

Duty of Relatives to Support Dependents

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word "insurance" in a negligence action may in itself be ground for the reversal of a judgment, and this notwithstanding that the jury has been instructed to disregard such reference.⁴⁷ In the majority of the cases where this rule was invoked, however, it was apparent that counsel injected the irrelevant reference to insurance with the deliberate purpose of prejudicing the defendant. In such instances the rule may be justified.⁴⁸ But where wilfulness is absent, it would seem that an instruction to the jury to disregard the statement is all that the defendant is entitled to for the safeguardment of his rights. To hold otherwise is a direct reflection on the intelligence of our jurors.⁴⁹

To summarize it may be said :

- (1) As a general rule any reference in a negligence action that the defendant is insured is improper ; violation of the rule where it appears that the defendant has been prejudiced thereby, will result in a new trial in spite of the fact that the jury has been instructed to disregard the reference ;
- (2) This rule does not exclude evidence of insurance where such evidence is relevant upon any material controverted fact ;
- (3) Evidence of insurance may be admissible where it forms part of a competent admission ;
- (4) Evidence of insurance may be admissible to show bias and interest of witnesses ;
- (5) Evidence of insurance may be admissible to show the interest of jurors ; questions relating to specific insurance companies are probably proper, providing they convey no inference that the defendant is insured.

LOUIS J. GUSMANO.

DUTY OF RELATIVES TO SUPPORT DEPENDENTS.

I.

More and more the problem of support of dependents by relatives has become recognized as a legal as well as a moral and social obliga-

⁴⁷ See note 11, *supra*.

⁴⁸ See notes 13, 14, *supra*.

⁴⁹ *Shaier v. Broadway Improvement Co.*, 22 App. Div. 102, 47 N. Y. Supp. 815 (1st Dept. 1897) ("It would be a severe reflection upon the integrity and intelligence of this jury for us to assume that because such a question was asked they disregarded the sworn testimony of the witness, and, in violation of the express direction of the court, assumed that the insurance company was interested in the case and allowed such an inference to affect their verdict").

tion. Present-day concepts of social obligations have forced the legislature, together with the courts, to take a more realistic attitude in this problem. They are forcing the duty of support upon those who should bear it and are relieving the social agencies and public institutions of the burden. In most states, the obligation of support has been recognized and is controlled by statute.¹ In all but one state the statutes have given recognition to the common law duty of a parent to support his children during their minority,² and now make the parent liable for the children whenever there arises a possibility that the child, whether minor or adult, will likely become a public charge.³ But too often where the children are apt to become public charges, the parents are likewise destitute. When this occurs, the only recourse is that the duty of support then fall upon the public. Still in certain cases, it has been the parent who has suffered the reverses in life while the children are supporting themselves comfortably. In such an event, the legislatures have given recognition to the moral obligation⁴ and hold the children liable for the support of their less fortunate parents.

Similarly, has the duty of a husband to support his wife, whether separated or living together, been strengthened into an iron-clad duty that is reciprocal in its nature. From the earliest common law to the present statutory obligation,⁵ it was a husband's duty to furnish the necessities of life to his wife. It is, in most jurisdictions today, recognized as obligatory upon the wife, whenever she has independent

¹ N. Y. DOM. REL. COURT ACT § 101 is typical of the statutes throughout the United States.

² *People v. Pierson*, 176 N. Y. 201, 208, 68 N. E. 243, 246 (1903); *People ex rel. Ramm v. Ramm*, 197 N. Y. Supp. 234 (1922). The State of Kansas imposes no civil liability, but it does have a criminal statute that creates the obligation, KANSAS REV. STAT. (1923) § 21(442).

³ The common law imposed the duty on the father for infant children during minority. *Betz v. Horr*, 276 N. Y. 83, 11 N. E. (2d) 548 (1937). The statute imposes the duty for adult children who may become public charges, *Frankel v. Goldstein*, 155 Misc. 531, 280 N. Y. Supp. 191 (1935). The father is liable for necessities, and if he furnishes them, he cannot be held for neglecting his duty, *Van Valkinburgh v. Watson*, 13 Johns. 480 (N. Y. 1816); *Winter v. Winter*, 246 App. Div. 232, 285 N. Y. Supp. 260 (1st Dept. 1936); *Fagal v. Rigir*, 247 App. Div. 853, 286 N. Y. Supp. 484 (3d Dept. 1936).

⁴ *Duffy v. Yordi*, 149 Cal. 140, 84 Pac. 838 (1906); *Cook v. Bradley*, 7 Conn. 57 (1828); *Stone v. Stone*, 32 Conn. 142 (1864); *Lebanon v. Griffin*, 45 N. H. 558 (1864); *In re Public Welfare Dept.*, 269 N. Y. 13, 198 N. E. 613, *rev'g*, 245 App. Div. 1, 280 N. Y. Supp. 489 (2d Dept. 1935); *Edwards v. Davis*, 16 Johns. 281 (N. Y. 1819); 1 BL. COMM. *453 holds that it is a moral obligation resting on the children; 2 KENT'S COMM. *207; SCHOULER, DOMESTIC RELATIONS (6th ed. 1921) 787.

⁵ *Fisher v. Drew*, 247 Mass. 178, 141 N. E. 875 (1923); *Keller v. Philips*, 39 N. Y. 351, 354 (1868); *Goodale v. Lawrence*, 88 N. Y. 513 (1882); *DeBrauwere v. DeBrauwere*, 203 N. Y. 460, 96 N. E. 722 (1911); *Rodgers v. Rodgers*, 229 N. Y. 255, 128 N. E. 117 (1920); Note (1938) 13 ST. JOHN'S LAW REV. 105; 3 VERNIER, AMERICAN FAMILY LAWS (1st ed. 1935) 48. *Contra*: *Morton v. Rhodes*, 18 Barb. 100 (N. Y. 1854).

means, to support her husband who is likely to become a public charge.⁶

II.

