697 (1927).

[204] State v. Hannon, 168 N.C. 215, 83 S.E. 701 (1914).

[205] State v. Ray, 195 N.C. 628, 143 S.E. 216 (1928).

[206] State v. Smith, 164 N.C. 475, 79 S.E. 979 (1913).

[207] State v. Bell, 184 N.C. 701, 115 S.E. 190 (1922).

[208] State v. Faulkner, 185 N.C. 635, 116 S.E. 168 (1923).

in the absence of a resumption of conjugal relations with her after the original abandonment and prosecution, as this offense is not a continuing one under the North Carolina decisions.[209] It is submitted that this rule is equally as questionable as the rule (criticized above) that a prosecution of the husband for the offense of abandonment and nonsupport of his wife is barred by the two-year statute of limitations if the abandonment occurred more than two years prior to the date of the return of the indictment. Yet, apparently, both rules still apply to the offense of abandonment and nonsupport of the wife,[210] although there have been no recent cases directly in point. On the other hand, abandonment and nonsupport of the children is clearly a continuing offense; so in a prosecution for that offense under this section, a plea of autrefois convict of the same offense is good as to the period prior to the conviction, but is not a bar to a prosecution for failure to provide adequate support for his children subsequent to the prior conviction.[211] It is also the rule that termination of a prosecution in the defendant's favor on the ground that the indictment was defective will not preclude a subsequent prosecution.[212]

It is no defense to the husband in a prosecution for abandonment and nonsupport that the marriage was contracted to avoid punishment for seduction,[213] that his wife was unchaste prior to marriage,[214] or, ordinarily, that the marriage is voidable where it has not been annulled prior

[209] State v. Hannon, 168 N.C. 215, 83 S.E. 701 (1914); State v. Dunston, 78 N.C. 418 (1878). In a case where the defendant was charged with the abandonment and nonsupport of his wife and his children, it was held that an announcement by the solicitor, made before entering upon the trial, that he would not prosecute the defendant for the abandonment and nonsupport of his wife was tantamount to a nolle prosequi or acquittal on that charge. State v. Brigman, 201 N.C. 793, 161 S.E. 727 (1931). As a general rule, however, a nolle prosequi in a criminal action will not support a plea of former jeopardy upon a subsequent prosecution for the same offense, while an acquittal will support such a plea.

[210] State v. Johnson, 212 N.C. 566, 571, 194 S.E. 319, 322 (1937), which held that the neglect or refusal to support an illegitimate child under N.C. Gen. Stat. § 49-2 is a continuing offense, and the prior prosecution is not a bar to a prosecution for a breach of the statute for the period subsequent to defendant's release from imprisonment imposed in the first prosecution, there appeared this dictum: "We do not consider that former decisions of this Court, under the provisions of . . . [N.C. Gen. Stat. § 14-322] are in point or controlling. An essential element of the crime created by that statute is abandonment. Without proof of abandonment a conviction cannot be had. This is certainly true up until the time the act was amended to make the offense as to the children a continuing offense. An abandonment takes place at a time certain. It cannot be continuing in its nature. The moment a husband separates himself from his wife with the intent to discontinue the marital relations and to disregard and shirk the marital obligations and responsibilities in respect to providing for support, and otherwise, abandonment is complete. The husband cannot again commit the same crime, as to the wife, without first reassuming the marital relations."

[211] State v. Jones, 201 N.C. 424, 160 S.E. 468 (1931).

[212] State v. Smith, 241 N.C. 301, 84 S.E.2d 913 (1954).

[213] State v. English, 101 S.C. 304, 85 S.E. 721 (1915).

[214] Commonwealth v. Branthoover, 98 Pa. Super. 87 (1929). *Contra,* Burdes v. Burdes, 195 Misc. 265, 90 N.Y.S.2d 97 (Dom. Rel. Ct. 1949).

to his prosecution.[215] Whether or not the defendant can raise as a defense the fact that the marriage was voidable (certainly he can if it is void) is uncertain in North Carolina; but it would appear not to be a valid defense if the marriage had not been avoided prior to the time of prosecution for abandonment and nonsupport, since voidable marriages are generally deemed valid until avoided.[216]

Evidence in a prosecution for abandonment and nonsupport of a wife is governed, of course, by the law of evidence in criminal cases generally. Since the misconduct of the wife after she has been abandoned by her husband is no defense to the husband in a criminal prosecution against him for abandonment, such misconduct cannot be proved by the husband unless it is connected with and tends to illustrate and explain similar acts committed by her before the separation. The defendant may put the chastity of his wife in issue by cross-examination or otherwise, but the burden of proving the defendant's guilt beyond a reasonable doubt remains on the state throughout the trial. Since the defendant may be acquitted without introducing any evidence in his behalf, when he puts the chastity of his wife in issue he does not assume the burden of satisfying the jury of the adultery of his wife, nor does he relieve the state of its burden. Hence it is error for the court to charge the jury that the burden is on the defendant to satisfy the jury of the adultery of the wife, "not beyond a reasonable doubt, nor by the greater weight of the evidence, but simply to your satisfaction."[217] Under N.C. Gen. Stat. section 8-57 the wife is a competent witness against her husband as to the fact of abandonment or neglect to provide adequate support.[218] She is also a competent witness to prove the fact of marriage,[219] the rule to the contrary

[215] Bostic v. State, 1 Ala. App. 255, 55 So. 260 (1911) (contracted under duress); State v. McPherson, 72 Wash. 371, 130 Pac. 481 (1913) (contracted by an infant). In State v. Oaks, 24 Del. 576, 76 Atl. 480 (1910), it was held that defendant was estopped to set up as a defense the fact that his wife was already married when she married him where he had acquired knowledge of that fact within six months after his marriage to her, but nevertheless had children by her and continued to live with her for 28 years.

[216] It was held in State v. Gibson, 202 N.C. 108, 161 S.E. 708 (1932), that the husband was not authorized to attack collaterally the validity of the marriage in a prosecution for abandonment on the ground that his consent to the marriage was obtained by his wife's false representation that she was pregnant. However, the case is questionable authority on the point since the amendment of N.C. Gen. Stat. § 51-3 in 1953.

[217] State v. Falkner, 182 N.C. 793, 108 S.E. 756 (1921).

[218] State v. Brown, 67 N.C. 470 (1872). The *Brown* case held that the wife was a competent witness against her husband as to the fact of abandonment or neglect to provide adequate support in a prosecution of the husband for the abandonment and non-support of his wife and children; but that she was not a competent witness as to the fact of marriage. On the latter point, the case was superseded by the 1933 amendment to N.C. Gen. Stat. § 8-57.

[219] State v. Chester, 172 N.C. 946, 90 S.E. 697 (1916). This case overruled the *Brown* case, *supra* note 218, on its holding that the wife was incompenent to prove the fact of marriage. The *Brown* case was decided under an earlier form of N.C. Gen. Stat. § 8-57. Prior to 1933 the wife was incompetent to testify against her husband in a prosecution for abandoning or neglecting to provide support for the

laid down in *State v. Brown*[220] having been superseded by an amendment of section 8-57 in 1933. Section 14-323, which is the present codification of the third section of the original abandonment statute of 1868, provides for presumptive evidence that the abandonment and nonsupport of a wife and children were willful. Willfulness is an essential element of the crime of abandonment and nonsupport, but if the other elements are proved and it is also proved that the defendant "neglects applying himself to some honest calling for the support of himself and family, and is found sauntering about, endeavoring to maintain himself by gaming or other undue means, or is a common frequenter of drinking houses, or is a known common drunkard," it will be presumed that the abandonment and neglect are willful. Thus, where abandonment and nonsupport are both established or admitted, then, under this section, it is necessary for the defendant to come forward with his evidence and proof that the abandonment and nonsupport were not willful in order to avoid the risk of an adverse verdict.[221]

Upon the conviction of a husband or parent for abandonment, the judge, under section 14-324, may make such order as in his judgment will best provide for the necessary support of the wife, or children, or both, from the property or labor of the defendant, including a suspension of sentence upon condition that the husband or parent properly support his or her family.[222] Thus, the criminal statutes on abandonment and nonsupport offer an indirect way to compel the husband to support his wife and the parent to support his or her child, since the court may suspend sentence upon the condition that the defendant provide for the maintenance of those persons he or she is required to support.

As the proceedings for the abandonment and nonsupport of wife and children under section 14-322 and section 14-325 are criminal proceedings, they are instituted by the state *ex relatione* the wife and children. In some states the wife must elect between civil and criminal remedies for abandonment and nonsupport; but in North Carolina there is no requirement of an election and the remedies are not mutually exclusive. Instituting a criminal proceeding under the abandonment and nonsupport statutes does not deprive the wife of her civil remedies under sections 50-14 to -16 or the child of its civil remedies. However, when the wife secures a decree for a divorce *a vinculo,* but without an award of alimony, she cannot subsequently institute a criminal proceeding for

children. See State v. Brigman, 201 N.C. 793, 161 S.E. 727 (1931), which was superseded by the 1933 amendment to N.C. Gen. Stat. § 8-57.

[220] 67 N.C. 470 (1872).

[221] State v. Falkner, 182 N.C. 793, 108 S.E. 756 (1921); Steel v. Steel, 104 N.C. 631, 10 S.E. 707 (1890).

[222] State v. Johnson, 230 N.C. 743, 55 S.E.2d 690 (1949); State v. Henderson, 207 N.C. 258, 176 S.E. 758 (1934); State v. Vickers, 197 N.C. 62, 147 S.E. 673 (1929).

maintenance under the nonsupport statute because she is no longer the wife of her former husband.

