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CRIMINAL NEGLIGENCE OF FAMILY

The burden cast upon society of caring for so many of its indigent members should lead to a reconsideration of laws making specific members responsible for particular individuals. Strict compliance with laws creating a legal duty of support where a moral duty already exists could alleviate the situation to an appreciable degree.

Our legislators have seen fit to make it a crime for a husband to desert or intentionally fail to support a wife in destitute or necessitous circumstances.¹ If either parent deserts or wilfully neglects to support a minor child, the parent is guilty of criminal neglect of family. Commission of this misdemeanor results in a fine of not over five hundred dollars or imprisonment for not more than one year, or both. The court may in its discretion direct that the payment be made to the dependent.²

However, the interpretation given by the Louisiana Supreme Court to prior statutory provisions very similar to Article 74 of the Louisiana Criminal Code has left much to be desired. Procedural impediments have prevented the statute from serving its obvious purpose.

In *State v. Fick*³ the Louisiana Supreme Court said:

located about 150 feet from the school building. The students had been warned of the danger, and teachers were on the school grounds supervising the children, which safeguard the court considered ample. The court also noted that the school had been in operation for 15 years "and yet no one ever had any apprehension or fear about this stream running by the school ground." (43 So.(2d) 47, 51.) But the court clearly based its decision on the ground that the ditch was a natural condition of the land declaring that in each of the cases relied upon by the plaintiff (including *Saxton v. Plum Orchards, Inc.*, 215 La. 378, 40 So.(2d) 791 [1949]) the "attractive nuisance" was created by the defendants, while in this case the defendants neither created the ditch nor had anything to do with its presence.

Of the *Saxton* case, the court said, "(It) makes no radical change in our jurisprudence; it merely applies the long recognized principles to the peculiar facts of the case," a view that the writer submits is substantiated by a careful analysis of the attractive nuisance doctrine in Louisiana.

1. Art. 74, La. Crim. Code of 1942 [La. R.S. (1950) § 14:74]:

"Criminal neglect of family is the desertion or intentional nonsupport:

"(1) By a husband of his wife who is in destitute or necessitous circumstances; or

"(2) By either parent of his minor child who is in destitute or necessitous circumstances.

"Whoever commits the offense of criminal neglect of family shall be fined not more than five hundred dollars, or imprisoned for not more than one year, or both; and if a fine should be imposed, the court may direct it to be paid in whole or in part to the wife, or to the tutor or custodian of the minor child or children, or to an organization or individual approved by the court as fiduciary for such wife or child."

2. *Ibid.*

3. 140 La. 1063, 74 So. 554 (1917).

"We take it, however, that the offense of deserting and wilfully neglecting to provide for the support of a wife and child, as denounced by the act of 1902,⁴ is committed, not at that place to which the deserted wife and child may be compelled to go, by reason of such desertion and neglect, in order to obtain the means of livelihood, but *at the place where the husband is to be found*, when and so long as, his desertion and neglect continues: for it is the desertion and neglect that constitutes the offense, and not the being deserted and neglected."⁵

In *State v. Hopkins*⁶ the defendant left his wife and minor child in Jefferson Davis Parish and went to the State of Washington, later returning to Louisiana but residing in Lafayette Parish. The court held that while he was out of the state he could have committed no crime against the laws of Louisiana since this state had no jurisdiction over him at that time, and for the period he resided in Lafayette Parish he could not be prosecuted in Jefferson Davis Parish because the venue of the crime was where the defendant was physically present. Conversely, in *State v. Baurens*⁷ the defendant excepted to the jurisdiction at his domicile, St. Bernard Parish, because the destitute wife and child had left him and gone to New Orleans. The court rejected this argument by saying that the proper venue was the domicile of the defendant and that this could not be changed by the removal of the wife and child. The position taken by the court in these cases has been consistently followed.⁸

As a result of this judicial interpretation, effective prosecution for desertion and non-support has become exceedingly difficult. The prosecuting officer of the place to which the defendant has moved may not be especially interested in the case, as the destitute persons are not wards of a welfare agency or public charity of his locality; he does not actually see the condition of the parties in destitute and necessitous circumstances; and there is no local public pressure brought to demand prosecution of the matter.

The majority of the American states, proceeding under stat-

4. This was superseded by La. Act 77 of 1932, which is substantially the same as Art. 74, La. Crim. Code of 1942.

5. 140 La. 1063, 1068, 74 So. 554, 555 (1917).

6. 171 La. 919, 132 So. 501 (1931).

7. 117 La. 136, 41 So. 442 (1906).