Certain phases of the now recognized obligations between relatives are, historically speaking, comparatively new. At common law, the legal obligation of children to support their parents, was unknown.⁷ It was only in some instances recognized as a moral obligation, and a moral obligation was not enforceable in a court of law. It was only in equity that the duty was recognized to any extent. There, in seeking to do justice, equity would spell out an obligation wherever possible. Any agreements entered into between parents and children whereby the children bound themselves to provide and pay for their parents' necessities were usually enforced.⁸ Also in recognition of this moral obligation, equity would not imply any remuneration for the services rendered to the parent by the children unless there was an express contract to that effect.⁹ But with chance and uncertainty being such a large element in the enforcement of the obligation, it can hardly be said that support was assured to those parents who had need of it.

Not only in that respect was the common law harsh and reluctant to spell out a legal duty, but it failed to provide adequately for support of children by their step-parents or those who stood in *locus parentis*.¹⁰ Adoption was unknown at common law¹¹ and whatever support was given the children was a mere gratuity. The fact that the step-parent had assumed that relationship did not force upon him any obligations,¹² and any expenditures incurred by the step-parent were items

⁶ *Livingston v. Superior Court*, 117 Cal. 633, 49 Pac. 836 (1897); *Hagert v. Hagert*, 22 N. D. 290, 133 N. W. 1035 (1911); *Hodson v. Picker*, 159 Misc. 356, 287 N. Y. Supp. 642 (1936); 3 VERNIER, *AMERICAN FAMILY LAWS* (1st ed. 1935) 110 names 17 states where it is now a reciprocal duty.

⁷ See note 4, *supra*.

⁸ *Lebanon v. Griffin*, 45 N. H. 558 (1864); *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997 (1891).

⁹ *Borum v. Bell*, 132 Ala. 85, 31 So. 454 (1901); *Worth v. Daniel*, 1 Ga. App. 15, 57 S. E. 898 (1907); *Falls v. Jones*, 107 Mo. App. 357, 81 S. W. 455 (1904); *In re Shelby's Estate*, 18 Misc. 719, 49 N. Y. Supp. 964 (1896); *In re Delaney's Estate*, 27 Misc. 398, 58 N. Y. Supp. 924 (1899).

¹⁰ *Kempson v. Goss*, 69 Ark. 451, 64 S. W. 224 (1901); *Freto v. Brown*, 4 Mass. 675 (1808); *Commonwealth v. Hamilton*, 6 Mass. 272 (1810); *Worcester v. Marchant*, 14 Pick. 510 (Mass. 1833); *Livingstone v. Hammond*, 162 Mass. 375, 38 N. E. 968 (1894); *In re Besondy*, 32 Minn. 385 (1884); *Popejoy v. Hydraulic Press Brick Co.*, 193 Mo. App. 612, 186 S. W. 1133 (1916); *Gay v. Ballou*, 4 Wend. 403 (N. Y. 1828); *Williams v. Hutchinson*, 3 N. Y. 312 (1850); *Tubb v. Harrison*, 4 T. R. 118, 100 Eng. Rep. 967 (K. B. 1790); 2 KENT'S COMM. *193.

¹¹ *Albing v. Ward*, 137 Mich. 352, 100 N. W. 609 (1904); *In re Thorne Estate*, 155 N. Y. 140, 49 N. E. 661 (1897); *In re Huych*, 49 Misc. 391, 99 N. Y. Supp. 502 (1906).

¹² *Brush v. Blanchard*, 18 Ill. 47 (1856); *McMahill v. McMahill*, 113 Ill. 461 (1885); *Davis v. Gallagher*, 37 App. Div. 626, 55 N. Y. Supp. 1060 (4th Dept. 1899).

for which he could demand repayment.¹³ But the step-child was not altogether forsaken at common law. Equity came to his aid and imposed a liability wherever possible and held responsible any person assuming *locus parentis* even without an express adoption.¹⁴ This assumption must have been in terms of clear liability to impose a duty where none existed. In keeping with the common law doctrine of no liability for step-children, it is easily understood that the step-child could not be bound legally or morally to support his step-parent.¹⁵

Closely aligned with the problem, at common law, of liability for support of step-children, was the equally difficult situation created by the necessity to provide for illegitimate children. It is true that in this case there was a clear duty upon the mother to support the child,¹⁶ but no corresponding obligation was to be found in the father. The common law absolutely refused to recognize an illegitimate child as imposing any legal obligation upon the father:¹⁷ the child was *nulius filius*. Still there existed a moral obligation which could not be denied. This moral obligation was enforced in many ways. The putative father became liable for any express promises to pay for support and maintenance of his illegitimate child, and he became bound on an implied contract to pay therefor where he adopted the child as his own.¹⁸

Despite the strictness of common law to insist upon a legal obligation to extend liability to any party, there did exist an obligation of support by parents for their children. This obligation was widely

¹³ *Gerber v. Bauerline*, 17 Ore. 115 (1888) ("A stepfather could qualify as a guardian for the child but did not assume liability and was not in *locus parentis*"); *In re Ackerman*, 116 N. Y. 654, 22 N. E. 552 (1889) (the grandfather contracted for recompense for support of child and the contract was valid as he was not in *locus parentis*).

¹⁴ *Murdock v. Murdock*, 7 Cal. 511 (1857); *Williams v. Hutchinson*, 3 Comst. 312 (N. Y. 1850); *Sharp v. Cropey*, 11 Barb. 224 (N. Y. 1851); *Lantz v. Frey*, 14 Pa. 201 (1850); *Cooper v. Martin*, 4 East 76, 102 Eng. Rep. 759 (1803). If stepfather adopts his wife's children, he becomes liable, *In re Harris*, 16 Ariz. 1, 140 Pac. 825 (1914); *Grossman v. Lauber*, 29 Ind. 618 (1868); *Murray v. Redell*, 21 Hun 409 (N. Y. 1880); *Zurt v. Fuchs*, 60 Hun 582, 14 N. Y. Supp. 806 (1891); *Monk v. Hurlburt*, 151 Wis. 41, 138 N. W. 59 (1912).

¹⁵ *Bell v. Rice*, 50 Neb. 547, 70 N. W. 25 (1897).