The statute, N.C. Gen. Stat. section 14-322, which makes it a criminal offense for a parent to neglect or refuse to support his or her child whether the child is abandoned or not,[223] has no application to the parent of an illegitimate child.[224] Apart from contract or statute, the father of an illegitimate child is not liable for its support. Of course, a contract made by a father with the mother for the support of their illegitimate child is as binding and enforceable as any other contract; and in addition to the mother's right to sue upon the contract, the child may also maintain an action to enforce the contract.[225] In the absence of contract there are no other civil remedies available to the illegitimate child, and such a child's only right to support from its putative father is that created by the bastardy statute.[226] Prior to 1933 a proceeding under the bastardy statute to compel a parent to support his illegitimate child was civil in nature, as it is in most states. However, in 1933 the North Carolina legislature changed the approach to the problem; it repealed the old law and set up a criminal statute. Presently, N.C. Gen. Stat. section 49-2 proscribes, as a misdemeanor, the willful neglect or refusal of any parent to support and maintain his or her illegitimate child. The mere begetting of an illegitimate child is not a crime under the act; it is the

[223] It should be noted that the 1957 amendment of N.C. Gen Stat. § 14-322 closed a hiatus which had hitherto existed in the law of abandonment and nonsupport of children in North Carolina. Prior to 1957, nonsupport of a child alone was not an offense, because under that statute, failure to support had to be coupled with willful abandonment, and both elements had to be charged in the indictment. State v. Smith, 241 N.C. 301, 84 S.E.2d 913 (1954). On the other hand, failure of the father to support his child while living with his wife was an offense under N.C. Gen. Stat. § 14-325, and the essential element "while living with his wife" had to be alleged in the indictment. State v. Outlaw, 242 N.C. 220, 87 S.E.2d 303 (1955). Not covered by either statute was the situation where the father, while not living with his wife, and without having abandoned the child, nevertheless neglected or refused to support it, as might easily occur in a case where the child was in the father's custody. Presently under N.C. Gen. Stat. § 14-322 as amended in 1957, it is a criminal offense for any parent to neglect or refuse to provide adequate support for his or her child under eighteen years of age, natural or adopted, regardless of whether or not the child was abandoned.

[224] Allen v. Hunnicutt, 230 N.C. 49, 52 S.E.2d 18 (1949); State v. Gardner, 219 N.C. 331, 13 S.E.2d 529 (1941). N.C. Gen. Stat. § 14-325 also is not applicable to an illegitimate child.

[225] Ray v. Ray, 219 N.C. 217, 13 S.E.2d 224 (1941); Conley v. Cabe, 198 N.C. 298, 151 S.E. 645 (1930); Redmon v. Roberts, 198 N.C. 161, 150 S.E. 881 (1929); Thayer v. Thayer, 189 N.C. 502, 127 S.E. 553 (1925).

[226] N.C. GEN. STAT. §§ 49-3 to -9 (1950), as amended, N.C. GEN. STAT. §§ 49-2, -4 (Supp. 1959); N.C. GEN. STAT. § 7-103 (Supp. 1959); Allen v. Hunnicutt, 230 N.C. 49, 52 S.E.2d 18 (1949). The child is only an incidental beneficiary of the meager statutory provisions for its support: "The duty of the putative father to support his illegitimate child was not created primarily for the benefit of the child. The legislation is social in nature and was enacted to prevent illegitimates from becoming public charges. The benefit to the child is incidental." Allen v. Hunnicutt, *supra* at 51, 52 S.E.2d at 19.

willful neglect or refusal to support and maintain[227] the child which constitutes the offense.[228] The North Carolina Supreme Court has held that the statute does not violate due process of law or impose imprisonment but by the law of the land, since it raises no presumption against the accused; but on the contrary, it requires the state to overcome the presumption of innocence, both as to the willfulness of the neglect to support and the paternity of the illegitimate child, beyond a reasonable doubt. Therefore, the statute is constitutional.[229]

As the statute is criminal, proceedings under it are conducted in the name of the state and can be instituted only by the child's mother or her personal representative, or, if the child is likely to become a public charge, the superintendent of public welfare.[230] The proceedings may be instituted in the superior courts or in inferior courts, except courts of justices of the peace and courts whose criminal jurisdiction is not in excess of those of justices of the peace.[231]

The prosecution of the reputed father under this statute must be instituted within three years after the birth of the child,[232] or, where the putative father has acknowledged his paternity of the child by making payments for the child's support within three years from its birth, then within three years from the last payment but not after the child reaches the age of eighteen;[233] or if the paternity has been judicially determined within three years from the birth of the child, at any time before it becomes eighteen years of age.[234] The prosecution of the mother of an illegitimate child, by the express provisions of section 49-4, may be instituted at any time before the child attains the age of eighteen years.

[227] The statutory obligation to support and maintain the child is not restricted to providing food; it includes the supplying of food, clothing, shelter, medical assistance reasonably required for the health of the child, and other necessities; and it applies even in the case of a newly-born baby. State v. Love, 238 N.C. 283, 77 S.E.2d 501 (1953). The willful failure to pay for medical expenses incurred upon the birth of the child is not a criminal offense under N.C. Gen. Stat. § 49-2. State v. Ferguson, 243 N.C. 766, 92 S.E.2d 197 (1956); State v. Stiles, 228 N.C. 137, 44 S.E.2d 728 (1947); State v. Summerlin, 224 N.C. 178, 29 S.E.2d 462 (1944). However, the court upon conviction, may require the defendant to pay for such expenses under N.C. Gen. Stat. § 49-8.

[228] State v. Coppedge, 244 N.C. 590, 94 S.E.2d 569 (1956); State v. Chambers, 238 N.C. 373, 78 S.E.2d 209 (1953); State v. Robinson, 236 N.C. 408, 72 S.E.2d 857 (1952).

[229] State v. Spillman, 210 N.C. 271, 186 S.E. 322 (1936).

[230] N.C. GEN. STAT. § 49-5 (1950); State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956). Although the point has not yet been passed upon by the North Carolina court, apparently the child cannot institute the proceedings.

[231] N.C. GEN. STAT. § 49-7 (1950); State v. Robinson, *supra* note 230. The Domestic Relations Court has jurisdiction of cases under the bastardy statute. N.C. GEN. STAT. § 7-103 (Supp. 1959). A justice of the peace may issue a warrant under the bastardy statute, but the defendant must be tried in a court of greater criminal jurisdiction.

[232] N.C. GEN. STAT. § 49-4 (Supp. 1959).

[233] State v. Dill, 224 N.C. 57, 29 S.E.2d 145 (1944); State v. Moore, 222 N.C. 356, 23 S.E.2d 31 (1942); State v. Hodges, 217 N.C. 625, 9 S.E.2d 24 (1940).

[234] State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956).

In order to convict a parent under section 49-2, the state must allege and prove beyond a reasonable doubt: (1) the defendant's paternity (where the defendant is the putative father, as is usually the case; however the mother of an illegitimate child is also criminally liable under the statute for failure of support it), (2) of an illegitimate child who is less than eighteen years of age, and (3) the willful neglect or refusal to support the child. While the state must allege and establish beyond a reasonable doubt that the defendant is the father of the child he is charged with failing to support, nevertheless, it is not required that the question of paternity should be judicially determined first in a separate and distinct action. It may be determined in the main prosecution for the offense. The Supreme Court pointed out in *State v. Lowe*[235] that the usual practice is to submit to the jury: (1) the issue as to the defendant's paternity of the child, (2) the issue as to his willful neglect or refusal to support the child, and (3) the issue as to his guilt of the offense charged.

Willfulness will not be presumed from the failure to support; it must be alleged and proved as the *sine qua non* of the offense. Therefore, a warrant or indictment which fails to allege that defendant's neglect or refusal to support his illegitimate child was willful is fatally defective,[236] and a warrant which merely charges defendant with being the father of an unborn illegitimate child charges no offense at all.[237]

The state also has the burden of proving beyond a reasonable doubt that the defendant's neglect or refusal to support his illegitimate child was willful, that is, intentional and without just cause, excuse or justification after notice and a request for support.[238] Moreover, it must be established that the defendant's willful failure to support occurred prior to the commencement of a criminal prosecution against him. Thus, evidence of a willful refusal of a demand for support after the issuance

[235] 238 N.C. 238, 77 S.E.2d 501 (1953).

[236] State v. Smith, 246 N.C. 118, 97 S.E.2d 442 (1957); State v. Coppedge, 244 N.C. 590, 94 S.E.2d 569 (1956); State v. Moore, 238 N.C. 743, 78 S.E.2d 914 (1953); State v. Morgan, 226 N.C. 414, 38 S.E.2d 166 (1946); State v. Vanderlip, 225 N.C. 610, 35 S.E.2d 885 (1945). As the offense is a continuing one, the dismissal or quashing of a warrant, or an indictment, or the arresting of a judgment, will not bar a subsequent prosecution on a new warrant or indictment. State v. Coppedge, *supra*; State v. Perry, 241 N.C. 119, 84 S.E.2d 329 (1954); State v. Chambers, 238 N.C. 373, 78 S.E.2d 209 (1953). Further, a prior prosecution is not a bar to a prosecution for breach of the statute during the period subsequent to the defendant's release from imprisonment imposed in the first prosecution. State v. Johnson, 212 N.C. 566, 194 S.E. 319 (1937).

[237] State v. Tyson, 208 N.C. 231, 180 S.E. 85 (1935).