8. *State v. Clark*, 144 La. 328, 80 So. 578 (1918); *State v. Smith*, 145 La. 914, 83 So. 189 (1919); *State v. Morel*, 146 La. 6, 83 So. 318 (1919).

utes strikingly similar to Article 74 and the Uniform Desertion and Nonsupport Act, allow prosecution for the offense in the jurisdiction where the wife or child becomes dependent, regardless of the defendant's nonresidence.⁹ It has been held that if a father who has never been a resident of a jurisdiction permits his minor child to be brought into that jurisdiction, and knowing him to be in destitute conditions, fails to provide for him, he is subject to prosecution in that jurisdiction.¹⁰ Where the wife, because of mistreatment, has taken the children to another jurisdiction where their condition becomes destitute, the court has held:

"If as a result of his wrongdoing they were obliged to leave him and seek refuge elsewhere, the circumstances that they found shelter in a state which undertakes to punish the neglect of parental duty under such circumstances, . . . imposed upon him no hardship of which he has any standing to complain."¹¹

If it is desired to change the effect of the Louisiana decisions by legislative action, such could be best accomplished by extending the rule of Article 16 of the Louisiana Code of Criminal Procedure¹² to cover specifically the crime of desertion and nonsupport. The following is an example of the type of provision possible:

Art. 16.1. When any person shall desert or intentionally not support his family in violation of Art. 74 of the Criminal Code, the offense may be prosecuted and punished:

(1) In the parish where the person owing the duty of support resides; or

(2) In the parish where the person (or persons) to

9. 27 Am. Jur. 47, § 444: "He is properly indicted and tried for the offense [of nonsupport and desertion] in the jurisdiction where the wife or child becomes dependent, regardless of his nonresidence, for that is the place where the duty of support should be discharged, and consequently the place where the offense of failure to support is committed."

10. *In re Fowles*, 89 Kan. 430, 131 Pac. 598 (1913). Here the question of extradition was not raised as the defendant had entered the state on unrelated business and the court obtained jurisdiction over him at that time.

11. *State v. Wellman*, 102 Kan. 503, 170 Pac. 1052, Ann. Cas. 1918D 1006, L.R.A. 1918D 949 (1918).

12. Art. 16, La. Code of Crim. Proc. of 1928 [La. R.S. (1950) § 15:16]: "If any mortal wound shall be given, or other violence or injury shall be inflicted or poison administered on the high seas, or in any other navigable waters, or on land, without the limits of this state, by means whereof death shall ensue in any parish thereof, such offenses may be prosecuted and punished in the parish where such death shall have ensued."

whom the duty of support is owed establishes a bona fide residence; provided that this provision shall be effective only if the person to whom the duty of support was owed was justified in establishing a separate residence.¹³

It is felt that an amendment of this type to Article 16 would to a great extent alleviate the present situation and also lead to a fuller and more effective enforcement of Article 74.

However, such a provision would not solve the problem where the person owing the duty of support goes to another state and subsequently fails intentionally to support the person or persons to whom he owes the duty. United States constitutional¹⁴ and statutory¹⁵ provisions require the governor of the state to whom an extradition demand is presented to determine, before he can lawfully comply with it, "that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled . . . ; and second, that the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand."¹⁶

"To be a fugitive from justice, in the sense of the Act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having *within a State committed that which by its laws constitutes a crime*, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another."¹⁷ It necessarily follows from this decision and many others¹⁸ that unless the accused incurs some guilt in the

13. The type of provision in (2) could be held constitutional under the theory that a substantial element of the crime occurred in the parish where the duty of support is owed.

14. U.S. Const. Art. IV, § 2: "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."

15. Rev. Stat. § 5278, 5279 (1873), 18 U.S.C.A. § 662 (1927).

16. *Roberts v. Reilly*, 116 U.S. 80, 95, 6 S.Ct. 291, 299, 29 L.Ed. 544, 549 (1885). Accord: *Innes v. Tobin*, 240 U.S. 127, 36 S.Ct. 290, 60 L.Ed. 562 (1916), affirming 77 Tex. Crim. Rep. 351, 173 S.W. 291, L.R.A. 1916C 1251 (1915).

17. 116 U.S. 80, 97, 6 S.Ct. 291, 300, 29 L.Ed. 544, 549 (1885).

18. *Hyatt v. Cockran*, 188 U.S. 691, 6 S.Ct. 291, 29 L.Ed. 544 (1902); *Ex parte Hoffstot*, 218 U.S. 665, 37 S.Ct. 222, 54 L.Ed. 1201 (1910), affirming 180 Fed. 240 (D.C. N.Y. 1910); *Strassheim v. Daily*, 221 U.S. 280, 285, 31 S.Ct.

demanding state *prior to his removal* therefrom he cannot be said to be a fugitive from justice and hence cannot be extradited.

