

# St. John's Law Review

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Volume 20  
Number 1 *Volume 20, November 1945, Number*  
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Article 9

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July 2013

## Contracts--Recovery Under Illegal Contract--Parties Not in Pari Delicto (Liebman v. Rosenthal, 185 Misc. 837 (1945))

St. John's Law Review

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CONTRACTS — RECOVERY UNDER ILLEGAL CONTRACT — PARTIES NOT IN PARI DELICTO.—The complaint alleged that the plaintiff and his family, who resided in Paris, France, desired to get to Portugal to escape the oncoming German armies. On the defendant's false representation that he would be able to secure the necessary visa from the Portuguese Consul, the plaintiff gave the defendant jewelry valued at \$28,000. The defendant thereupon absconded, making no effort to secure the visa. At the trial the defendant moved for summary judgment under Rules 113 and 114 of the Rules of Civil Practice on the ground that the agreement under which this action was brought was illegal because it contemplated bribery. *Held*, that since the plaintiff's actions were motivated by the desire to save the lives of his family and himself from the Hitlerian army, he was not in *pari delicto* with the defendant. Motion denied. *Liebman v. Rosenthal*, 185 Misc. 837, 57 N. Y. S. (2d) 875 (1945).

The instant case is an unusual application of the doctrine of public policy permitting recovery of payments under an illegal contract. Ordinarily courts will not entertain any action based on such an obligation.<sup>1</sup> This rule applies generally in an action for restitution of money paid pursuant to the terms of an executed agreement,<sup>2</sup> as well as for enforcement of payment under a wholly executory contract.<sup>3</sup> In the former situation the courts have uniformly held that where the parties are not in *pari delicto* the plaintiff would be entitled to recover his payment under an executed contract.<sup>4</sup> In the latter one the defendant is prevented from performing his obligation by a rule of law—thus having a defense of impossibility as well as illegality. Accordingly, regardless of whether the parties are equally guilty, courts have unanimously refused to entertain such an action unless the public welfare is involved.<sup>5</sup>

The court arrived at its decision on the ground that the parties are not equal in guilt. Our courts in many cases have not been averse to granting recovery on a partially executed contract for this reason.<sup>6</sup>

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<sup>1</sup> "The law will not sanction dishonest practices by enabling an individual to acquire, by means of his own wrongdoing, a legal right, or a cause of action. Where parties are equally guilty of illegal practices, the law will leave them where it finds them, and refuse its aid to either to recover from the other at the price of his rascality." *Sheridan v. Weber*, 252 App. Div. 398, 403, 299 N. Y. Supp. 726, 732 (4th Dep't 1937).

<sup>2</sup> *Andrews v. Empire City Racing Ass'n*, 170 Misc. 338, 9 N. Y. S. (2d) 987 (1939).

<sup>3</sup> *Di Tomasso v. Loverro*, 250 App. Div. 206, 293 N. Y. Supp. 912 (2d Dep't 1937), *aff'd* 276 N. Y. 551, 12 N. E. (2d) 570 (1937).

<sup>4</sup> 6 WILLISTON, CONTRACTS (rev. ed. 1938) § 1789.

<sup>5</sup> *Id.* § 1762.

<sup>6</sup> *Duval v. Wellman*, 124 N. Y. 156, 26 N. E. 343 (1891); *Tracy v. Talmage*, 14 N. Y. 162 (1856); *Furman v. Furman*, 178 Misc. 582, 34 N. Y. S. (2d) 699 (1941), *aff'd* 262 App. Div. 512, 30 N. Y. S. (2d) 516 (1941), *aff'd* 287 N. Y. 772, 40 N. E. (2d) 643 (1942).

The present action is for a deception arising out of an illegal transaction as distinguished from the normal case involving illegality, where the suit is brought in contract rather than in tort. While there is little choice between one who provides the bribe money and one who makes the actual payment, because of the various disclosures which have aroused public sympathy for the oppressed of Europe, the court felt that it would be difficult to deny to one of them any protection it might give.

While in a technical legalistic sense, it would seem that the decision may be questioned, one of the goals of our courts is to administer practical justice. On this basis the soundness of the decision cannot be questioned.

Z. W.

DOMESTIC RELATIONS—PETITION FOR SUPPORT.—A proceeding in the form of a petition for support was brought by a wife against her husband under subdivision 4 of Section 137 of the Domestic Relations Court Act of the City of New York.<sup>1</sup>

The parties were married in January, 1944 and lived together until August, 1944, when the plaintiff, wife, left the defendant. Shortly thereafter the wife brought an action for separation on the grounds of cruel and inhuman treatment and failure to provide. That action terminated in a judgment for the husband on the merits, and no alimony was granted to the wife.<sup>2</sup>

A few days after the rendition of the judgment in the separation action, the wife filed this petition alleging that she "is without funds, dependent upon respondent for support, and is likely to become a public charge."

The facts showed that while petitioner's age, physical condition and work inexperience made doubtful her obtaining gainful employment, her adult children of a previous marriage were adequately able to provide for her. The court was also convinced that the petitioner still had actual control of jewelry, donated by respondent, worth at least \$800.00. Moreover, the husband still was genuinely willing and able to support the wife in the joint home. *Held*, petition dismissed, the wife is not a petitioner "likely to become a public charge" within the contemplation of Section 137 of Domestic Relations Court Act.<sup>3</sup> *Salvatore v. Salvatore*, 185 Misc. 309, 57 N. Y. S. (2d) 564 (1945).

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<sup>1</sup> N. Y. DOM. REL. CT. ACT § 137, subd. 4: "After final adjudication by the supreme court denying alimony in a separation action, if in the opinion of the family court the circumstances of the parties have changed, or if it is shown to the satisfaction of the family court that the petitioner is likely to become a public charge, the family court may entertain a petition for support."

<sup>2</sup> *Salierno v. Salierno*, — Misc. —, 57 N. Y. S. (2d) 563 (1945).

<sup>3</sup> N. Y. DOM. REL. CT. ACT § 137, subd. 4, cited *supra* note 1.