[238] State v. Chambers, 238 N.C. 373, 78 S.E.2d 209 (1953). In State v. McDay, 232 N.C. 388, 61 S.E.2d 86 (1950), the Supreme Court held that an instruction defining willful as "wrongfully and unjustifiably, without valid and good excuse," instead of defining it as an intentional neglect or refusal constituted reversible error. See also State v. Ellison, 230 N.C. 59, 52 S.E.2d 9 (1949); State v. Stiles, 228 N.C. 137, 44 S.E.2d 728 (1947); State v. Hayden, 224 N.C. 779, 32 S.E.2d 333 (1944).

of a warrant is incompetent.[239] In the recent case of *State v.* Perry[240] the court, in a per curiam opinion, reversed a conviction for willful failure to support an illegitimate child where the evidence disclosed that no demand for support of the child was made upon the defendant until after the warrant was drawn.

In a prosecution of the putative father under the bastardy statute, the mother of the child may testify as to the acts of illicit intercourse with the defendant, that he is the father of the child, and that he admitted paternity. However, where the child was conceived during the wedlock of the mother, permitting her to testify to the nonaccess of her husband is reversible error.[241] A section of the bastardy statute, section 49-7, permits the results of a blood grouping test, which the court may order upon motion of the defendant, to be admitted into evidence on the issue of paternity. However, it seems that this section, although never expressly repealed, has been superseded by a broader statute, N.C. Gen. Stat. section 8-50.1, which contains virtually identical provisions applicable to any criminal action in which the question of paternity arises and extends legislative approval to the use of blood grouping tests in civil actions in which paternity is a relevant issue.[242]

It has been held that a judgment of nonsuit does not constitute an adjudication of the paternity issue in defendant's favor; therefore, a subsequent prosecution for an alleged failure to support his illegitimate child, relating to a later period, is not barred by the prior prosecution, since the offense is a continuing one.[243] However, if it is judicially deter-

[239] State v. Sharpe, 234 N.C. 154, 66 S.E.2d 655 (1951).

[240] 241 N.C. 119, 84 S.E. 329 (1954); see also State v. White, 225 N.C. 351, 34 S.E.2d 139 (1945). Where the evidence is conflicting as to whether a demand was made before or after the issuance of the warrant, the question is for the jury. State v. Humphrey, 236 N.C. 608, 73 S.E.2d 479 (1952).

[241] State v. Bowman, 231 N.C. 51, 55 S.E.2d 789 (1949); State v. Bowman, 230 N.C. 203, 52 S.E.2d 345 (1949).

[242] See comment on the 1949 enactment of N.C. Gen. Stat. § 8-50.1 in 27 N.C.L. REV. 456 (1949). Apparently, the results of such tests are relevant only when offered to prove that the defendant, alleged putative father, is *not* the father of the child whose paternity is in question. STANSBURY, NORTH CAROLINA EVIDENCE § 86 (1946).

[243] State v. Ferguson, 243 N.C. 766, 92 S.E.2d 197 (1956). In this case the defendant was first tried in the Domestic Relations Court on a warrant which initially charged him with willfully refusing to provide medical care incident to pregnancy, but was amended, after the birth of the child, to charge his willful refusal to support his illegitimate child. Upon defendant's conviction he appealed to the Superior Court and a nonsuit was allowed. Subsequently, defendant was charged with nonsupport in a new warrant and his plea of former jeopardy was allowed by the Domestic Relations Court. The state appealed and defendant was convicted in the Superior Court. On defendant's appeal to the Supreme Court, it was held that: (1) the nonsuit on the first warrant was proper because the warrant initially failed to charge any criminal offense and it could not be amended to charge an offense which was committed, if committed at all, after the warrant was issued; (2) the judgment of nonsuit did not constitute a negative finding on the issue of paternity so a subsequent prosecution relating to a later period was not barred, since N.C. Gen. Stat. § 49-2 creates a continuing offense; and (3) under N.C. Gen. Stat. § 15-179, which governs appeals by the state in criminal cases, the state had no

mined in a prosecution for willful nonsupport that the defendant is the father of the child, then though he is acquitted on the charge of willful failure to support the child, nevertheless, the issue of paternity will be foreclosed thereafter under the doctrine of res judicata. Therefore, the defendant may be prosecuted subsequently, for the willful neglect or refusal to support his illegitimate child and the question of paternity will no longer be an open one.[244] It would be wise for a defendant wishing to avoid the consequence to appeal from the judgment establishing his paternity of a child, notwithstanding the fact that the issue as to his guilt of the offense of willful nonsupport was found in his favor. Such an appeal is expressly permited under a 1947 amendment of section 49-7.[245]

After the court has determined that the defendant is the father of the illegitimate child in question and that he has willfully neglected or refused to provide for its support, then it must proceed to fix a specific sum of money which is necessary for the child's support. In arriving at an adequate amount, the court is required to consider the circumstances of the particular case, the defendant's financial ability and earning capacity, and the defendant's willingness to cooperate for the welfare of the child. Then the court may order the defendant to pay the specified amount in a lump sum or periodic installments, depending upon the circumstances of the case, and it may modify the order from time to time.[246] In addition to its order directing the defendant to make payments, the court, in the original order or a subsequent modification thereof, may also do any or all of the following things: commit the defendant to prison for a term not to exceed six months; suspend his sentence and continue the case; release him from custody on probation upon the condition that he comply with all the terms of his probation, including payment of the sums fixed for the support of his child; order him to pay to the child's mother the necessary expenses of birth and medical attention; or require him to

right to appeal from a judgment sustaining a defendant's plea of former jeopardy. Therefore, all subsequent proceedings in the case were a nullity.

[244] State v. Clonch, 242 N.C. 760, 89 S.E.2d 469 (1955); see also State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956).

[245] State v. Clement, 230 N.C. 614, 54 S.E.2d 919 (1949), *superseding* State v. Hiatt, 211 N.C. 116, 189 S.E. 124 (1937). By the express statutory language of N.C. Gen. Stat. § 49-5 preliminary proceedings to determine the paternity of the child may be initiated and determined before the birth of the child; and, in its discretion, the court may continue the proceedings until after the birth of the child, taking the recognizance of the accused to assure his appearance. State v. Robinson, *supra* note 244. The defendant, however, cannot be held criminally liable for failure to support an unborn child. State v. Thompson, 233 N.C. 345, 64 S.E.2d 157 (1951). An adjudication of the paternity issue at this stage would be valid although the court exceeded its power and prematurely passed on the issue of defendant's guilt of nonsupport. State v. Robinson, *supra*.

[246] N.C. Gen. Stat. § 49-7 (1950).

sign a recognizance with security for compliance with any order the court may make.[247]

Here again the sanctions of the criminal law are used to accomplish a bit of social engineering, albeit far too narrow a bit, namely, that of preventing illegitimate children from becoming burdens on the taxpayers.[248] The community's concern should not be limited to the protection of the public purse, however. For economic, if not for humane, reasons, the community should be concerned about helping the children, who are already stigmatized for circumstances they had no part in creating, to become useful members of society.

VII

Jurisdiction in Abandonment and Nonsupport Cases

One of the most troublesome problems has been saved for the last, namely, that of jurisdiction. Where are the offenses of abandonment and nonsupport deemed to be committed? Even a cursory perusal of the cases will quickly reveal that there is substantial disagreement among the states on questions of jurisdiction and venue in nonsupport cases. This is due in part to confusion with respect to the nature of the criminal act, in part to a diversity of views with respect to the place where the criminal act occurs, in part to variations in the wording of applicable statutes, and in part to differences with reference to the primary purpose of criminal nonsupport statutes. It is principally because of the problem of jurisdiction that there have been such new developments in this area of law as the Uniform Desertion and Nonsupport Act, the Uniform Support of Dependents Act, and most recently, the Uniform Reciprocal Enforcement of Support Act.

First, it is an elementary principle of the common law that the criminal law of a state has no extra-territorial effect, and one state will not enforce the criminal law of another state. Second, at common law jurisdiction over a criminal offense is determined by the place of the commission of the crime, and the crime is deemed committed at the place where the act takes effect. This, in sumary, is the common law territorial theory of jurisdiction, which was a logical outgrowth of the English conception of criminal justice as a means of keeping the king's

[247] N.C. Gen. Stat. § 49-8 (1950). It was held in the recent case of State v. Robinson, 248 N.C. 282, 103 S.E.2d 376 (1958), that a Domestic Relations Court has authority, upon conviction of a defendant for willful refusal to support her illegitimate child, to suspend sentence upon condition that defendant pay a stipulated sum per week into court for the support of the child, under N.C. Gen. Stat. §§ 49-7, -8. However, in that case, which involved a charge of willful neglect and nonsupport against a mother of an illegitimate child, the court remanded the cause in order for the judge below to determine whether or not the failure of the defendant to make weekly payments was without lawful excuse so as to justify putting into effect the supended sentence.

[248] Allen v. Hunnicutt, 230 N.C. 49, 52 S.E.2d 18 (1949).

peace. Under this conception, the jurisdiction of a state to punish for crime is limited to acts done within its boundary lines. Obviously, however, people do acts which do not take place wholly within one state, so statutes have been enacted to cope with such cases. For example, in the famous case of *State v. Hall*[249] the defendants, while standing in North Carolina, shot across the state line and killed their victim in Tennessee. Because of the common law rule that an act across a boundary line is punishable in the state where the act takes effect, it was held that the defendants could not be punished for the homicide by North Carolina. The crime was committed in Tennessee; therefore, that state would have to try the defendants. Subsequently, in the second *Hall* case[250] it was held that the defendants could not, under the federal extradition statute,[251] be extradited to Tennessee due to the fact that, although they had committed a crime in Tennessee, they had not committed a crime there and also fled from the state as fugitives from justice. Presence in the demanding state at the time the alleged crime was committed is a prerequisite of extradition under the federal extradition act.[252]

The gap in the law illustrated by the *Hall* case was eventually closed by a series of statutes—specifically N.C. Gen. Stat. section 15-132,

[249] 114 N.C. 910, 19 S.E. 602 (1894).

