CRIMINAL LAW: Wife abandonment and failure to support may be charged separately or conjunctively.

June 26, 1941

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Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Mr. Marr:

Under date of June 20, 1941, you wrote this office requesting an opinion as follows:

> "The facts in this criminal case were, that the family of a man and wife and one child under two years lived in Cooper County and moved to Morgan County on Friday, and with the intention of making Morgan County, Mo the permanent home. The following Wednesday he packed up part of the provisions, the best of the furniture and all the money and the baby, and moved back to Cooper County. The wife was away picking berries. She is seven months pregnant. On her complaint I filed a charge setting up one offense, the offense of abandoning the wife, without good cause.
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> "It is my understanding that the charges are in the disjunctive; one for abandoning and one for refusal to support bot with a criminal intent and both done or refused to be done without good cause. This theory is found in Miller v. Gerk, 27 S. W. (2) 444.
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> "Therefore, I filed just the single charge, and expect to be able to sustain the same.

> "But the law seems to be confused and I am confused. Every time there is a charge of wife or child abandonment, there is also the charge in the information of the refusal to support, or the fact alleged that the wife has been left destitute.
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> "For instance in State v. Harrison, 17 S. W. (2) 935; l.c. 937, State v. Higbee, 110 S. W. (2) 789, and it seems from reading these cases that the failure to support, plus the present ability of the husband to support is also part of the single crime of abandonment.
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> "Do I have allege and prove in my information, failure to support along with the abandonment or do I have the right to catually separate the offenses, and stand on the single and sole charge of abandonment?"

As you know, for many years the statute on wife abandonment provided that, 'if any man shall, without cause abandon or desert his wife * * * * * and shall neglect or refuse * * * * *.' Under this statute it was necessary to charge and prove both abandonment or desertion and the failure to support. In 1921 the General Assembly, by House Bill No. 334, repealed that section and enacted a new section which contained the provision we have today relating to wife abandonment. This is Section 4420, Article IV, Chapter 31, R. S. Missouri, 1939, and is as follows:

> "If any man, shall, without good cause, abandon or desert his wife or shall fail, neglect or refuse to maintain and provide for such wife; or if any man or woman shall, without good cause, abandon or desert or shall, without good cause, fail, neglect or refuse to provide the

> necessary food, clothing or lodging for his or her child or children born in or out of wedlock, under the age of sixteen years, or if any other person having the legal care or custody of such minor child, shall without good cause, fail, refuse or neglect to provide the necessary food, clothing or lodging for such child, or if any man shall leave the state of Missouri and shall take up his abode in some other state, and shall leave his wife, child or children, in the state of Missouri, and shall, without just cause or excuse, fail, neglect or refuse to provide said wife, child or children, with proper food, clothing or shelter, then such person shall be deemed to have abandoned said wife, child or children, within the state of Missouri, he or she shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars ($1,000) or by both such fine and imprisonment. No other evidence shall be required to prove that such man was married to such wife than would be necessary to prove such fact in a civil action."

As it was necessary under the old act to charge and prove both the abandonment and failure to support, a great many pleaders still follow that method as it permits a greater latitude in the introduction of evidence.

In your letter you mentioned the cases of State v. Harrison, 17 S. W. (2d) 935 and State v. Higbee, 110 S. W. (2d) 789, as indicating that it might still be necessary to charge both the abandonment and failure to support. In the case of State v. Higbee, 110 S. W. (2d) 789, this question was not raised, and apparently, the case of State v.

Harrison is in another volume, for at page 935 of 17 S. W. (2d) is State ex rel. Gary Realty Company v. Hall.

In the case of State v. Thomas, 240 S. W. 857, decided by the Springfield Court of Appeals May 8, 1922, the question was raised which you ask in your letter. We quote at length from that case:

> "This information is assailed on the ground that it is multifarious; the claim being that two offenses -- abandonment and failure to support -- are charged in the same action. No motion to quash was filed, and no attack upon the information made before the trial and since the two charges, if they be considered as two separate offenses, are not repugnant to each other and entail the same punishment, the information must be held good after verdict. State v. Klein, 78 Mo. 627; State v. Harrison, 62 Mo. App. 112, 115.
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> "The information, however, is not open to the objection of being multifarious. The present statute (Acts of 1921, p. 281) makes it a misdemeanor for a man without good cause to abandon or desert his wife, or fail, neglect, or refuse to maintain and provide for her. It is contended that the abandonment without good cause constitutes one offense, and failure or refusal to support without good cause is another offense, and therefore the two cannot be joined in the same count. While the two acts of abandonment and failure to support are separate acts, and in one sense may be considered as separate offenses, yet they are both found in the same section of the statute, and both grow out of a man's disregard of his marital duty to his wife, and but