¹⁶ *People v. Green*, 19 Cal. 109, 124 Pac. 871 (1912); *Wright v. Wright*, 2 Mass. 109 (1806); *Commonwealth v. Callaghan*, 223 Mass. 150, 111 N. E. 773 (1916); *People v. Landt*, 2 Johns. 375 (N. Y. 1807); *Carpenter v. Whitman*, 15 Johns. 208 (N. Y. 1818); *People ex rel. Estoff v. Chamberlain*, 106 N. Y. Supp. 149 (1907) (duty fixed by statute).

¹⁷ *Simmons v. Bull*, 121 Ala. 501 (1852); *Glidden v. Nelson*, 15 Ill. App. 297 (1884); *Moncrief v. Ely*, 19 Wend. 405 (N. Y. 1838); *Todd v. Weber*, 95 N. Y. 181 (1884); *Bissill v. Myton*, 160 App. Div. 268, 145 N. Y. Supp. 591 (1st Dept. 1914); *People ex rel. Lawton v. Snell*, 216 N. Y. 527, 111 N. E. 50 (1916); *Grillo v. Sherman-Statler Co.*, 195 App. Div. 362, 186 N. Y. Supp. 810 (3d Dept. 1921), *aff'd*, 231 N. Y. 621, 132 N. E. 913 (1921); 1 BL. COMM. *459.

¹⁸ The moral obligation was recognized and often enforced, *Moncrief v. Ely*, 19 Wend. 405 (N. Y. 1838); *Birdsall v. Edgerton*, 25 Wend. 619 (N. Y. 1843); *Todd v. Weber*, 95 N. Y. 181 (1884); *Sanders v. Sanders*, 167 N. C. 319, 83 S. E. 490 (1914); *State v. Rucher*, 86 S. C. 66, 68 S. E. 133 (1910).

recognized and enforced.¹⁹ There can be no refutation of the existence of a moral obligation, but early decisions conflict as to the existence of a legal obligation.²⁰ However, the weight of authority holds that it is a legal, as well as a moral, obligation.²¹ It is logical to believe the double obligation existed when earliest criminal statutes imposed a criminal liability upon parents who neglected and abandoned their children.²² Yet, this recognition did not insure parental aid under all circumstances. The father was primarily liable,²³ but only during minority of the child²⁴ and then it was the child's responsibility to make provisions for himself. The marriage of a minor female child ended the duty of support²⁵ and did not result in an assumption of

¹⁹ *People v. Hill*, 163 Ill. 186, 191, 46 N. E. 796, 797 (1896); *Van Valkinburgh v. Watson*, 13 Johns. 480 (N. Y. 1816); *People ex rel. Ramm v. Ramm*, 197 N. Y. Supp. 234 (1922); *In re Public Welfare Dept. (Kane v. Nicci)*, 269 N. Y. 13, 198 N. E. 613 (1935); *People ex rel. Deming v. Williams*, 161 Misc. 573, 292 N. Y. Supp. 458 (1936); *Betz v. Horr*, 276 N. Y. 83, 11 N. E. (2d) 548 (1937); *Butler v. Butler*, 3 Atk. 58, 26 Eng. Rep. 836 (1743). Father cannot lose his liability by support of others, *Levy v. Levy*, 242 App. Div. 773, 274 N. Y. Supp. 340 (2d Dept. 1934). Dire want is not a necessity to force support, *Sanderson v. Sanderson*, 149 Misc. 88, 267 N. Y. Supp. 410 (1933).

²⁰ The early English cases which form the basis of the common law of the United States admitted the moral obligation, but even after fixation of the duty by statutes, the English courts construed them strictly, holding that a moral obligation alone was present. In *Mortimer v. Wright*, 6 M. & W. 482, 488, 151 Eng. Rep. 502, 504 (1840), Parke, B., said: "It is clear principle of law that a father is not under any legal obligation to pay his son's debts, except under proceedings by 43 Eliz. C. 2, by which he may, under certain circumstances, be compelled to support his children according to his ability, but the mere moral obligation cannot impose any legal liability." Accord: *Shelton v. Springett*, 11 C. B. 452, 138 Eng. Rep. 549 (1851).

Early American decisions followed closely these rulings and imposed no legal obligation except under special circumstances or by statute. *Raymond v. Loyl*, 10 Barb. 483 (N. Y. 1851); *Chilcott v. Trimble*, 13 Barb. 502 (N. Y. 1852); *Freeman v. Robinson*, 38 N. J. L. 383 (1876).

²¹ *Studebaker Bros. Mfg. Co. v. De Moss*, 62 Ind. App. 635, 647, 113 N. E. 417 (1916); *Van Valkinburgh v. Watson*, 13 Johns. 480 (N. Y. 1816); *Edwards v. Davis*, 16 Johns. 281, 285 (N. Y. 1819); *In re Ryder*, 11 Paige 185 (N. Y. 1844); *Crane v. Bandonine*, 55 N. Y. 256, 259 (1873); *Furman v. Van Sise*, 56 N. Y. 435, 439 (1874); *Beardsley v. Hotchkiss*, 96 N. Y. 201, 219 (1884); *Manning v. Wells*, 8 Misc. 646, 29 N. Y. Supp. 1044 (1894).

²² *Rex v. Friend, & wife*, 1 Russ. & R. 20, 168 Eng. Rep. 662 (1802); *Regina v. Conde*, 10 Cox, C. C. 547 (1867); *Gibson v. Commonwealth*, 106 Ky. 360, 50 S. W. 532 (1899); CLARK AND MARSEAL, *LAW OF CRIMES* (2d ed. 1905) 376; TIFFANY, *DOMESTIC RELATIONS* (2d ed. 1909) 253.

²³ *Leahe v. J. R. King Dry Goods Co.*, 5 Ga. App. 102, 62 S. E. 729 (1908); *People v. Reubens*, 92 N. Y. Supp. 121 (1904); *In re Lyon's Estate*, 137 N. Y. Supp. 171 (1912); *Wignall v. Wignall*, 163 Misc. 910, 298 N. Y. Supp. 251 (1937). Duty imposed by statute, *State v. Beslin*, 19 Idaho 185, 112 Pac. 1053 (1911).

