1 Phil. 404

[G.R. No. 996. October 13, 1902]

LUIS R. YANGCO, PETITIONER, VS. WILLIAM J. ROHDE, JUDGE OF THE COURT OF FIRST INSTANCE OF MANILA, RESPONDENT.

D E C I S I O N

ARRELANO, C.J.:

The petitioner, Luis R. Yangco, filed in this court a petition for a writ of prohibition, alleging that before Judge William J. Rohde, of the Court of First Instance of the city of Manila, a complaint had been filed by Victorina Obin against the petitioner praying that she be declared the lawful wife of the said Yangco, and that she be granted a divorce, an allowance for alimony, and attorney's fees during the pendency of the suit; that the demurrer filed by the petitioner was overruled by the said judge, said ruling being in part as follows: "I am of the opinion that the marriage alleged in the complaint is valid under the laws in force, although the question is not clear nor without doubt. The facts alleged in the complaint compel me to resolve the doubt in favor of the plaintiff;" and that the petitioner, in answer to the complaint, denied the principal allegation of fact therein, to wit, the mutual agreement to be husband and wife alleged by the plaintiff to have been entered into before witnesses; that while the case was in this condition the plaintiff filed, a motion for a monthly allowance as alimony, costs, and attorney's fees; that on the 22d of July last the said judge ordered the petitioner to pay the plaintiff, in advance, a monthly allowance of 250 Mexican pesos from and after the 11th of March last past, and to pay on ttfe 1st day of August following all accrued allowances, in addition to the allowance for the said month, amounting io the sum of 1,500 pesos; that the plaintiff in the said action owns no property, and the judge not having required from her any security, it is certain that the petitioner, defendant in the said action below, should judgment be rendered in his favor, would be unable to recover such sums as the judge might compel him to disburse; that against the ruling of the court he has no right of appeal or any plain, speedy, or adequate remedy; therefore he prays the court to render judgment declaring the Hon. William J. Rohde, judge of the Court of

First Instance of Manila, has acted in excess of his jurisdiction in attempting to oblige petitioner to pay to the said Victorina Obin the said allowance, and to direct that a writ of prohibition issue to the said William J. Rohde prohibiting him from attempting to compel petitioner to pay the said amount.

Against this petition the attorney for the respondent, William J, Rohde, filed a demurrer and motion to dismiss upon the following grounds: (1) That this court is without jurisdiction over the subject-matter of the action; (2) that the petition does not state facts sufficient to constitute a cause of action. It is to be observed that in the oral argument and brief filed no denial was made, but on the contrary the fact alleged by the petitioner was affirmed in that the ruling on the demurrer in the Court of First Instance the respondent had expressed his opinion that "the question (as to the alleged marriage) is not clear nor free from doubt."

"Nevertheless," he says, "this being so, the said Victorina Obin acquired a right to all conjugal rights, and in particular to the allowance of alimony *pendente lite*." And upon this supposition he cited articles of the Civil Code as to rights enjoyed by a married woman by virtue of the marriage, and those which she may further exercise by reason of divorce pending litigation and those granted to her finally in case of a favorable judgment.

The entire theory developed by the demurrer now before us may be expressed in the following terms: The respondent judge had jurisdiction to try the divorce case and its incidents, among others that of alimony; in an interlocutory ruling he held that the alleged matrimony existed, although it appeared to him to be a matter not clear or free from doubt; in another interlocutory order, notwithstanding the fact that the existence of the marriage is not clear or free from doubt, he directed an allowance of alimony *pendente lite* in favor of the plaintiff; against this interlocutory order no appeal lies on behalf of the alleged husband who is to pay this allowance; this alleged husband must pay it without any guaranty of recovery in the event that the proof should establish a contrary condition of affairs to that assumed to be correct, notwithstanding the fact that the question is not clear or free from doubt; and as the judge is not devoid of jurisdiction, and as no appeal lies against an interlocutory order, that such an opinion, such an interlocutory order so rendered, although erroneous and causing irreparable damage, can not be reviewed by any other court during the course of the trial.

Such a theory was not possible in these Islands under its former Law of Civil Procedure, nor is it possible now under the present Code of Civil Procedure. Under article 1591 of the old Code any person believing himself entitled to that provisional alimony or support was

required to file with the complaint documents proving conclusively the title by virtue of which the same was sued for. If the title was based upon a right created by law, it was necessary to present the documents establishing the bond of relationship between the plaintiff and defendant or the circumstances which gave a right to the alimony, such evidence to be completed by the testimonyof witnesses if necessary. The judge, under article 1592, could not admit the complaint unless the documents referred to in the preceding article were submitted. It is evident from this that under the provisions of the law then in force a suit for alimony could not prosper upon the mere opinion of the judge expressed, not in a final judgment causing status, but in an interlocutory order which has no other purpose than to facilitate the continuance of the trial. This, apart from the fact that under the former procedural law every interlocutory order not merely of practice was appealable, and consequently the case of one finding himself prejudiced by an order capable of causing him irreparable damage, such as that of paying an allowance without security or possibility of recovery, could never arise under that system of legislation.