Other states are still faced with this problem. Numerous cases hold that a man who furnishes adequate support while within a particular state, but after leaving it fails to continue the support, is not, with respect to the offense of nonsupport, a fugitive from the justice of the state where the deserted wife or child remains, and is not subject to extradition.¹⁹ However, the temporary presence within the state by one charged with neglect to support his wife or children, although for an innocent purpose, is sufficient to charge him with being a fugitive from justice upon his departure again from the state.²⁰

In view of the United States Supreme Court jurisprudence²¹ on this point, it seems that this interpretation will remain, regardless of its merits.

A liberal and logical interpretation of the desertion provision of Article 74 of the Criminal Code might cover the situation to a large degree. Black defines desertion as "*The act by which a person abandons and forsakes, without justification, or unauthorized, a station or condition of public or social life, renouncing its responsibilities and evading its duties.*"²² It logically follows that if a person within the provisions of Article 74 should desert one in destitute or necessitous circumstances to whom the duty is owed, the crime of desertion would occur at the place the defendant left. This would not only allow prosecution at the former family domicile but would allow extradition in the event the defendant absconded into another state. The dicta in the case of *State v. Fick*²³ indicates that the supreme court may interpret the desertion provision to the contrary. However, when it becomes necessary for the court to face squarely the issue, a reconsideration could easily lead to a different result.

558, 560, 55 L.Ed. 735 (1910); *Ex parte Graham*, 216 Fed. 813 (D.C. Calif. 1913); *Taft v. Lord*, 92 Conn. 539, 103 Atl. 644, L.R.A. 1918E 545 (1918).

19. *Taft v. Lord*, 92 Conn. 539, 103 Atl. 644, L.R.A. 1918E 545 (1918); *Re Kuhns*, 36 Nev. 487, 137 Pac. 83, 50 L.R.A. (N.S.) 507 (1913); *Re Roberson*, 38 Nev. 326, 149 Pac. 182, L.R.A. 1915E 691 (1915).

20. 22 Am. Jur. 261 (1939); *Chase v. State*, 93 Fla. 963, 113 So. 103, 54 A.L.R. 271 (1927); *People ex rel. Gottschalk v. Brown*, 237 N.Y. 483, 143 N.E. 653, 32 A.L.R. 1164 (1924). Notes (1924) 32 A.L.R. 1167, (1928) 54 A.L.R. 281.

21. See cases cited in note 19, *supra*.

22. Black, *Law Dictionary* (3 ed. 1933) 565.

23. 140 La. 1063, 74 So. 554 (1917).

CONCLUSIONS

1. Article 74 of the Criminal Code, as interpreted, does not result in a full accomplishment of the desired end, that is, support of a family by the husband or wife charged with that responsibility.

2. An amendment, similar to the one suggested, should lead to more effective enforcement of Article 74 of the Criminal Code. This would allow prosecution either at the domicile of the person owing the duty of support or at the justifiably established residence of the person to whom the duty of support is owed.

3. The restrictions on extradition impair the effectiveness of such a provision where the husband goes to another state. There seems to be little that can be done about this in strictly non-support cases.

4. A liberal interpretation of the *desertion* provision of Article 74 would achieve a desirable result in those cases where the husband's intent could be shown at the time he left. This would

a. Allow prosecution for desertion at the former family domicile, and,

b. Allow extradition in the event the defendant left the state as he would then be a fugitive from justice.

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IMPROPER REMARKS OF THE DISTRICT ATTORNEY

Article 381 of the Code of Criminal Procedure states the general rule that "Counsel may argue to the jury both the law and the evidence of the case, but must confine themselves to matters as to which evidence has been received; and *counsel shall refrain from any appeal to prejudice.*"¹ A survey of the jurisprudence indicates that some improper remarks are held

1. This article, as written, applies to defense counsels as well as prosecuting attorneys. Obviously, in a criminal trial, counsel for the defendant cannot make such an appeal to prejudice as would cause the verdict to be set aside on appeal. If the jury or court errs in being swayed by the prejudicial appeals of defense counsel and the result is an acquittal for the accused, the matter is settled, for the principle of double jeopardy prevents an appeal by the state. Due process of law demands that the defendant have a fair trial, and errors in the proceedings of a criminal trial that prejudice this right of the accused result in the denial of due process. The converse of this is not true; mistakes in the trial that result in the acquittal of the defendant are not reversible errors. See *State v. Schiro*, 143 La. 841, 79 So. 426 (1918).