²⁴ *Voras v. Rosenberry*, 85 Ill. App. 623 (1899); *Haynes v. Waggoner*, 25 Ind. 174 (1865); *Studebaker Bros. Mfg. Co. v. De Moss*, 62 Ind. App. 635, 113 N. E. 417 (1916); *Skidmore v. Skidmore*, 160 App. Div. 594, 145 N. Y. Supp. 939 (2d Dept. 1914); *In re Willis Estate*, 94 Misc. 29, 158 N. Y. Supp. 985 (1916), *aff'd*, 175 App. Div. 933, 161 N. Y. Supp. 1150 (1st Dept. 1916); 2 KENT'S COMM. *193.

²⁵ *Perkins v. Westcoat*, 3 Colo. App. 338, 33 Pac. 139 (1893).

liability by the parent for the son-in-law. A separation between husband and wife did not end the duty to provide necessities for either wife or children,²⁶ but where the wife left without good cause and took the children or kept unlawful custody over them, that was sufficient to end liability of the husband for the children.²⁷ When the infant left the home with the consent of his parents, they did not lose their liability.²⁸ But where the infant voluntarily abandoned the home, he could not bind his parents even for necessities.²⁹ A divorce did not end the father's liability for support,³⁰ but where the decree gave custody to the mother she had the primary obligation, and the divorced husband was only responsible in event of her inability.³¹ Naturally, death ended the father's primary duty, but the widow was held responsible to support the minor children.³² In certain cases, the infant children had an independent source of support, but this did not relieve the parents of their obligation, and only in cases of absolute necessity was an infant forced to resort to his own estate to furnish the means for his own support.³³ Yet, where the infant did have an independent source of income, the mother was relieved of her duty when it evolved upon her.³⁴

²⁶ *Maxwell v. Boyd*, 123 Mo. App. 334, 100 S. W. 540 (1907); *Town of Rumney v. Keyes*, 7 N. H. 571 (1835); *Kimball v. Keyes*, 11 Wend. 32 (N. Y. 1833); *Greenhut v. Rosenstein*, 7 Daly 164 (N. Y. 1877).

²⁷ *Baldwin v. Foster*, 138 Mass. 449 (1885); *City of N. Y. v. Itzkowitz*, 200 App. Div. 839, 191 N. Y. Supp. 919 (2d Dept. 1921). *Contra*: *People v. Reubens*, 92 N. Y. Supp. 121 (1904); *Jones v. Jones*, 161 Misc. 660, 292 N. Y. Supp. 221 (1937).

²⁸ *McMillen v. Lee*, 78 Ill. 443 (1875); *De Wane v. Hansow*, 56 Ill. App. 575 (1894); *Gay v. Ballou*, 4 Wend. 403 (N. Y. 1828).

²⁹ *Raymond v. Loyl*, 10 Barb. 483 (N. Y. 1851).

³⁰ *Hall v. Hall*, 141 Ga. 361, 80 S. E. 992 (1914); *Conn v. Conn*, 57 Ind. 323 (1877); *Bennett v. Robinson*, 180 Mo. App. 56, 165 S. W. 856 (1914); *Thomas v. Thomas*, 41 Wis. 229 (1876); *Stockwell v. Stockwell*, 87 Vt. 424, 89 Atl. 478 (1914). *Contra*: *Bondis v. Bondis*, 40 Okla. 164, 136 Pac. 1089 (1913).

³¹ *Finch v. Finch*, 22 Conn. 411 (1853); *Ellis v. Hewitt*, 15 Ga. App. 693, 84 S. E. 185 (1915); *Brow v. Brightman*, 136 Mass. 187 (1883); *Burritt v. Burritt*, 29 Barb. 124 (N. Y. 1859); *Exchange Bank & Trust Co. v. Finley*, 73 S. C. 423, 53 S. E. 649 (1906).

³² *Inhabitants of Dedham v. Inhabitants of Natick*, 16 Mass. 140 (1819); *Mo. Pacific Ry. v. Palmer*, 55 Neb. 559, 76 N. W. 169 (1898); *Gray v. Durland*, 50 Barb. 100 (N. Y. 1867); *Furman v. Van Sise*, 56 N. Y. 435 (1874); *Welch v. Welch*, 200 N. Y. Supp. 652 (1923). *Contra*: *Whipple v. Dow*, 2 Mass. 415 (1807); 2 KENT'S COMM. *191.

³³ The father's primary duty exceeds the child's ability to support himself, *In re Harris' Estate*, 16 Ariz. 1, 140 Pac. 825 (1914); *Rowe v. Raper*, 23 Ind. App. 27, 54 N. E. 770 (1899); *In re Wilber's Estate*, 27 Misc. 53, 57 N. Y. Supp. 942 (1899); *In re Davis' Estate*, 98 App. Div. 546, 90 N. Y. Supp. 244 (4th Dept. 1904), *aff'd*, 184 N. Y. 299, 77 N. E. 259 (1904); *In re Cohen's Estate*, 153 Misc. 757, 276 N. Y. Supp. 59 (1934). But where father's means are insufficient, the child must support and educate himself from his own estate, *Fuller v. Fuller*, 23 Fla. 236, 2 So. 426 (1887); *Beardsley v. Hotchkiss*, 96 N. Y. 201, 220 (1884).

³⁴ *Mowbray v. Mowbray*, 64 Ill. 383 (1872); *Whipple v. Dow*, 2 Mass. 415 (1807).

However much recognition was given at common law to the parental obligation of support, no corresponding liability can be shown to rest upon the grandparents in the event the parents failed in their duty.³⁵ Even less liability could be imputed to grandparents for illegitimate children.³⁶ The common law seemed jealous to bestow its protection freely, and liability arose only when a parent's or step-parent's acts could be strictly construed as intending to impose an obligation for support.