[250] State v. Hall, 115 N.C. 811, 20 S.E. 729 (1894). Having been released after the decision in the first *Hall* case, the defendants were rearrested and held under N.C. Gen. Stat. § 15-49 for extradition. Upon the petition for habeas corpus, it was decided that as the defendants were not fugitives, they could not be held for extradition under the North Carolina statute, nor could they be extradited under the federal statute. N.C. Gen Stat. § 15-49 was amended the next year to provide, in pertinent part, that any one of certain judicial officers therein named "on satisfactory information laid before him that any fugitive or other person in the State has committed . . . any offense" is authorized to issue a warrant for his arrest.

[251] Interstate Rendition Act, 18 U.S.C. § 3182 (1959). Technically, the term "extradition" refers to the surrender, between nations, of persons charged with crime. As between states, such surrender is referred to as "interstate rendition," and the federal statute cited as known as the Interstate Rendition Act. However, the terms are frequently used without differentiation.

[252] Extradition is provided for in the U.S. Constitution as follows: "A person charged in any State with Treason, Felony, or other crime, who shall flee from Justice and be found in another State, shall on Demand of the executive Authority of the State from which he fled be delivered up, to be removed to the State having Jurisdiction of the crime." U.S. CONST. art. IV, § 2. This section was very early declared not to be self-executing and Congress enacted several statutes implementing it. Interstate Rendition Act, 18 U.S.C. §§ 3181-95 (1952). Both federal and state courts have construed the provisions of the Constitution and the implementing statutes as requiring the actual physical presence of the accused in the demanding state at the time of the commission of the alleged crime and a subsequent flight therefrom in order for him to be a fugitive from justice within the meaning of the extradition laws. Hyatt v. People *ex rel.* Corkran, 188 U.S. 691 (1903); Daugherty v. Hornsby, 151 F.2d 799 (5th Cir. 1945); *Ex parte* Brewer, 61 Cal. App. 2d 388, 143 P.2d 33 (1933); Fowler v. Ross, 196 F.2d 25 (D.C. Cir. 1952). Strassheim v. Daily, 221 U.S. 280 (1911), placed one limitation on this doctrine by holding that one who had commited an overt act in the demanding state which resulted in a crime there after he had fled from the state could be extradited. However, the presence requirement has generally been extended to the abandonment and non-support cases. People *ex rel.* Higley v. Millspaw, 281 N.Y. 441, 24 N.E.2d 117 (1939).

making criminal, and so punishable in North Carolina, acts committed within the state which result in harm to persons outside the state, and finally section 6 of the Uniform Criminal Extradition Act enacted in 1937 and codified as N.C. Gen. Stat. section 15-60,[253] providing for extradition to the demanding state of any person who intentionally commits an act outside the demanding state which results in a crime in the demanding state.

The offense of abandonment and nonsupport must be considered in the light of these principles of criminal jurisdiction. As has been pointed out previously in this article, the substantive crime of abandonment and nonsupport of a wife by a husband is a single offense consisting of two essential elements: willful abandonment coupled with willful failure to support. Apparently, the act of abandonment is not a continuing offense under the North Carolina cases, while the willful failure to support is a continuing offense under the cases, on the ground that the duty to support is a continuing one in the absence of circumstances which would legally terminate the duty or excuse the nonperformance of it.[254] It seems to be the view under these decisions that abandonment is committed where the act of desertion, or unjustifiable cessation of cohabitation with an intent not to resume cohabitation, actually occurs (implying physical presence at the place where the wife resides and a subsequent withdrawal from that place); and the willful failure to provide support is committed at the residence of the person to whom the duty of support is owed, regardless of whether or not the person who owes the duty has ever been present at that place.[255]

Thus, in North Carolina, in order for a husband to be convicted of the offense of abandonment and nonsupport (and prior to the 1957 amendment of section 14-322 this applied to a parent charged with the abandonment and nonsupport of his or her child), he must have willfully abandoned his wife without providing adequate support for her. Nonsupport alone would not constitute the offense of abandonment and

[253] N.C. Gen. Stat. § 15-60 provides as follows: "Extradition of persons not present in demanding state at time of commission of crime. The Governor of this State may also surrender, on demand of the executive authority of any other state, any person in this State charged in such other state in the manner provided in Section 15-57 with committing an act in this State, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this article not otherwise inconsistent, shall apply to such cases, *even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom.*" (Emphasis added.)

[254] State v. Sneed, 197 N.C. 668, 150 S.E. 197 (1929).

[255] We are dealing here with negative acts, criminal omissions. A criminal omission occurs at the place where there is a legal duty to act. When the legal duty is owed to a particular person, the obligation and the liability for failure to perform it follow the obligee. It is generally recognized that the crime of nonsupport is committed at the residence of those to whom, by law, a duty of support is owed. People v. Hennefent, 315 Ill. App. 141, 42 N.E.2d 663 (1942). *Contra,* State v. Fick, 140 La. 1063, 74 So. 554 (1917) (crime is committed at place where obligor resides).

nonsupport under section 14-322 unless preceded by abandonment. Moreover, both of the essential acts must have taken place in North Carolina.[256] If the abandonment occurred outside of the state, the North Carolina courts would not have jurisdiction to try the accused.[257] It has been intimated, however, in some cases, that North Carolina would have jurisdiction to prosecute the husband for abandonment if either the husband or the wife were a domiciliary of the state at the time of the original abandonment.[258]

There is no reason why abandonment should not be regarded as a continuing offense and as one not requiring the presence of the perpetrator at the place where it is consummated. As long as the husband remains separated from his wife and leaves her destitute, or to the mercies of charitable agencies, relatives or friends, and as long as he intends to divest himself of all obligations owed to her and to have no further ties with her, he should be regarded as abandoning his wife, even if she is residing in a state he has never entered.

Actually, a solution to the problem of jurisdiction in the case where abandonment is an element of criminal nonsupport and the abandonment—in the sense of a wrongful separation coupled with a withdrawal of support from the wife—occurs outside of the state can be found within recognized common law principles. At common law a state has no jurisdiction to punish a citizen of another state for an offense committed beyond its territorial limits, *unless the act takes effect and constitutes an offense within territorial limits.* Acts done outside the state which culminate in crime within the state are punishable in the state where the acts take effect, provided that the state can obtain in personam jurisdiction. Admittedly, by the better view a legislature cannot punish

[256] This was said to be the law of North Carolina in Fowler v. Ross, 196 F.2d 25 (D.C. Cir. 1952). There is authority to support that interpretation of North Carolina law. If the husband is domiciled in the state and the wife outside the state, he may be prosecuted for the offense. State v. Hannon, 168 N.C. 215, 83 S.E. 701 (1914). If the wife is domiciled in the state and the husband outside, he may be prosecuted. State v. Beam, 181 N.C. 597, 107 S.E. 429 (1921). In both cases, however, the husband and wife had once been together in the state and subsequently, the husband had separated himself from, and withdrawn support from, his wife: See also State v. Carson, 228 N.C. 151, 44 S.E.2d 721 (1947); State v. Sneed, 197 N.C. 668, 150 S.E. 197 (1929).

[257] State v. Carson, *supra* note 256. In the *Carson* case, the defendant and his wife lived in Virginia and they separated there; then he came to North Carolina, where she followed him sometime later. The court held that the evidence was insufficient to be submitted to the jury on the issue of abandonment, since it failed to show an unjustifiable desertion or willful failure to support; but it also said, in effect, that the court would have no jurisdiction of a prosecution of a husband for willful abandonment of his wife without providing support for her if the abandonment occurred outside the state, citing as controlling on that proposition State v. Jones, 227 N.C. 94, 40 S.E.2d 700 (1946), in which the court dismissed a prosecution for aiding and abetting bigamy by entering into a marriage with a person then married on the ground that it had no jurisdiction over the offense since the evidence showed it was committed outside the state.

[258] See note 256 *supra.*

acts by persons outside the state where the acts do not take effect and constitute an injury and offense within its territorial limits. One of the leading cases for this view is an early North Carolina case, *State v. Knight*,[259] in which it was held that the legislature could not punish the counterfeiting of North Carolina bills of credit by citizens of Virginia in Virginia. There are numerous other North Carolina cases to the same effect.[260] But on the other hand, it is well established that a state may punish acts of citizens of other states committed outside its territorial limits, if the acts take effect and constitute an injury to its own citizens within its limits. This the North Carolina court recognized in the first *Hall* case[261] when it decided that the defendant who, while standing in North Carolina, fired a fatal shot across the state line and killed his victim in Tennessee had, under the common law authorities, committed murder in Tennessee and was therefore triable by the tribunals of that state.

