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ILLEGITIMATE CHILD—PROSECUTION UNDER SECTION 13008, GENERAL CODE, MAY BE MAINTAINED FOR NON-SUPPORT WITHOUT IT FIRST BEING ADJUDGED THAT THE ACCUSED IS THE FATHER OF SUCH CHILD. IN A PROSECUTION UNDER SECTION 13008, GENERAL CODE.

SYLLABUS:

1. *A prosecution may be maintained under Section 13008, General Code, for non-support of an illegitimate child without it first being adjudged that the accused is the father of such child.*

2. *In a prosecution under Section 13008, General Code, paternity is a material averment which must be proved beyond a reasonable doubt in order to authorize a verdict of guilty, and an accused may interpose, among other defenses, that he is not the father as alleged in the indictment.*

COLUMBUS, OHIO, June 2, 1927.

HON. G. C. SHEFFLER, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent inquiry which reads as follows:

“The writer has a case wherein a young man was arrested on a bastardy charge under Section 12114, General Code, in the Juvenile Court.

After his arrest, and before the birth of the child, this matter was taken before the Juvenile Court and compromised, and satisfaction made as to all the claims the mother individually had against him, although at that time the accused refused to state whether or not he was the father of the child; yet a compromise was made as to the mother, but not the child.

The mother was then taken to the Florence Crittenden Home, at Toledo, Ohio, and remained in the home until after the birth of the child.

What I desire to know is: Can this young man now be indicted under Section 13008 for the support and maintenance of this illegitimate child, before he has been proven the reputed father?

Or can I indict, and then if he stands trial before a petit jury, have I the right to produce evidence to show that he is the father of the baby? In other words, what is the procedure under the conditions as I have stated herein?

This new Section 12114 does not provide for a bond, and none was given as to the support of said child.

Kindly answer immediately as I wish to present this case to our grand jury at its next session.”

The sections of the General Code pertinent to your inquiry are Sections 12114 and 13008 which read as follows:

“Sec. 12114. If, during the examination before the justice or judge, or before judgment in the court of common pleas, or juvenile court, the accused pays or secures to be paid to the complainant such amount of money or property as she agrees to receive in full satisfaction of all claims she may have individually against said accused arising out of said complaint, such justice, court, or judge, shall discharge him from custody, upon his paying the costs of prosecution. Such agreement must be made or acknowledged by both parties in the presence of the justice, court, or judge, who thereupon

shall enter a memorandum thereof on his docket or cause it to be made upon his journal. Provided, however, that nothing in this section shall be construed as a bar to the prosecution of the accused for failure to support his illegitimate child or children under the provisions of any statute providing for prosecution and punishment for the non-support of legitimate or illegitimate children."

"Sec. 13008. Whoever, being the father, or when charged by law with the maintenance thereof, the mother, of a legitimate or illegitimate child under sixteen years of age, or the husband of a pregnant woman, living in this state, fails, neglects or refuses to provide such child or such woman with the necessary or proper home, care, food and clothing, shall be imprisoned in a jail or workhouse at hard labor not less than six months nor more than one year, or in the penitentiary not less than one year nor more than three years."

The purpose of Section 12114, supra, and the sections in *pari materia* is well stated by Judge Washburn in the case of *Cowley vs. State*, No. 356, decided by the Court of Appeals of the ninth district on May 8, 1926, and reported in 5 Ohio Law Abstract, 24:

"From a consideration of 12126 and 12127 G. C. which were repealed and 12134 and 12114 G. C. before they were and as they have been amended, the matter of maintenance of an illegitimate child was eliminated entirely from the bastardy act, and a proceeding under the act as it now is, is for the sole benefit of the mother of the child or her estate, the purposes of the proceedings under the present bastardy act being to compensate the mother or her estate for her necessary support, maintenance and expenses during pregnancy and child birth."

That such was the intent of the legislature is clearly manifested by the concluding sentence of Section 12114, supra, to wit:

"Provided, however, that *nothing in this section shall be construed as a bar to the prosecution of the accused for failure to support his illegitimate child or children under the provisions of any statute providing for prosecution and punishment for the nonsupport of legitimate or illegitimate children.*"

Since the act of April 5, 1923 (110 O. L. 296), amending Section 12114, supra, a bastardy proceeding and compromise thereon is no longer a bar to the prosecution under Section 13008, supra, of an accused, for failure to support his illegitimate child or children.

It is not essential to the finding of a "true bill" against an accused that evidence be presented to the grand jury that such accused, in a bastardy proceeding, was adjudged to be the father of the child in question. Even if the accused were adjudged to be the father of the child in a bastardy proceeding the record of such proceeding would not be admissible in evidence upon the trial. To this effect see *Gee vs. State*, 60 O. S. 485, the syllabus of which reads:

"On the trial of the issues joined by a plea of not guilty to an information or an indictment charging the defendant with willfully and negligently failing to support his illegitimate child the record of a bastardy proceedings instituted by the mother of the child in which the defendant was adjudged to be its reputed father is not admissible in evidence."

On page 486, the court said:

"The record offered is not competent under the general rule that in a criminal proceeding the record of a civil action cannot be introduced to establish the facts on which it was rendered. The judgments offered followed verdicts which might have been lawfully returned upon a mere preponderance of evidence. A higher degree of evidence was required to convict under the indictment and the information."

Nor need an indictment under Section 13008, *supra*, allege that in a previous proceeding under the bastardy act the defendant had been or had not been adjudged to be the reputed father of such child. See the case of *Ogg vs. State*, 73 O. S. 59, the syllabus of which reads:

"An indictment under Section 3140-2, Revised Statutes, for failure to provide for an illegitimate child under sixteen years of age need not allege that in a previous proceeding under the bastardy act the defendant had been adjudged to be the reputed father of such child, nor is evidence of such former adjudication necessary to a valid conviction."

Although this case refers to an earlier form of Section 13008, *supra*, the same rule is applicable to such section in its present form.

It must be remembered that upon the trial of an indictment charging a violation of section 13008, *supra*, the paternity of the child in question is an essential element of the crime therein denounced and must be established beyond a reasonable doubt in order to authorize a verdict of guilty. The defendant can interpose, among other defenses, that he is *not* the father of the child. The burden is upon the prosecution to introduce evidence that will prove beyond a reasonable doubt that the defendant is the father of the child in question, the same as it must prove all other material elements of the offense charged in any criminal prosecution.

Summarizing and answering your question specifically, it is my opinion that a prosecution may be maintained under section 13008, General Code, for non-support of an illegitimate child without it first being adjudged that accused is the father of such child. Paternity is a material element of the crime denounced in said section and in order to authorize a verdict of guilty, it must be proved beyond a reasonable doubt that accused *is* the father of such child. The defendant as one of his defenses may show that he is not the father as alleged in the indictment.

Respectfully,

EDWARD C. TURNER,
Attorney General.

554.

MUNICIPAL COUNCIL—AUTHORITY TO PROTECT WATER SUPPLY
WHEN SOURCE OF SUCH SUPPLY IS LOCATED OUTSIDE OF COR-
PORATE LIMITS OF MUNICIPALITY.

SYLLABUS:

1. *Where the water supply of a municipality is obtained from wells, the water works plant being located outside the territorial limits of such municipality, the council of such municipality cannot under the provisions of section 3619, General Code, by ordinance, protect such water supply from possible contamination resulting from the use of adjacent property by the owners thereof.*