It was only in the relationship of husband and wife that the common law unhesitatingly placed a liability for support.³⁷ Even here the wife's actions determined the extent of this liability. Where her actions were such as to imply or express a refusal of support, then the common law courts would not act to enforce the obligation that existed.³⁸ The degree of support rested within the control of the husband. He was liable only for necessities which in turn were determined by his station in life.³⁹

III.

Considering the strictness of the common law, it is only natural that the changing conception of a social and moral obligation of support be reflected in the modern statutory rules. Human necessity, as always, was the determiner of the new policy for support of dependents. The common law could not furnish adequate relief for the suffering created by the strictness of its application. Equity could not fill in the gaps with relief based only on a moral obligation. Early English legislators sought to fix a legal obligation.⁴⁰ These laws have since been re-enacted into our present system of law and are given broad interpretation. But no longer do the courts base their decisions only upon a pure legal obligation. The opinions are now determined

³⁵ *People ex rel. Ramm v. Ramm*, 197 N. Y. Supp. 234 (1922); *Kiser v. Overseers of Frankfort*, 3 N. J. L. 410 (1808); *Sharum v. Sharum*, 101 Okla. 273, 275, 225 Pac. 682 (1924); *In re Whiting*, 3 Pittsb. (Pa.) 129 (1869); *In re Lafferty's Estate*, 147 Pa. 283, 23 Atl. 445 (1892); *In re Wall's Estate*, 13 Pa. C. C. 413 (1893).

³⁶ *Inhabitants of Hiram v. Pierce*, 45 Me. 367 (1858); *Director of Poor v. Hichman*, 4 Pa. Dist. 494 (1895); 2 KENT'S COMM. *96, 212.

³⁷ See note 5, *supra*.

³⁸ Thus adultery and abandonment were sufficient to relieve husband of his liability, *Reardon v. Reardon*, 210 Ala. 129, 97 So. 138 (1923); *Pearson v. Pearson*, 230 N. Y. 141, 129 N. E. 349 (1921); *Wirth v. Wirth*, 184 App. Div. 643, 172 N. Y. Supp. 309 (1st Dept. 1918); *City of N. Y. v. Itzkowitz*, 200 App. Div. 839, 191 N. Y. Supp. 919 (2d Dept. 1921); Note (1938) 13 Sr. JOHN'S L. REV. 106.

³⁹ *Pattberg v. Pattberg*, 94 N. J. Eq. 715, 120 Atl. 790 (1923); Note (1938) 13 Sr. JOHN'S L. REV. 106.

⁴⁰ The earliest English laws imposing any liability on relatives are found in 18 ELIZ. c. 3 (1570) and 43 ELIZ. c. 2, § 7 (1601), which form the basis of the N. Y. DOM. REL. COURT ACT § 101. Former N. Y. CODE OF CRIM. PROC. § 839 enforced the criminal liability and is now covered by § 914. The early English laws were followed by other laws which, in turn, were adopted by the colonial legislatures and became part of the state law in the United States.

by public policy.⁴¹ The statutes are all-embracing and insure liability where the common law hesitated or refused. With public policy acting as the determiner in enforcing the obligation, it is natural to see a much broader view taken by the courts. The father has still the primary obligation, and his wife may sue him to enforce it,⁴² but where he fails, the duty continues on to the mother and then to the grandparents.⁴³ But, to bind the mother or grandparents it is necessary to show absolutely the father's inability to provide adequately.⁴⁴ Upon the father's death, the duty of support follows the same order. The obligations created by statute between parent and child, grandparent and grandchild, or step-parent and step-child are determined by public policy and cannot be waived or contracted away.⁴⁵ Any agreement entered into concerning the support of children must be approved by the proper court or public welfare authorities in order to be binding.⁴⁶ Nor may the father try to escape liability by such abuse of the children that he is relieved of custody and control of them.⁴⁷ The legal obligations now created are not limited to the infant children, but where an adult child is helpless or there is danger of his becoming a public charge then liability arises.⁴⁸ Certain defenses, available at common law, as waiver of the obligation by contract or voluntary emancipation

⁴¹ N. Y. DOM. REL. COURT ACT § 92(4) makes all orders of support run until 17 years unless child will later become public charge. *City of New York v. Cohen*, 143 Misc. 27, 256 N. Y. Supp. 155, *aff'd*, 259 N. Y. 645, 182 N. E. 217 (1932); *Winter v. Winter*, 246 App. Div. 232, 285 N. Y. Supp. 260 (1st Dept. 1936); *Germer v. Germer*, 167 Misc. 882, 4 N. Y. S. (2d) 747 (1938); *In re Ford*, 9 N. Y. S. (2d) 932 (1939).

⁴² *Leibold v. Leibold*, 158 Ind. 60, 62 N. E. 627 (1902); *Alvey v. Hartwig*, 106 Md. 254, 67 Atl. 132 (1907).

⁴³ N. Y. DOM. REL. COURT ACT § 101. The statute thus determines the order of liability. N. Y. DOM. REL. LAW § 132 provides for liability of mother if possessed of sufficient property.

⁴⁴ *People ex rel. Ramm v. Ramm*, 197 N. Y. Supp. 234 (1922); *Szilagyi v. Szilagyi*, 9 N. Y. S. (2d) 440 (1939).

⁴⁵ *Perkins v. Westcoat*, 3 Colo. App. 338, 33 Pac. 139 (1893); *Wright v. Teupp*, 70 N. J. Eq. 130, 62 Atl. 464 (1905); *Von Roeder v. Miller*, 117 Misc. 106, 190 N. Y. Supp. 787 (1921); *Kriss v. Kriss*, 246 App. Div. 847, 285 N. Y. Supp. 58 (2d Dept. 1936).

⁴⁶ N. Y. DOM. REL. LAW § 121 makes an agreement by mother or child or their agent, concerning support binding only if approved by a judge, except where entered into by a public official with such authority.

⁴⁷ *Ippolito v. Terragni*, 140 Misc. 606, 251 N. Y. Supp. 376 (1931) holds act not retroactive as to agreements prior to its enactment.