The necessity of founding the action for support or alimony on a title, and a title supported by documentary evidence, is a consequence of the precepts of article 143 of the Civil Code cited by the respondent judge himself. In this article the right to support is granted (1) to spouses *inter se*; (2) to legitimate descendants and ascendants *inter se;* (3) to parents and certain legitimated and acknowledged natural children; (4) to other illegitimate children, and (5) to brothers and sisters. In all these cases it is a civil status or a juridical relation which is the basis of the action for support—the civil static of marriage or that of relationship.

In the present case the action for the support or alimony is brought by a woman who alleges that she is a wife; therefore it is necessary for her to prove possession of the civil status of a spouse—that is, a marriage, without which one has no right to the title of husband or wife. Marriages celebrated before the adoption of the Civil Code must be proven by the means established by the former laws (art. 53). "Marriages celebrated before the operation of the Code," says Q. Mucius Scaevola "must be proven by the canonical certificate." (Vol. 2,'p. 137.) "Before the Council of Trent," says Manresa, "no absolute provision of law required the parish priests to make entries in their books with regard to the birth, marriage, or death of their parishioners * * *. The council required the parish priests to open books in which to record baptisms, marriages, and deaths * * * The State, the attention of which was called for the first time to the importance of the records established by the provisions of the council, gave evidence of its interest by issuing the royal order of March 21, 1749, according to which the prelates of the Kingdom were directed to require the evidence referred to to be

kept exclusively in the churches." (Commentaries, vol. 1, p. 262.)

This evidence being lacking, and the civil status of marriage being in litigation, it is evident that nothing can be taken for granted upon the point in issue. There is no law or reason which authorizes the granting of alimony to a person who claims to be a spouse in the same manner as to a person who conclusively establishes by legal proof that he or she is such spouse, and sues for divorce or separation. In this case the legal evidence raises a presumption of law; in the former there is no presumption, there is nothing but a mere allegation—a fact in issue—and a simple fact in issue must not be confounded with an established right recognized by a final judgment or based upon a legal presumption. The civil status of marriage being denied, and this civil status, from which the right to support is derived, being in issue, it is difficult to see how any effect can be given to such a claim until an authoritative declaration has been made as to the existence of the cause. It is evident that there is of necessity a substantial difference between the capacity of a person after the rendition of a final judgment in which that person is decHred to be in possession of the status of marriage and his capacity prior to such time when nothing exists other than his suit or claim to be declared in possession of such status of marriage. Any other view would render useless all the legal effects which flow from the authority of *res ndjudicata*.

Nor can such a theory be sustained under the Code of Civil Procedure now in force. It is true that an interlocutory order such as that rendered by the respondent judge in the present case is not appealable during the course of the trial, but only after a final judgment ha« been rendered therein; but it is none the less true that it can not be the intention of the law, when prohibiting an appeal against interlocutory orders, to give executory force to all kinds of interlocutory orders which the judge may see fit to make in the course of a trial, and still less when the effect would be to cause irreparable damage, such as that alleged by the petitioner in the present case, by reason of the insolvency of the person in whose favor the granting of alimony has been ordered, and which allegation has not been objected to or denied by the respondent. It is indeed a wise rule of procedure which refuses to perjnit the interruption of a trial by means of incidental appeals, but, if the judge incidentally in the course of a trial proceeds without or in excess of his jurisdiction, this rule which prohibits an appeal does not leave the party aggrieved without remedy. The same Code of Civil Procedure establishes several means by which such excess may be prevented.

In this case the remedy of prohibition is invoked. (Art. 516 in relation with 226.) This remedy must be based upon a lack of jurisdiction or an excess in the exercise of jurisdiction in order that the judge may be prohibited from continuing the proceedings. This remedy

having been established by the Code of Civil Procedure now in force, it is not allowable to apply the theories and principles concerning the lack of jurisdiction or an excess in its exercise wThich prevailed in the law of these Islands prior to the promulgation of that Code. We must of necessity apply the theories and principles which prevail in the law which has established the remedy, or the authorities which, in the American law, establish the doctrine upon the subject, and more especially the views prevailing in the State of California, whose Code of Procedure is strictly in accord with the Code in these Islands as to the remedy in question, with respect to which it may be said that the California Code is its true legal precedent.

