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Domestic Relations--Petition for Support (Salvatore v. Salvatore, 185 Misc. 309 (1945))

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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.¹

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.²

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.³ *Salvatore v. Salvatore*, 185 Misc. 309, 57 N. Y. S. (2d) 564 (1945).

¹ 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."

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

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

There is no doubt that this petition could have been dismissed on the sole ground of failure of proof that petitioner is so destitute at this time as to require public assistance outside of respondent's home. The court, however, decided the petition on the broader ground that a wife whose husband is ready to support her in the joint home is not entitled to a support order under the Domestic Relations Court Act.

In *Gilguin v. Gilguin*⁴ Justice Hill traced the gradual enlargement of the statutory support obligations of husbands, culminating in the creation, by Section 137 of the Domestic Relations Court Act, of a duty unknown to the common law to support a wife likely to become a public charge even though the husband has been awarded a judgment of separation without alimony. The principle underlying the statute is that, regardless of a wife's fault, as between the community and the husband, the burden of support falls primarily on the husband. It has now become the settled practice to enter support orders against husbands in proper cases.⁵

However, the feature of this case that distinguishes it from other cases decided under the statute is that even now the respondent is willing and able to provide for the petitioner in the marital home. The judgment of the Supreme Court in the separation action that petitioner is not justified in refusing to live with respondent becomes the law in this case.⁶

Looking at this case in its entirety we have a situation of a husband still ready and willing to support the wife in the marital home, and the wife, not destitute, unjustifiably refusing to live with her husband, and at the same time seeking a support order.

Justice Sicher, in dismissing the petition, concluded: "Surely, Domestic Relations Court Act, Section 137, Subdivision 4, is not to be so construed as to permit a wife to leave the home under circumstances not entitling her to a judgment of separation and then to vouchsafe her, by indirection, separate maintenance through the device of a 'hunger strike' application to the Department of Welfare of the City of New York and an aiding petition under Domestic Relations Court Act, Section 137, Subdivision 4. Sound policy forbids such an interpretation."

W. J. DEZ.

⁴ *Gilguin v. Gilguin*, May 2, 1935, N. Y. L. J., p. 2249 (not reported elsewhere).

⁵ *Anonymous v. Anonymous*, — Misc. —, 20 N. Y. S. (2d) 514 (1940); *Matter of Aronowitz v. Aronowitz*, 159 Misc. 103, 287 N. Y. Supp. 130 (1936).

⁶ *Matter of Chandler v. Chandler*, 241 App. Div. 390, 272 N. Y. Supp. 306 (1st Dep't 1934).