

✓ A-98 RS No 1939

September 12, 1933



Hon. Lampton Berry,
122 East 22nd Street,
New York, New York

Dear Sir:

This department acknowledges receipt of your letter requesting opinion upon the following question, to-wit:

"Mr. A. comes to the United States from Italy and settled in your state. He leaves his family, consisting of a wife and three minor children, in Italy. After coming to the United States Mr. A. refuses absolutely to send maintenance to his family. Would it be possible for the wife, through power of attorney, to bring an action for a maintenance order in the proper court in your state even though she is physically a resident in Italy? If your answer is in the negative, will you kindly refer me to the Statute or Court decision upon which you base your opinion?"

Section 698 Revised Statute 1929 reads as follows:

"Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the next succeeding section; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract."

Now in view of the expressed provision in the foregoing statute, a suit for maintenance by A's wife could not

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be maintained in the name of an attorney-in-fact, or agent. If this right existed under the common law it has been abrogated by express statute.

Vol. 2 C. J., Page 1070, Paragraph 37, reads as follows:

"It may be laid down, as a general rule, that aliens, except alien enemies, who are sui juris, and not otherwise specifically disabled by the law of the place where the suit is brought, may maintain suits in the proper courts to vindicate their rights and redress their wrongs. This right is not affected by the fact that a similar remedy is not afforded to aliens in the country to which plaintiff belongs."

21 Cyc., Page 1603, Paragraph C. reads as follows:

"The inherent right claimed by many courts of equity to grant separate maintenance, and the right as conferred by statute have been considered in preceeding sections. Generally, to give jurisdiction, at least one of the parties must be a bona fide resident of the state in which the suit is brought."

In Tolman v. Tolman, 1 App. Cas.(D. C.) 299, the court said:

"It is not necessary that a wife be a resident of the state in order to maintain a bill against the husband for alimony, where the husband is a resident."

Also the same doctrine is announced in Shrader v. Shrader, 36 Fla. 502.

In our state we have no statute which precludes an alien, except an enemy alien, from maintaining suits in the proper courts to vindicate his rights and redress his wrongs.

In view of the rule, as announced in other jurisdictions

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we therefore conclude that a suit for separate maintenance could be maintained by the wife, even though an alien and physically a resident of a foreign country, in the proper court, with cost secured, in her own name.

We regret that you have been delayed in receiving this opinion, but your request came at one of our busiest seasons, by reason of the preparation necessary in briefing cases coming up for hearing in the September term of our Supreme Court.

Yours very truly,

W. W. Barnes
Assistant Attorney General.

APPROVED

Attorney General.