⁴⁸ *Hutchinson v. Hutchinson*, 124 Cal. 677, 57 Pac. 674 (1899); *Leibold v. Leibold*, 158 Ind. 60, 62 N. E. 627 (1902); *Rankin v. Rankin*, 83 Mo. App. 335 (1900).

⁴⁹ *Drain v. Malone*, 130 Ky. 125, 113 S. W. 67 (1908); *Cromwell v. Benjamin*, 41 Barb. 558 (N. Y. 1863); *In re Van Denburgh*, 178 App. Div. 237, 164 N. Y. Supp. 966 (3d Dept. 1917); *In re Willis' Estate*, 94 Misc. 29, 158 N. Y. Supp. 985 (1916), *aff'd*, 175 App. Div. 933, 161 N. Y. Supp. 1150 (1st Dept. 1916); *Winter v. Winter*, 246 App. Div. 232, 285 N. Y. Supp. 260 (1st Dept. 1936); *Fagal v. Riger*, 247 App. Div. 853, 286 N. Y. Supp. 484 (3d Dept. 1936); *Frankel v. Goldstein*, 155 Misc. 531, 280 N. Y. Supp. 191 (1935). Where the adult child stays home, common law liability exists, *Brown v. Ramsay*, 29 N. J. L. 117, 120 (1860).

by the child, are now swept aside where it is evident that the child will become a public charge.⁴⁹ The courts seek to place liability on the parents wherever possible rather than let the public bear the burden. Always, where there is imminent danger that one of the parties in the action will become a public charge, the courts impose the liability of support on the proper person.⁵⁰

In common with the extension of liability for support of children, the law took recognition of the illegitimate child and fastened a duty of support upon the putative father.⁵¹ The law now permits the mother to establish the paternity⁵² of the infant and the court will force the father to bear all necessary expenses⁵³ of the mother and the child. As there was no duty at common law, the courts are still reluctant to impose liability where no order of filiation has been entered.⁵⁴ But even if such order has been entered, the liability only extends to sixteen years of age. Once the order of filiation has been entered, the subsequent marriage of the mother to another cannot relieve the putative father of his obligations⁵⁵ unless the husband expressly adopts the child. Similarly has adoption, purely statutory, become recognized as creating a liability upon the foster parents, who assume under the statute all the duties of the natural parents, and relieve the natural parents of all obligations.⁵⁶ No decisions have as yet construed the

⁴⁹ *Winter v. Winter*, 246 App. Div. 232, 285 N. Y. Supp. 260 (1st Dept. 1936); *Fagal v. Riger*, 247 App. Div. 853, 286 N. Y. Supp. 484 (3d Dept. 1936); *In re Goyette's Estate*, 141 Misc. 80, 252 N. Y. Supp. 566 (1931).

⁵⁰ See note 42, *supra*.

⁵¹ 18 ELIZ. c. 3 (1570); 4 & 5 Wm. IV, c. 76, § 72 (1834); 7 & 8 Vict. c. 101 (1844); N. Y. DOM. REL. LAW § 120; 4 VERNIER, AMERICAN FAMILY LAWS (1936) 91, n.19: " * * * 13 jurisdictions provide for express support of illegitimate children apart from poor laws and bastardy proceedings (Iowa, Nev., N. M., N. Y., N. D., S. D., Wyo., Minn., Ariz., Cal., Ga., N. J., La.)" *State ex rel. MacArthur v. Evans*, 19 Ind. 92 (1862); *Mann v. People*, 35 Ill. 467 (1864); *Bailey v. Chesley*, 64 Mass. 284 (1852); *People ex rel. Lawton v. Snell*, 216 N. Y. 527, 111 N. E. 50 (1916).

⁵² N. Y. DOM. REL. LAW § 122(2): "Proceedings to establish the paternity of the child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been acknowledged by the father in writing or by the furnishing of support * * *"

N. Y. DOM. REL. LAW § 126a: "Blood grouping tests. The court, on motion of the defendant, shall order the mother, her child and the defendant to submit to one or more blood grouping tests by a duly qualified physician to determine whether or not the defendant can be excluded as being the father of the child, and the results of such tests may be received in evidence but only in cases where definite exclusion is established."

N. Y. DOM. REL. LAW § 127 provides for an order of filiation, stating the paternity and provides for support. Liability continues up to 16 years of age.

⁵³ N. Y. DOM. REL. LAW § 120; *Jones v. Jones*, 161 Misc. 660, 292 N. Y. Supp. 221 (1937); *Hacher v. Anonymous*, 163 Misc. 832, 299 N. Y. Supp. 460 (1937).

⁵⁴ *People v. Polep*, 233 App. Div. 450, 253 N. Y. Supp. 253 (3d Dept. 1931).

⁵⁵ *People v. Fermoile*, 236 App. Div. 388, 259 N. Y. Supp. 564 (4th Dept. 1932).

⁵⁶ Adoption was unknown at common law and arises only by statute which relieves natural parent of liability and places it all on foster parents, *In re Heye*,

liability of the parents of the foster parents for the adopted child. However, it would seem logical, after viewing the contractual obligation of adoption, that there can be no liability upon the parents of the foster parents as they were not parties to the adoption agreement and cannot interfere in the proceedings. It must be remembered that adoption was unknown at common law and grandparents did not have liability for grandchildren. Therefore, despite a tendency to place a liberal interpretation on support legislation, any statute changing these rules must be strictly construed.⁵⁷ Also, it seems apparent that natural grandparents do not lose their liability even though there has been an adoption. In view of the express duty imposed by statute, the grandparents still continue liable as they were not parties to the adoption agreements.⁵⁸ In the case of a step-father, who had no liability at common law, he now has a statutory duty where he has knowledge of the existence of the child prior to his marriage whether the child is legitimate or not.⁵⁹ This liability is co-existent with that of the father.⁶⁰ But such liability is at all times strictly construed and does not extend to adult step-children.⁶¹

The common law obligation between the husband and wife has been strengthened and broadened in many ways. Many of the former defenses by the husband, such as a separation agreement, misconduct or desertion, are now ignored when it appears that the wife will become a public charge.⁶² It is now a recognized duty between spouses to maintain each other where one lacks the proper means.⁶³ The degree and the amount of support that is required is still determined by the spouse's income and station in life.