By analogy, a husband who, outside the state, wrongfully separates himself from his wife with the intention of shirking the legal obligations arising out of the marital relation and who willfully refuses or neglects to support her thenceforth could be regarded as putting in motion, outside the state, forces which culminate, take effect, and constitute an injury and offense within the state where the wife now resides. Consequently, he should be amenable to the criminal laws of the state whose taxpayers may have to provide the support that the husband is willfully failing to provide, whenever and however the state can get in personam jurisdiction over him; and, as between two states which have enacted the Uniform Criminal Extradition Act, he should be extraditable to the injured state, although he was never present therein.[262]

[259] 1 N.C. 143 (1799).

[260] Thus the North Carolina court has held that it had no jurisdiction to try the accused for: bigamy in South Carolina, State v. Jones, 227 N.C. 94, 40 S.E.2d 700 (1946); for larceny in South Carolina, State v. Buchanan, 130 N.C. 660, 41 S.E. 107 (1902); for murder in Tennessee, State v. Hall, 114 N.C. 910, 19 S.E. 602 (1893); for assault and battery in Tennessee, State v. Mitchell, 83 N.C. 674 (1880).

[261] 114 N.C. 910, 19 S.E. 602 (1893).

[262] In many jurisdictions both elements of the dual element offense of abandonment and nonsupport are continuing and neither element need be begun in the demanding state; therefore the offense can be committed by momentary presence within the demanding state. People *ex rel.* Gottschalk v. Brown, 237 N.Y. 483, 143 N.E. 653 (1924) (absence of overt acts irrelevant since charge by its very nature is founded, not upon commission of overt acts, but upon neglect of duty). On the other hand, there has been a tendency on the part of the courts to refuse to extradite, even under the Uniform Criminal Extradition Act, a defendant who was never present in demanding state. People *ex rel.* Buck v. Britt, 187 Misc. 217, 62 N.Y.S.2d 479 (Sup. Ct. 1946). *Contra, Ex parte* Bledsoe, 93 Okla. Crim. 302, 227 P.2d 680 (1951). In People *ex rel.* Kaufman v. O'Brien, 197 Misc. 1019, 96 N.Y.S.2d 401 (Sup. Ct. 1950), it was held that one apprehended in New York and imprisioned upon warrant of the governor of New York and requisition for extradition under indictment authenticated by the demanding executive authority and charging crime of nonsupport of a minor, which was an indictable offense under laws of Ohio, could be extradited from New York to Ohio, notwithstanding he was not in Ohio at time of commission of the alleged crime nor a fugitive from justice from that state.

There should be no bar, conceptual or otherwise, to the acceptance of this view in North Carolina. In *State v. Tickle*,[263] a case where the accused was charged with the willful neglect and refusal to support his illegitimate child, the North Carolina Supreme Court held that this state had jurisdiction over the offense despite the defendant's total absence from the state. In that case the child was conceived in Virginia, the defendant had always lived there, and the mother worked there, although she was a domiciliary of North Carolina. The mother, unable to get support from the defendant, had returned to her family home in North Carolina where the child was born. The defendant had "nothing to do" with the mother's living arrangements; he ignored her letter pleading for material assistance and remained in Virginia. But in an unwary moment he went hunting in North Carolina, and on that trip he was arrested and charged with nonsupport. On appeal from a conviction in the court below the question presented was whether the court, having jurisdiction over the person of the defendant, had jurisdiction to try him for the offense of willful failure to support his illegitimate child when it appeared that the defendant, a nonresident, was living outside of the state during all material stages of the offense.

The North Carolina Supreme Court, in affirming the conviction, held that North Carolina had jurisdiction to prosecute the defendant for the crime of willful nonsupport of his illegitimate child despite his absence from the state. The court concluded that the injury contemplated and proscribed by the statute actually occurred in North Carolina where the child, to whom a duty of support was owed, resided. The statute requiring a parent to support his or her illegitimate child applies in any case where the child is a bona fide resident of North Carolina at the time of the institution of the proceeding for support, regardless of the place of conception or birth of the child.[264] The court cited authorities to support its position that the father is properly indicted and tried for the offense of failure to support his child in the state where he has permitted the child to become dependent, irrespective of the fact that he resides in another state. While the court also concluded that the defendant was "constructively present" in North Carolina where the consequences of his acts in Virginia culminated in a crime, it did not need to rely on the dubious doctrine of constructive presence. The court properly reasoned that the harm proscribed by the statute occurred in North Carolina where the consequences of defendant's willful failure to support his illegitimate child had their effect. Thus, the court's position

[263] 238 N.C. 206, 77 S.E.2d 632 (1953).

[264] N.C. GEN. STAT. § 49-3 (1950) provides as follows: "Place of birth no consideration. The provisions of this article shall apply whether such child shall have been begotten or shall have been within or without the State of North Carolina: Provided, that the child to be supported is a bona fide resident of this State at the time of the institution of any proceedings under this article."

was clearly in accordance with the traditional common law territorial theory of jurisdiction: jurisdiction over crimes is determined by the situs of the impact of the injury. Here the defendant, outside of the state, put into operation forces which produced the result of his willful failure to support his illegitimate child in North Carolina. That result was criminal under the laws of North Carolina;[265] therefore, North Carolina, under the principle of *State v. Hall*,[266] had jurisdiction over the offense and could try the accused whenever it could also obtain jurisdiction over his person.[267]

The principle of the *Tickle* case was incorporated into the statutory law the same year that case was decided. The 1953 General Assembly enacted a new statute which eliminates, in the prosecution of a parent charged with the willful neglect or refusal to support his child, the defense that he or she was not present at the time the alleged nonsupport began, and, therefore, had committed no crime in this state. The new act provides that "the offense of willful neglect or refusal of a father to support and maintain his child or children, and the offense of wilful neglect or refusal to support and maintain one's illegitimate child, shall be deemed to have been committed in the State of North Carolina whenever the child is living in North Carolina at the time of such wilful neglect or refusal to support and maintain such child."[268] Under this

[265] N.C. GEN. STAT. § 49-2 (Supp. 1959). It may be noted also that the offense of willful failure to support an illegitimate child is a continuing offense. State v. Johnson, 212 N.C. 566, 194 S.E. 319 (1937). The willful failure to support, as a continuing offense, is deemed committed at the residence of the person to whom the duty of support is owed. Under this theory, the defendant in the *Tickle* case was committing the offense in North Carolina, and therefore North Carolina only needed jurisdiction over the person of the defendant in order to prosecute him for the crime. The question of venue has not been discussd very much in the North Carolina nonsupport cases. At common law venue, as well as jurisdiction, is fixed at the situs of the crime; and as a general rule, where the crime charged is the failure to do a legally required act, the place fixed for its performance fixes the situs of the crime. This requirement of venue states the public policy that fixes the situs of the trial in the vicinage of the crime rather than the residence of the accused. Johnson v. United States, 351 U.S. 215 (1956). To the effect that venue is in the county of the residence of the one to whom the duty of support is owed, see State v. Hooker, 186 N.C. 761, 120 S.E. 449 (1923); State v. Beam, 181 N.C. 597, 107 S.E. 429 (1921). In prosecutions under the bastardy statutes, venue may be laid in the county where the mother resides or is found, where the putative father resides or is found, or where the child is found. N.C. GEN. STAT. § 49-5 (1950).

[266] 114 N.C. 910, 19 S.E. 602 (1893).

[267] But that as to some crimes the physical presence of the accused at the place where the crime is committed is not essential to his guilt is well settled. "The constitutional requirement is that the *crime* shall be tried in the State and District where committed, not necessarily in the State or District where the party committing it happened to be at the time." Burton v. United States, 202 U.S. 344, 387 (1906). Justice and the policy behind the nonsupport statutes would seem to call for an assumption of jurisdiction in cases of this type. Where the defendant is present in the jurisdiction during his trial, and is represented by counsel, the maintenance of an action against him would not be violative of due process requirements nor offend traditional notions of fair play and substantial justice.

[268] N.C. GEN. STAT. § 14-325.1 (Supp. 1959). Probably due to an oversight, the statute, as worded, appears to apply only to the father of a legitimate child, but to

statute and the *Tickle* decision, when the offense charged is the willful neglect or refusal by a parent to support his or her child, legitimate or illegitimate, the offense is deemed committed in North Carolina if the child to whom the duty of support is owed is residing in North Carolina at the time of the willful failure to support it. This is true regardless of the residence of the parent at the time. There may be, however, the practical problem of obtaining in personam jurisdiction of the accused. If the accused comes into the state only momentarily,[269] as he did in the *Tickle* and *Fowler*[270] cases, he may be arrested on a nonsupport charge on the ground that he is still committing the offense, which is a continuing one. On the other hand, if the delinquent parent does not come into the state voluntarily, he may be brought in by extradition proceedings, if the state in which he resides is a party to the Uniform Criminal Extradition Act,[271] which, unlike the federal Interstate Rendition Act,[272] does not require the presence of the accused in the demanding state at the time of the commission of the crime.[273]

It is in a case where a husband is charged with the dual element offense of abandonment and nonsupport of his *wife* that the problem of jurisdiction presents the greatest difficulty.[274] As has been pointed out

either parent of an illegitimate child. Since N.C. Gen. Stat. § 14-322 makes it a criminal offense for either parent willfully to neglect or refuse to support his or her legitimate child, it would seem that N.C. Gen. Stat. § 14-325.1 was intended to apply to either parent also.

[269] Under N.C. Gen. Stat. § 8-68, a section of the Uniform Act To Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, a nonresident witness coming into or passing through the state is exempt from criminal or civil process in connection with matters which arose prior to his entrance into the state. In view of the fact that the offense of willful failure to support one's child is defined as a continuing offense, it would seem that such a nonresident witness would be amenable to arrest on a nonsupport charge on the theory that the witness is then committing a criminal offense, and therefore his arrest is not sought "in connection with matters which arose before his entrance into this State" within the meaning of N.C. Gen. Stat. § 8-68. Nonresidents under arrest for crime are not privileged from being arrested on another criminal charge while in the state. See State v. Tickle, 238 N.C. 206, 77 S.E.2d (1953).