To this end and as an illustration of the case as to the propriety of the remedy by prohibition, we may cite a decision of the supreme court of California of July 9, 1890. (Havemeyer & Co., petitioners, vs. the Superior Court, Judge Wallace, respondent.)

This was a case of *quo warranto* brought by the attorney-general of the State against a California corporation, the American Sugar Refinery Company, for the cancellation of its charter, and in which case judgment was rendered on the 8th of January, 1890; an incident having arisen as to the appointment of a receiver to take charge of the property of the company pending the taking of an appeal or to proceed to distribute the same according to law in case an appeal should not be taken, inasmuch as the corporation had been dissolved and its corporate rights forfeited, the judge made an order appointing a receiver. The receiver attempted to take possession of the sugar refinery, which he found in the possession of Messrs. Havemeyer & Co., who claimed to have purchased it in the month of March, 1889, and asserted that since that time they had been in full and complete possession as absolute owners in their own exclusive right. After several other incidental proceedings the judge made an order directing the sheriff to put the receiver in possession of the *locus in quo*. Havemeyer & Co. then applied to the supreme court for a writ of prohibition, which was issued. “The question now remains, says the court in its decision, “whether the superior court had jurisdiction to make an order appointing the receiver and ordering him to take from the possession of the petitioners certain property, the petitioners not having been a party to the *quo warranto* proceedings and alleging a right of their own to the said property.”

In disposing of this question the court holds that the judge was without jurisdiction to make this order, and continues: “We now come to the question as to the remedy. Prohibition arrests the proceedings of an inferior judicial tribunal or officer when such proceedings are without or in excess of the jurisdiction of such tribunal or officer, and the writ issues in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of the

law. We have shown that the superior court in appointing a receiver exceeded its jurisdiction, and there is no question that the petitioners are seriously injured by the enforcement of the order. If then they have no plain, speedy, and adequate remedy in the ordinary course of law, they are clearly entitled to the benefit of the writ of prohibition to arrest the proceedings under the void order." The court, to fortify its decision, takes up and discusses various objections, such as the following: (1) That the petitioners might have bowed to the authority of the receiver, giving him possession, and then obtained leave from the court to sue him in ejectment; (2) that the order appointing the receiver was appealable, and that, therefore, the remedy for prohibition would not lie; (3) that before availing themselves of this remedy petitioners should show that an objection to the order in question had been overruled. With respect to the first point the court says: "It is true petitioners might have done this, but the remedy would have been neither speedy nor adequate. They had the right not merely to get their property back after a long and expensive litigation—they had a right to keep it. The wrong with which they were threatened when they applied for the writ and when the writ issued was the deprivation of the possession and the use of their property. To give the property up in the hope of being allowed by the superior court to sue for it and to recover it after years of litigation was neither an adequate nor speedy remedy. It would be as reasonable to say that an injunction should never issue to restrain a threatened injury because the injured party may always have his action for damages." As to the second point the court states: "There must not only be a right of appeal but the appeal must furnish an adequate remedy in order to prevent the issuance of the writ. A number of cases have been decided in this court in which writs of prohibition have been refused because there was a right of appeal, but in all of those cases the appeal alforded a complete and adequate remedy for the threatened excess of jurisdiction."

With respect to the third point the court says that "the following propositions applicable to the case are fully supported by the decision in the case of the Mayor of London vs. Cox, L. R., H. L., 278-280: (1) If a want of jurisdiction is apparent on the face of the proceedings in the lower court, no plea or preliminary objection is necessary before suing out the writ of prohibition. (2) If the proceeding in the lower court is not on its face without the jurisdiction of such court, but is so in fact by reason of the existence of some matter not disclosed, such matter ought to be averred in some proper form in order to make the want of jurisdiction appear. (3) But this is not essential to the jurisdiction of the superior court to grant prohibition. It is only laches which may or may not be excused, according to circumstances.

"Accordingly, we find that frequently a failure to plead in the lower court was

> excused for the reason that it appeared that the plea would have been rejected if made."