An entirely new field for the courts was in enforcing a liability upon children, both infant and adult, to support their indigent parents. This is purely statutory.⁶⁴ But since it is based on public policy it

241 App. Div. 907 (4th Dept. 1934); *Gross v. Gross*, 110 Misc. 278, 179 N. Y. Supp. 900 (1920); *Betz v. Horr*, 276 N. Y. 83, 11 N. E. (2d) 548 (1937); *Op. Atty. Gen.* 482 (1933).

⁵⁷ *In re Bamber*, 147 Misc. 712, 265 N. Y. Supp. 798 (1933); *In re Mark's Adoption*, 159 Misc. 348, 287 N. Y. Supp. 800 (1936).

⁵⁸ N. Y. DOM. REL. COURT ACT § 101 places an express liability that cannot be contracted away.

⁵⁹ N. Y. DOM. REL. COURT ACT § 101(5); N. Y. PUBLIC WEL. LAW § 125; *Jones v. Jones*, 161 Misc. 660, 292 N. Y. Supp. 221 (1937).

⁶⁰ *Jones v. Jones*, 161 Misc. 660, 292 N. Y. Supp. 221 (1937).

⁶¹ *Op. Atty. Gen.*, 51 St. Dept. 284 (1934); *People ex rel. Deming v. Williams*, 161 Misc. 573, 292 N. Y. Supp. 458 (1936).

⁶² *People v. Pollack*, 198 N. Y. Supp. 569 (1923); *City of New York v. Cohen*, 143 Misc. 27, 256 N. Y. Supp. 155, *aff'd*, 259 N. Y. 645, 182 N. E. 217 (1932); *City of New York v. Jansen*, 150 Misc. 268, 268 N. Y. Supp. 542 (1934). But if paramour of wife gives sufficient support, the husband is not liable, *Germer v. Germer*, 167 Misc. 882, 4 N. Y. S. (2d) 747 (1938). Misconduct by wife and facts showing her independent income relieves husband of support, *Lifshitz v. Lifshitz*, 249 App. Div. 859, 292 N. Y. Supp. 717 (2d Dept. 1937).

⁶³ See note 6, *supra*.

⁶⁴ *Stone v. Stone*, 32 Conn. 142 (1864); *Lebanon v. Griffin*, 45 N. H. 558 (1864); *Edwards v. Davis*, 16 Johns. 281 (N. Y. 1819); *Rex v. Munden*, 1

has been construed liberally. It extends to grandchildren in enforcing support to grandparents.⁶⁵ This statutory liability cannot be waived or contracted away as such agreements are void as against public policy.⁶⁶ The statutes are merely giving recognition to a moral obligation that always existed but could never be enforced. Despite the moral obligation, no liability can be imposed upon the children to support their natural parents after they have been adopted by foster parents,⁶⁷ but, naturally, they must support the foster parents. Infant children can be forced to contribute to the support of their parents only if they have sufficient means.⁶⁸

In keeping with the broad rights and duties created by the statutes for relief of dependents, the power of enforcement is threefold in nature, arising in the courts,⁶⁹ the public authorities,⁷⁰ or the indigent persons. Both a civil and criminal liability is created where there is a failure to act. Abandonment by a person who has the burden of support is a misdemeanor,⁷¹ and it is not changed by collateral statutes

Strange 190, 93 Eng. Rep. 465 (K. B. 1780); SCHOULER, DOMESTIC RELATIONS (6th ed. 1921) 787 (stating that there was no common law liability by adult child to support parent). But statutes originating in England (43 ELIZ. c. 2 [1601]) and adopted in the United States have fixed a legal liability, 2 KENT'S COMM. *208. The Athenians compelled children to provide for their father if he was destitute, 2 PORTER'S ANTIQ. 347, 351. Formerly, where children failed to support their parents, the latter could disinherit them. *Ex parte* Hunt, 5 Cow. 284 (N. Y. 1826); Stone v. Burgers, 47 N. Y. 521 (1872); 2 KENT'S COMM. *208. At present the statutory liability exists in all but 11 states in the United States, Bradley v. Finn, 103 Conn. 1, 3, 130 Atl. 126, 127 (1925). Destitution is the basis of support by children, Beutel v. State, 36 Ohio App. 73, 172 N. E. 838 (1930); Note (1931) 16 ST. LOUIS L. REV. 334-335.

⁶⁵ N. Y. DOM. REL. COURT ACT § 101; 4 VERNIER, AMERICAN FAMILY LAWS (1936) 92 (stating there are 21 jurisdictions which make grandchildren liable for support of relatives).

⁶⁶ Kriss v. Kriss, 246 App. Div. 847, 285 N. Y. Supp. 58 (2d Dept. 1936); N. Y. PUBLIC WEL. LAW § 125; N. Y. CODE OF CRIM. PROC. § 914.

⁶⁷ Op. Atty. Gen. 482 (1933).

⁶⁸ N. Y. PUBLIC WEL. LAW § 125: "No liability for support shall be imposed upon a minor child or a grandchild * * * unless the Court * * * shall expressly find the money and property * * * are in excess of the reasonable requirements of such infant."

⁶⁹ By statute the Domestic Relations Court, consisting of the Children's Court and the Family Court, was created to treat with the special problems that arise in the family, which includes the duty of support.

⁷⁰ The public welfare authorities have been given wide authority to cope with the problem of support. They are supported by statutes which give effect to their work: N. Y. PUBLIC WEL. LAW § 126 empowers the public welfare official to sue to compel support; N. Y. DOM. REL. LAW § 122 provides the superintendent with an action for support by the mother. The municipality may sue to recover expenses incurred in supporting a person when there is a person liable or capable of supporting said person, People *ex rel.* Kilpatrick v. Crowley, 20 Misc. 160, 45 N. Y. Supp. 824, *aff'd*, 25 App. Div. 175, 49 N. Y. Supp. 214 (2d Dept. 1898); Hodson v. Grumlich, 156 Misc. 199, 280 N. Y. Supp. 249 (1935); Tolley v. Maliswaski, 159 Misc. 89, 287 N. Y. Supp. 245 (1936); N. Y. PUBLIC WEL. LAW § 126; N. Y. CODE OF CRIM. PROC. §§ 914, 915.