[270] Fowler v. Ross, 196 F.2d 25 (D.C. Cir. 1952).

[271] N.C. GEN. STAT. §§ 15-55 to -84 (1953), as amended, N.C. GEN. STAT. § 15-78, -80 (Supp. 1959).

[272] See note 252 *supra* and accompanying text.

[273] See note 253 *supra* and accompanying text.

[274] As has been pointed out earlier in this article, the legislature dispensed with abandonment as an essential element of the offense as against the child under N.C. Gen. Stat. § 14-322 when it amended that section in 1957 to provide, in effect, that the willfull neglect or refusal to provide adequate support for the child, whether or not the child has been abandoned, constitutes an offense. In addition, abandonment is not an essential element of the offense of willful neglect or refusal to support an illegitimate child under § 49-2. It is particularly noteworthy that § 14-325.1, which was enacted in 1953 to fix the situs of nonsupport offenses against a child, legitimate or illegitimate, in North Carolina whenever the child is living in this state at the time of failure to provide support, refers to "the offense of willful neglect or refusal of a father to support and maintain his child," (here meaning *legitimate* child). There was no such offense as the willful neglect or refusal to support a legitimate child prior to the 1957 amendment of § 14-322, except as to the extent that the willful neglect of the father to provide adequate support for his child while living with

previously, the willful failure to support the wife alone while living apart from her is not an offense;[275] failure to support must be preceded by abandonment, and the abandonment, as well as the failure to support, must have taken place in North Carolina. If North Carolina had adopted the view that the failure to support is a continuing offense—committed at the residence of the one to whom the duty of support is owed, regardless of the presence of the one who owes the duty of support—the same result reached in the *Tickle* case could be reached in a case where the husband is charged with the failure to support his wife. But unfortunately, abandonment is an element of that offense; and the view that has been taken of the element of abandonment as an act of separation from the wife—implying withdrawal of physical presence—and the conclusion that the offense as to the wife is not a continuing one, preclude the court from reaching the desirable result of the *Tickle* decision in such a case. Either the statute, N.C. Gen Stat. section 14-322, should be rewritten to provide that "if any husband shall willfully neglect or refuse to provide adequate support for his wife, whether or not he abandons her, he shall be guilty of a misdemeanor," or abandonment as an element of the offense of willful failure to support a wife should be eliminated. Failing that, abandonment should be redefined as a continuing offense, which it is possible to commit without being present at the residence of the person to whom the duty of support is owed, along the lines suggested in the discussion above.[276] This would increase the effec-

his wife, constituted an offense under § 14-325. It was consistently held that abandonment was an indispensable element of the offense as against a child under § 14-322, and that it had to be alleged in the indictment or warrant and proved. Apparently, the significance of the wording of § 14-325.1 and its possible effect on the offense under § 14-322 went unnoticed. It is interesting to note that all of the cases decided between 1953, when § 14-325.1 was enacted, and 1957, when § 14-322 was amended, continued to regard the offense of failure to support a child as a dual element offense requiring proof of abandonment as well as neglect or refusal to support. State v. Outlaw, 242 N.C. 220, 87 S.E.2d 303 (1955); State v. Lucas, 242 N.C. 84, 86 S.E.2d 770 (1955); State v. Smith, 241 N.C. 301, 84 S.E.2d 913 (1954). Although the court in Lee v. Coffield, 245 N.C. 570, 96 S.E.2d 726 (1957), refers off-handedly to the willful failure to support a child as a misdemeanor the context indicates that the court was probably making a kind of short-hand reference to the offense rather than thinking in terms of the technical legal requirements of the offense.

[275] It is not an offense under N.C. Gen Stat. § 14-322. However, the willful neglect to provide adequate support for the wife, while living with her, in the absence of any abandonment of her, is an offense under § 14-325.

[276] See notes 254 to 262 *supra* and accompanying text. The difficulties with respect to jurisdiction where abandonment is an element of the offense of nonsupport are due in part to the tendency of the courts to equate the concepts of abandonment in the law of nonsupport and "abandonment" or "desertion" in the law of divorce. For purposes of divorce or legal separation, abandonment, or desertion, does not necessarily involve nonsupport; it means a wrongful separation without cause from the other spouse, regardless of the question of support, and it occurs only one time—when the deserter actually leaves the familial abode. In the law of support, however, separation of the husband from his wife, or a parent from his child, usually is of no concern unless coupled with nonsupport (except where abandonment alone is made an offense, as in N.C. Gen. Stat. § 14-326). The emphasis is on support, and the objectives are to secure to the wife and children the support

tiveness of the criminal law as a means of enforcing duties of support.

As the law stands now, however, where a husband is charged with the abandonment and nonsupport of his wife, jurisdictional problems will continue to militate against the effective use of criminal sanctions to enforce the duty of the husband to support his wife. Illustrative of this point is the recent case of *Fowler v. Ross*,[277] a habeas corpus proceeding in which it was held that the violator of a suspended sentence, given him on condition that he support his family, could not be extradited from the District of Columbia to North Carolina because he was absent from North Carolina, the demanding state, at the time the alleged crime was committed. The petitioner had deserted his wife and minor children in the District of Columbia, and subsequently the wife and the children moved to North Carolina. On his only visit to North Carolina petitioner was arrested for willful abandonment and nonsupport. He pleaded guilty and was given a suspended sentence on condition that he resume supporting his family. Petitioner returned to the District of Columbia, where he was later arrested on an extradition warrant for failure to comply with the support requirement of his suspended sentence. On appeal from the denial of his petition for habeas corpus by the United States District Court, the Court of Appeals reversed and ordered the petitioner released. It held that even though petitioner had been convicted, he could not be extradited because he was not actually present in North Carolina when both the acts of abandonment and failure to support were committed. In this case extradition was sought under the Interstate Rendition Act,[278] which has been consistently interpreted to require that the accused must have been present in the demanding state at the time that the alleged crime was committed. The majority of the court ruled that the petitioner's guilty plea after an involuntary appearance in North Carolina was not a waiver of his right to resist extradition, and that the Constitution,[279] the statute, and previous cases compelled the use of the presence test in the instant case.

The "presence at the time of the crime" requirement in extradition cases is one of the numerous obstacles to effective interstate enforcement of family support duties. In the *Fowler* case the court extended the

to which they are entitled and to protect the public purse from the burden of providing for persons who could otherwise be maintained by members of their families. Some states have recognized this distinction and have taken the position that the duty of support is a continuing one which follows the family deserter; consequently he may be prosecuted wherever he may be found, regardless of the whereabouts of his dependents. Commonwealth v. Acker, 197 Mass. 91, 83 N.E. 312 (1908). North Carolina clearly recognizes this distinction also. See Pruett v. Pruett, 247 N.C. 13, 23, 100 S.E.2d 296, 303 (1957), where the court said "abandonment under G.S. § 50-7(1) is not synonymous with the criminal offense defined in G.S. § 14-322." However, apparently the wording of § 14-322 precludes the court from construing the offense as to the wife under that section as a continuing one.

[277] 196 F.2d 25 (D.C. Cir. 1952). [278] 18 U.S.C. § 3182 (1959).

[279] U.S. CONST. art. IV, § 2.

requirement to a case in which the person whose extradition was sought had already been convicted in the demanding state by a court which had jurisdiction over him. Admittedly, the conviction would have been void and of no effect if the convicting court lacked jurisdiction over the subject matter, since jurisdiction in that respect cannot be conferred by consent or waiver. However, it was not entirely clear that the North Carolina court did not have jurisdiction of the subject matter. Since the state law was uncertain on the point,[280] it would seem that the petitioner should have been left to his remedies in the demanding state, and the writ of habeas corpus denied.

A justification for the presence requirement is that it prevents a state from extending its criminal laws beyond its territorial limits; but in the *Fowler* case the petitioner was present in North Carolina while committing the nonsupport element of the offense and the court which convicted him had jurisdiction over his person. The fact that the petitioner committed a part of the crime within the state, by willfully failing to support his wife and children who were residing in the state, should have been sufficient to satisfy the requirements for extradition under the rule in *Strassheim v. Dailey*,[281] which held that extradition may be granted under the Interestate Rendition Act if the accused committed within the demanding state any acts constituting a part of the crime, although the crime was completed in his absence. In *State ex rel Lea v. Brown*,[282] the only case involving the question of whether one convicted in the demanding state but not present there at the time of the crime could be extradited, a state court, in a unanimous decision rendered in the form of two conflicting opinions held that the accused could be extradited. Half of the court took the position that the accused had waived the right to resist extradition by voluntarily appearing for trial; the other half concluded that the presence test was inapplicable where the accused had been corporally within the legal custody and jurisdiction of a court of the demanding state, had been convicted, and subsequently had departed the state.

Thus it can be seen that the abandonment and nonsupport cases present numerous and difficult problems with respect to jurisdiction and extradition. One accused of abandonment and nonsupport is more likely to have been absent from the prosecuting state at the time the offense was allegedly committed than one accused of almost any other crime, with

[280] The uncertainty on this point would seem to be due to the fact that the *Fowler* case involved the wife as well as the children, rather than to the fact that the case arose prior to the decision in State v. Tickle, 238 N.C. 206, 77 S.E.2d 632 (1953).