> one punishment is provided in the statute defining the offense, and since the disjunctive 'or,' instead of the conjunctive 'and,' is used in connecting the two acts, it is clear that the Legislature meant that either act denounced by the statute would subject the offender to the punishment therein provided, and there is nothing in the act to warrant a duplicate penalty if he should commit both acts. He cannot therefore be charged in separate counts and a separate punishment assessed for each act, which could be done if appellant's contention should be upheld. Criminal statutes are to be strictly construed in favor of the accused, and where different acts are prohibited by the same section of the statute and but one punishment provided, it is usually, if not universally, held that but one offense is defined, and while a party may be convicted on proof of the commission of one of the forbidden acts only, yet if he be proven to have committed all of them, he is still guilty of but one offense, and cannot have more than one penalty assessed against him. State v. Murphy, 47 Mo. 274; State v. McWilliams, 7 Mo. App. 99; State v. Young, 163 Mo. App. 88, 98, 146 S. W. 70; State v. Miller, 188 Mo. 370, 377, 87 S. W. 484; St. Louis v. Theatre Co., 202 Mo. 690, 698, 100 S. W. 627."

We fail to find where this case has been overruled or criticized, and from the above quotation you will observe that there are two offenses, that either may be charged, or both may charged in the same count without rendering the information or indictment subject to be quashed for duplicity.

To the same effect is the case of Miller v. Gerk, 27 S. W. (2d), 444, although, in this case, the matter under discussion was abandonment and failure to support children instead of the wife.

In the case of State v. Coffee, 35 S. W. (2d), 969, a case brought under Section 3596, R. S. Missouri, 1919, which was the statute prohibiting a person from laboring on Sunday, or permitting his servants to work. The information charged that the defendant labored and permitted his servants to work and was not held to be duplicity in the following language:

> "It is urged that the information charges two separate and distinct offenses in the same count, and should have been quashed for duplicity. The information is based on section 3596, R. S. Mo. 1919, which provides that 'every person who shall either labor himself, or compel or permit his apprentice or servant * * * to labor or perform any work other than the household offices of daily necessity, or other works of necessity or charity * * * on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding fifty dollars.' It is evident that the information follows the language of the statute. It charges the defendant with both laboring himself and permitting his servants to work on Sunday. It is well settled, as urged by defendant, that an information charging two separate and distinct offenses in one count is bad for duplicity. State v. Huffman, 136 Mo. 58, 37 S. W. 797; State v. Young, (Mo. App.) 215 S. W. 499. However, it is equally well settled that, where a statute enumerates

offenses in the alternative and provides one and the same punishment therefor, if such offenses are not repugnant, an information charging all of such offenses conjunctively in one count is not open to the objection of duplicity or multifariousness. State v. Spano, 320 Mo. 280, 6 S. W. (2d) 849; State v. Currier, 225 Mo. 642, 125 S. W. 461; State v. Young, 163 Mo. App. 88, 146, S. W. 70; State v. Pittman, 76 Mo. 56; State v. Jenkins (Mo. App.) 255 S. W. 338; State v. Thomas, 210 Mo. App. 493, 240 S. W. 857; State v. Boyd, 196 Mo. 52, 94 S. W. 536.

"In the case at bar, the information charges the two offenses conjunctively. It is apparent the offense of laboring and the offense of permitting one's servants to labor on Sunday are not repugnant, and a violation of either or both constitutes but one offense under the statute. The trial court limited the jury by its instruction to the charge of defendant permitting his servants to labor, which was proper, for the reason there was no evidence that defendant himself performed any labor on Sunday. In any event, we find no error in overruling the motion to quash."

CONCLUSION.

It is the conclusion of this Department that, under Section 4420, supra, wife abandonment and failure to support are two separate offenses and a conviction might be had by

charging either if the facts warranted. However, since there is only one punishment prescribed, it is permissible to charge both conjunctively in the same count, and the information or indictment would not be bad because of duplicity.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

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