⁷¹ N. Y. PENAL LAW §§ 482, 840: "A person who wilfully omits * * * to perform a duty by law imposed upon him to furnish food, clothing, shelter * * * to a minor as may be required by order of the court is guilty of a misdemeanor."

fixing civil liability.⁷² Under the present Domestic Relations Court Act,⁷³ the order of civil liability is shown. This liability is enforced by sequestration of property, furnishing of security, jail sentence, or probation.⁷⁴ All these remedies must be guided by law of the domicile of the father,⁷⁵ as the father and husband still maintains the right to create the domicile of the family.

IV.

Conclusion.

A review of the decisions of the courts in the light of statutory regulation shows only one result. The duty of support is now placed upon relatives and not upon the public. The common law obligation was based mainly on a legal duty which at times was difficult to find. Its strictness inevitably had to be changed to fit into more modern concepts of social obligations. Public policy now determines the decisions of the courts in fixing liability for support of dependent relatives. All support legislation is representative of the present tendency to relieve the public of any obligation. The statutory regulations fixing the liability for the recipient of public relief are to protect the public from loss due to neglect of a moral or natural duty imposed, and does so by transforming that duty into a statutory and legal liability. The statutes providing for adoption,⁷⁶ for legitimatization of children with the resulting duty of support,⁷⁷ and the enforcement of a duty upon children to support less fortunate relatives⁷⁸ all result from a recognition of the social problem that existed under the common law. But the legislation does not cover completely all existing problems. Where the laws set aside the rule at common law, the courts, despite their liberal tendencies, still construe the new obligations strictly. The legislatures have sought to place liability in all possible situations that might arise, but where the statute does not apply, the common law is binding. The laws among the various states in the United States are not uniform, and this hampers freedom in enforcement. Each state is

People v. Joyce, 112 App. Div. 717, 98 N. Y. Supp. 863 (4th Dept. 1906), *aff'd*, 189 N. Y. 518, 81 N. E. 1171 (1906); People v. Lewis, 132 App. Div. 256, 116 N. Y. Supp. 893 (1st Dept. 1909).

⁷² People v. Rogers, 248 App. Div. 141, 288 N. Y. Supp. 900 (1st Dept. 1936); N. Y. PENAL LAW § 2500.

⁷³ See note 44, *supra*.

⁷⁴ N. Y. PUBLIC WEL. LAW § 127 allows for seizure of property or person liable for support. N. Y. DOM. REL. LAW § 129 provides that security may be required, or person liable for support may be put in jail or on probation.

⁷⁵ The domicile must be *bona fide*, Coldingham Parish Council v. Smith (1918), 2 K. B. 90. Husband's residence is domicile of the family, State v. Beslin, 19 Idaho 185, 112 Pac. 1053 (1911); Harris v. Harris, 83 App. Div. 123, 82 N. Y. Supp. 568 (2d Dept. 1903); Mallina v. Mallina, 167 Misc. 343, 4 N. Y. S. (2d) 27 (1938).

⁷⁶ N. Y. DOM. REL. LAW §§ 110 to 118.

⁷⁷ N. Y. DOM. REL. LAW §§ 119 to 139.

⁷⁸ N. Y. DOM. REL. COURT ACT §§ 101 to 103.

limited to its own jurisdiction. As the domicile of the father determines the law that controls, it is easy to see how inconsistencies in the law between the states work a hardship and prevent adequate enforcement and relief. With the liberalization of divorce laws, a problem of care of unwanted children arises which is not met completely. Nor has liability as yet been determined between brother and sister for support.⁷⁹ In commercial fields uniform law has met with evident success, and a uniform system of family laws should be advocated.⁸⁰ The tremendous advance in the recognition of the moral obligation for support of dependent relatives, and its present enforcement by the courts is an indication that the public will continue, wherever possible, to remedy the weaknesses that still exist.

ROBERT M. POST.

THE BASIS OF RECOVERY FOR LOSS OF CONSORTIUM.

The family ways of English speaking peoples have changed greatly since the day when a wife was regarded as nothing more than the chattel of her husband.¹ The law had always recognized a right in the man to the exclusive possession of his wife, and any interference with his right of property in her would enable him to sue out a writ of trespass. The wife, on the other hand, was not recognized as a legal entity for either of two reasons: (1) she had vested rights but could not enforce them because of the disabilities of coverture,² or (2) she had no rights at all because of her inferior position in the marriage relationship.³ Such procedural fiction served the courts until the passage of the Enabling Acts.⁴ Then the problems arose as

⁷⁹ *Lee v. Smith*, 161 Misc. 43, 291 N. Y. Supp. 47 (1936).

⁸⁰ Note (1908) 21 HARV. L. REV. 416, 510, 519, 583; Note (1911) 5 ILL. L. REV. 521-544.

¹ "The law of England and the United States on this topic (law of husband and wife), has undergone a remarkable change. * * * The old common law theory of marriage, that of unity of person and property in the husband, is so repugnant to modern ideas that it has been almost entirely swept away. * * *"
I SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS (6th ed. 1921) 5.

"Perhaps the characteristic of the twentieth century family that most sharply challenges the attention of the student of family history is its instability. It is a far cry from the closely knit, highly unified family organization of the ancient Romans or the Middle-Age Teutons to the more loosely organized household of modern time wherein each member tends to claim independence as an individual with a personality to be developed and respected." GOODSELL, A HISTORY OF THE FAMILY AS A SOCIAL AND EDUCATIONAL INSTITUTION (1930) 456.

² *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17 (1889).

³ 3 BL. COMM. *142, 143.

⁴ One example of such legislation is that of New York, N. Y. DOM. REL. LAW §§ 50, 51, 52, 53, 56, 57, 59, 60.