[281] 221 U.S. 280 (1911).

[282] 166 Tenn. 669, 64 S.W.2d 841 (1933), *cert. denied*, 292 U.S. 638 (1934).

the possible exception of conspiracy and offenses involving accessories. Extradition, perforce, is difficult and frequently impossible to obtain. The absence of flight from the demanding state, the *sine qua non* of the fugitive from justice concept, bars extradition of the family deserter under the federal extradition statute. In addition, the Uniform Criminal Extradition Act, section 6 of which was expressly designed to provide for the extradition of persons not present in the demanding state at the time of the crime, has been strictly construed in some states. Consequently, extradition has been denied under section 6 where the extradition papers described the accused as a fugitive from justice in a case where he was not present at the time of the crime,[283] the extradition papers did not contain a formal allegation in the language of the statute,[284] and where the warrant was defective in that it recited as authority for extradition the "Constitution and laws of the United States."[285] Then, too, the fact remains that, even under section 6 of the Uniform Criminal Extradition Act, the courts have been reluctant to extradite a person who was never at any time in the demanding state.

There are still other barriers to the effective interstate enforcement of support duties. While the procedure for extradition is clear,[286] as a practical matter the process of extradition is slow and expensive, and it does not assure the abandoned family that they will get the much-needed support. Moreover, requests for extradition are frequently denied by governors of asylum states for numerous reasons: extradition may be sought under the federal statute and the accused is not a fugitive from justice because he was not present in the demanding state at the time of the crime; the accused may be a law abiding citizen who has established a new family unit in the asylum state; or there may be indications that the accused will not be accorded fair treatment in the demanding state. The granting of requests for extradition is entirely discretionary with the governors of asylum states and if they deny such requests there is no recourse from the denial.[287]

[283] *Ex parte* King, 139 Me. 203, 28 A.2d 562 (1942); *Ex parte* Kaufman, 39 N.W. 2d 905 (S.D. 1949). *Contra*: People *ex rel* Kaufman v. O'Brien, 97 Misc. 1019, 96 N.Y.S.2d 401 (Sup. Ct. 1950) (treating words "fugitive from justice" as "mere surplusage").

[284] *Ex parte* Brewer, 61 Cal. App. 2d 388, 143 P.2d 33 (1943).

[285] Stobie v. Barger, 129 Colo. 222, 268 P.2d 409 (1954).

[286] The mechanics of extradition are substantially as follows: (1) the chief executive of the state which is seeking to have the accused turned over to its law enforcement officers must demand, in a "requisition," the accused as a fugitive from justice; (2) the demand or requisition must be accompanied by a copy (certified by the chief executive) of the indictment or other accusation charging the accused with having committed a crime in the demanding state; (3) the chief executive of the asylum state must order that the accused be arrested and held for the agents of the demanding state.

[287] Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861).

VIII

Reciprocal Enforcement of Support

The problem of forcing husbands and parents to support their wives and children, although difficult in any case, can be met—and some measure of success achieved in coping with it—as long as the members of the family remain in one state. Enlightened legislation has removed many procedural obstacles to civil enforcement of support duties, and criminal proceedings are readily available in every jurisdiction. However, in most cases today family deserters abscond to other states, thereby creating a problem of interstate enforcement of support duties. It is at the level of interstate enforcement that the traditional remedies, civil and criminal, have broken down and proved inadequate to cope with a problem that has now reached enormous proportions. In fact, there is no effective civil remedy available to compel absconding deserters to support their dependents. The difficulties of obtaining jurisdiction of person, property, and subject matter, conflict of law problems, the difficulties of enforcing foreign support orders and judgments, and the costs of litigation are some of the obstacles to effective civil enforcement of support duties. On the other hand, the use of the criminal law to enforce the duties of support has also been ineffective in the cases where the delinquent breadwinner has fled from the state. The patchwork of criminal abandonment and nonsupport statutes; the wide divergence as to the interpretation, scope and purposes of the statutes; the difficulties of obtaining, and the high cost of, extradition; problems of venue; and above all, the requirements of jurisdiction—which are more stringent in criminal than in civil proceedings—operate to render criminal enforcement of family support even less effective and less practicable than civil enforcement. In addition, undesirable consequences of criminal prosecution, such as loss of status and reputation making it difficult for the convicted deserter to obtain employment, the aggravation of financial difficulties by imprisonment of the breadwinner, and the intensification of intra-family animosity, contribute to the general unsatisfactoriness of the criminal remedy as a means of enforcing duties of support. The acuteness of the problem of family support and the lack of effective methods of coping with it made the development of a new approach imperative. Reciprocal enforcement of support legislation, based on interstate cooperation, seemed to furnish the solution to the problem of family support.

Within the past few years all fifty states, the District of Columbia, Guam, Puerto Rico and the Virgin Islands have enacted some form of reciprocal legislation for the interstate enforcement of support duties. All of these jurisdictions except New York[288] and the Virgin Islands[289]

[288] In 1948, New York enacted the first reciprocal type statute, the Uniform

have adopted the Uniform Reciprocal Enforcement of Support Act.[290] This statute was designed primarily to provide a procedural device for supplementing[291] pre-existing remedies, common law and statutory, civil and criminal, under the law of the enacting state. Although there is some argument to the contrary with respect to the operation of certain provisions[292] of the act, it was not intended to effect changes in the substantive law of support in the adopting states. "Each state will enforce its own laws as before so long as the husband remains in the state, and the new act is meant to improve enforcement where the parties are in different states."[293]

The Uniform Reciprocal Enforcement of Support Act, popularly called the Fugitive Husband's Law or the Runaway Papa Act, has created a somewhat novel approach to the problem of nonsupport. It has been pointed out earlier in this article that the criminal prosecution of a family deserter is frequently unsatisfactory. The husband or father may be compelled to leave a state where he has found employment; the ill feelings resulting from this forcible uprooting instigated by the abandoned wife may make reconciliation impossible; the deserter must stand trial, and if he is convicted, he may be fined (and generally, he is financially incapable of paying a fine) or jailed; or if he is released on probation, he may adamantly refuse to work; and finally, the convicted deserter is thenceforth stigmatized to such an extent that he will, in all probability, have difficulty in finding any worthwhile employment in the future. The Reciprocal Act obviates these undesirable consequences of the use of the criminal process to enforce support duties. It provides a simple two-state procedure[294] whereby the obligee[295] may initiate an action in the

Support of Dependents Law, Laws of New York 1948, ch. 790. That statute, which has been amended several times, is still in force in New York. In Landes v. Landes, 1 N.Y.2d 358, 135 N.E.2d 562, 153 N.Y.S.2d 14 (1956), it was held that the procedure did not violate the compact clause, the due process clause, or the equal protection clause of the Federal Constitution. The New York statute is sufficiently similar to the Uniform Reciprocal Enforcement of Support Act to permit reciprocity between New York and the jurisdictions which have adopted either act.

[289] The Virgin Islands enacted the Uniform Support of Dependents Law. 16 VIRGIN IS. C. § 391-429 (1957).

[290] N.C. GEN. STAT. §§ 52A-1 to -20 (Supp. 1959). See *A Survey of Statutory Changes in North Carolina in 1951*, 29 N.C.L. REV. 351, 423 (1951). North Carolina enacted the original Uniform Act of 1950 with minor modifications. In 1955, North Carolina amended its act extensively to bring it in line, substantially, with the Uniform Act of 1952, an amended version of the original act.

[291] N.C. Gen. Stat. § 52A-5 provides: "The remedies herein provided are in addition to and not in substitution for any other remedies."

[292] The provisions appear in N.C. Gen. Stat. §§ 52A-3(6), -5, and -8. See extensive discussion in Ehrenzweig, *Interstate Recognition of Support Duties*, 42 CALIF. L. REV. 382 (1954).

[293] Commissioners' Prefatory Note to 1950 Act, 9C UNIFORM LAWS ANN. 1, 4.

[294] Briefly, this two-state proceeding is as follows: It opens with an action (N.C. Gen. Stat. § 52A-9) which normally will be commenced in the state where the family has been deserted (the initiating state, § 52A-3(2)). A simplified complaint (verified) is filed (§ 52A-10). The judge looks it over to decide whether the facts show the existence of a duty of support and if they do, he so certifies and sends copies

state where she is then residing, which will be forwarded to and completed in the state where the obligor[296] is found. The procedure involves only a minimum of expense to the parties and the state, limited almost entirely to court costs and postage for the transmission of papers and the payments. Due process is preserved because each party pleads in a court in his own jurisdiction.[297]

Although a general discussion of the operation of the Uniform Reciprocal Enforcement of Support Act is beyond the scope of this article,[298] it should be noted, apropos the previous discussion of jurisdictional problems in nonsupport cases, that the act has provisions for criminal enforcement as part of the over-all scheme of interlocking civil and criminal remedies. One section[299] of the act provides for the interstate rendition of persons charged with criminal liability for nonsupport; and

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of the complaint, certificate, and the act to a court of the responding state (§ 52A-11). That court will take the necessary steps to obtain jurisdiction of the husband or father, will hold a hearing (§ 52A-12), and if the court finds that a duty of support exists, it may order the defendant to furnish support (§ 52A-13), and will transmit a copy of its order to the court in the initiating state (§ 52A-14). To enforce compliance with its orders, the court may subject the defendant to such terms and conditions as it may deem proper, may require him to furnish bond or make periodic payments, or in case of refusal, may punish him for contempt (§ 52A-15). It has the duty to transmit to the initiating court any payments it receives and upon requst to furnish a certified statement of those payments (§ 52A-16). The initiating court must receive and disburse the payments (§ 52A-17).

Other sections of the act provide that the husband and wife are competent, and may even be compelled to testify as witnesses (§ 52A-18), and for simplified rules of evidence (§ 52A-19).

[295] "Obligee" means any person to whom a duty of support is owed. N.C. GEN. STAT. § 52A-3(8) (Supp. 1959).

[296] "Obligor" means any person owing a duty of support. N.C. GEN. STAT. § 52A-3(7) (Supp. 1959).

[297] For a discussion of choice of law problems under reciprocal enforcement of support legislation see Ehrenzweig, *op. cit. supra* note 292, and Chernak, *Nonsupport Actions and the Uniform Reciprocal Enforcement Support Act,* 46 J. CRIM. L., C. & P.S. 519, 524-25 (1955).

[298] For a discussion of the North Carolina act see *A Survey of Statutory Changes in North Carolina in 1951,* 29 N.C.L. REV. 351, 423 (1951); *A Survey of Statutory Changes in North Carolina in 1955,* 33 N.C.L. REV. 513, 550 (1955). The act was interpreted by the North Carolina Supreme Court in Mahan v. Read, 240 N.C. 641, 83 S.E.2d 706 (1954), 34 N.C.L. REV. 126 (1955). See also Brockelbank, *The Problem of Family Support: A New Uniform Act Offers a Solution,* 37 A.B.A.J. 93 (1951); Chernak, *op. cit. supra* note 297.

[299] Uniform Reciprocal Enforcement of Support Act § 5, N.C. GEN. STAT. § 52A-6 (Supp. 1959), provides as follows: "The Governor of this state (1) may demand from the governor or any other State the surrender of any person found in such other state who is charged in this State with the crime of failing to provide for the support of any person in this State and (2) may surrender on demand by the governor of any other state any person found in this State who is charged in such other state with the crime of failing to provide for the support of a person in such other state. The provisions for extradition of criminals not inconsistent herewith shall apply to any such demand although the person whose surrender is demanded was not in the demanding state at the time of the commission of the crime and although he had not fled therefrom. Neither the demand, the oath nor any proceedings for extradition pursuant to this section need state or show that the person whose surrender is demanded has fled from justice, or at the time of the commission of the crime was in the demanding or the other state."

another section[300] is designed to encourage voluntary compliance with the civil enforcement procedure under the act.

The interstate rendition provision of the statute, unlike section 6 of the Uniform Criminal Extradition Act,[301] expressly provides for the extradition of a person charged with the crime of nonsupport, notwithstanding the fact that he was not present in the demanding state at the time the crime was committed and has not fled from that state, thus obviating the difficulties which have heretofore plagued the interstate enforcement of support duties. The constitutionality of this provision has been challenged, but it has been upheld as valid in several state decisions.[302]

A companion provision[303] of the act provides for relief from the operation of the interstate rendition provision upon compliance by the obligor with a support order of the asylum state. This relief provision has been construed to contemplate the prior commencement of a civil proceeding under the act in the initiating state as a condition precedent to the obligor's submission to the jurisdiction of the responding state for voluntary compliance with an order rendered by a court of the responding state after a hearing in which the defendant obligor was given an opportunity to be heard. Thus, it was held in *Ex parte Floyd*[304] that a father could not avoid extradition from California to Ohio, where he was charged with the crime of failing to support his wife and minor child, by initiating support proceedings in California under the purported authority of section 6 of the Uniform Reciprocal Enforcement of Support Act and complying with the order of the California court for the support of his wife and child in Ohio. Unfortunately, under this construction of the "relief from extradition" provision of the statute, it is possible that the purpose of the enactment, which is to encourage voluntary compliance with support orders and make it unnecessary to resort to the expensive process of extradition, will be frustrated in those cases in which the obligee, perhaps out of a spirit of vindictiveness, refuses to institute a proceeding for support.

As would be expected in any ambitious legislative scheme, particularly one in the still largely uncharted field of interstate cooperation, a few

[300] Uniform Reciprocal Enforcement of Support Act § 6, N.C. GEN. STAT. § 52A-7 (Supp. 1959), provides as follows: "Any obligor contemplated by G.S. 52A-6, who submits to the jurisdiction of the court of such other state and complies with the court's order of support, shall be relieved of extradition for desertion or nonsupport entered in the courts of this State during the period of such compliances: Provided, however, that an obligor may not upon his ex parte petition avail himself of the provisions of this chapter."

[301] N.C. Gen. Stat. § 15-60, discussed in Part VIII *supra*.

[302] Harrison v. State, 38 Ala. App. 60, 77 So. 2d 384 (1954), *cert. denied*, 262 Ala. 701, 77 So. 2d 387 (1955); State *ex rel* Bryant v. Fleming, 195 Tenn. 419, 260 S.W.2d 161 (1953); *Ex parte* Coleman, 157 Tex. Crim. 37, 245 S.W.2d 712 (1951).

[303] See note 300 *supra*.

[304] 43 Cal. 2d 379, 273 P.2d 820 (1954), 24 CRIM. L. REV. (N.Y.) 139 (1955).

difficulties have been encountered in the practical operation of the reciprocal support legislation. Some of these have already been eliminated or ameliorated by amendments and by judicial decisions rendered with a view toward effectuating the over-all purpose of the legislation, which is primarily to provide an effective remedy for deserted dependents in cases where the family breadwinner has moved across state lines in an effort to avoid his support obligations. If it is not the ultimate solution to the problem of family support, the Uniform Reciprocal Enforcement of Support Act certainly appears to be a step in the right direction.

CONCLUSION

The difficulties inherent in obtaining and enforcing a support order in a civil action have been rendered practically prohibitive as a consequence of the increasing frequency with which family deserters have been crossing state lines. The complications of personal jurisdiction, full faith and credit, comity and reciprocity then operate to make civil remedies for the enforcement of support largely ineffective. As a result of this, a solution to the pressing problems of abandonment and nonsupport has been sought in the criminal law; and now all states have statutes providing for the criminal prosecution of those who willfully neglect or refuse to perform their duties of support.

First, it should be noted that the use of the criminal law to supplement the remedies available in civil actions against a husband, parent, or child who is derelict in his or her duties to provide support actually represents a departure from the traditional conception of the objectives of the criminal law. Under the older view, which was reflected in the earlier criminal statutes on abandonment and nonsupport and still is reflected in the statutes of a few states, the primary purposes of criminal sanctions are to deter the wrongdoer from engaging in the particular proscribed anti-social behavior, and, by example, to deter others from engaging in similar behavior; to punish the wrongdoer for his offense against society; and to protect the community from the consequences of the wrongdoer's transgression of the law, namely, the financial burden of providing for abandoned wives, children, and parents. The use of the criminal process to accomplish broad social objectives is not altogether undersirable, however.

Second, a question arises as to whether, in the final analysis, the criminal remedy is an adequate and effective means for coping with the increasingly acute problem of family desertion and nonsupport. The shortcomings of criminal prosecution for the enforcement of support are many. Criminal prosecution means that a social stigma will be attached

to those who are otherwise law-abiding citizens; it aggravates and intensifies the mutual grievances and antagonisms of the family circle, and militates against any possible reconciliation or voluntary cooperation. In the cases where the family deserter has left the state and the extradition process must be resorted to, the cost of the procedure, and other obstacles, may operate as a deterrent. Further, as a practical matter, law enforcement agencies are not enthusiastic about prosecuting family deserters. This is partly due to the ever increasing load of criminal cases to be prosecuted; partly due to the nature of family support cases, as affording little opportunity for politically ambitious prosecutors to gain prestige and public acclaim; and partly due to the fact that frequently grand juries are reluctant to indict, governors are reluctant to extradite, and petit juries are reluctant to convict as a criminal one whose delinquency may be due to a run of "hard luck," or other mitigating factors.

It is the belief of some segments of the public, particularly sociologists, psychologists, social workers, the public welfare people, and some lawyers, that attempting to cope with abandonment and nonsupport through criminal prosecution is a superficial approach to the whole problem, and one not calculated to reach the underlying causes of broken homes and family irresponsibility, nor designed to cure the deep-rooted social conditions which give rise to family desertion. This may, of course, be true; nevertheless, there is a need for immediately effective measures that will at least alleviate a staggering problem. That this is generally recognized is indicated by the fact that there has been a clearly discernible statutory trend toward more and better criminal legislation for the enforcement of support, buttressed by a new legislative scheme—reciprocal support legislation—designed to supplement existing remedies, civil and criminal, and remove heretofore insurmountable barriers to the effective interstate enforcement of support duties.

Reciprocal support legislation, now adopted, gratifyingly, in all states and territories, represents a commendable effort on the part of the states to cope with the nation-wide problem of family support by minimizing the operation of those concomitants of a system of multiple sovereignties which have heretofore precluded any effective interstate enforcement of support duties—namely, doctrines of territorial limitations and in personam jurisdiction, and controversies over conflict of laws, full faith and credit, and comity. It is perhaps too early yet to ascertain just how effective the reciprocal support legislation has been in alleviating the pressing problems created by the rapidly increasing number of deserted dependents who must look to the welfare agencies, and ultimately the overburdened taxpayers, for assistance. In any event, the legislation is

certainly the most practical method thus far advanced for dealing with the problem of family support in our highly mobilized society. While it is no panacea, it promises to afford a workable solution to that problem if administered in the spirit of the underlying purpose of the legislation.