By judgment of the 12th of December, 1891, the same supreme court in a similar proceeding against the superior court of San Francisco, Judge Wallace used the following language:

"Prohibition lies in all cases where there have been proceedings 'without or in excess' of jurisdiction, and there 'is not a plain, speedy, and adequate remedy in the ordinary course of law.' Jurisdiction is usually defined as 'the power to hear and determine;' but, of course, it is difficult to express in abstract terms a statement of the distinction between error in exercising jurisdiction and jurisdiction itself that can be readily applied to all cases as they may arise. The law endeavors to fix definitely everything that can in its nature be so fixed, so as to leave as little as possible to the judgment or caprice of those who administer it. But as many future events can not, in the nature of things, be foreseen and provided for, it follows necessarily that much must be left to the discretion of courts and other tribunals."
This doctrine was applied to the procedure of the judge who had taken action upon a void information presented by a grand jury which by reason of its defective organization was not regarded as a legally existing body, and the court decided "that the jury not being a legal body and the so-called indictment being void, the court below was without jurisdiction to try the accused upon such an indictment, hence the attempted action of the court was without and in excess of its jurisdiction." As to whether the petitioner had any other prompt, speedy, and adequate remedy in the ordinary course of law, the court said:

> "If there be such remedy, it must be by appeal. But it would be a difficult proposition to maintain that a defendant in a criminal case, forced through all the stages of a trial for felony without any indictment against him, or, which is the same thing in effect, upon a void indictment, would have a plain, speedy, and adequate remedy, because, after conviction and judgment, and perhaps after suffering the ignominy of imprisonment in the state prison, he could have the illegal proceeding reversed on appeal. * * * We are of opinion, therefore, that there is no jurisdiction in the respondent to proceed with the trial of petitioner; that the latter has no 'plain, speedy, and adequate remedy in the ordinary course of law, and that prohibition is the proper remedy."

Mr. Justice Garmette added:

> "The case of Quimbo Appo *vs.* People, 20 N. Y., 542, received an exhaustive consideration from the court of that State, and, after referring to many authorities upon the question as to when the writ of prohibition should issue, it said: 'These cases prove that the writ lies to prevent the exercise of any unauthorized power in a cause or proceeding of which the subordinate tribunal has jurisdiction, no less than when the entire cause is without the jurisdiction.' And again : 'This shows that the writ was never governed by any narrow, technical rules, but was resorted to as a convenient mode of exercising a wholesome control over inferior tribunals. The scope of this remedy ought not, I think, to be abridged, as it is far better to prevent the exercise of unauthorized power than to be driven to the necessity of correcting the error after it is committed.' "

In its decision of December 8, 1890, the same supreme court in a proceeding similar to that now before us, instituted, by J. M. McDowell against Aaron Bell, judge of the superior court of Shasta County, upon the ground that this judge in an incidental proceeding similar to that which now occupies our attention directed that certain property claimed by a third person be subjected to the satisfaction of a judgment rendered against the grantee, held as follows:

> "In this the respondent exceeded his jurisdiction and the jurisdiction of his court. His only power in the premises was to make an order authorizing the judgment creditor to institute an action in the proper court against the parties claiming the property for the recovery of the property and the subjection of the same to the satisfaction of the debt, and forbidding a transfer of the property until such action could be commenced and prosecuted to judgment."

This indicates what is meant by an act without or in excess of jurisdiction in accordance with the .principles upon which article 226 of the present Code of Civil Procedure is based.

The court below had jurisdiction to try the divorce suit, but he was without jurisdiction to grant alimony when the right to claim alimony had not accrued in accordance with the provisions of the Civil Code. This Code only grants the right to alimony to a *wife*. This status not appearing by a final judgment, the court is without jurisdiction to make any order in the

matter. Therefore mandamus is the proper remedy upon the facts related.

It is not necessary to decide at this time if an exception could be made with respect to a case in which the fact of the marriage is admitted of record by the defendant. In the case before us this fact was denied. The motion and demurrer are overruled and the defendant is authorized to answer the complaint within twenty days from this date.

Torres, Willard, and *Ladd, JJ.,* concur.

Smith and *Mapa, JJ.,* did not sit in this case.

DISSENTING

COOPER, J.:

The petition for the writ of prohibition presents a case in which the Court of First Instance of Manila in an action for divorce has, by an interlocutory order upon application of the alleged wife after a hearing had thereon, granted the alleged wife, the plaintiff in the suit, alimony *pendente lite.* The defendant bases his application for a writ of prohibition, staying and annulling the order granting the alimony, on the grounds that the Court of First Instance in granting alimony *pendente lite* has acted in excess of its jurisdiction; that the alleged wife, the plaintiff in the divorce suit, has no resources whatever, and that the judge not having required of her security for the return of the money to be received as alimony, in the event of the rendition of judgment against her upon the final trial the money will be lost to him, and that the remedy by appeal is not a plain, speedy, and adequate remedy. A demurrer was presented to the application which has been overruled by this court. The reasons of the court for overruling are summarized as follows: (1) The Court of First Instance had jurisdiction in the matter of divorce; (2) in this suit the power to grant alimony depends exclusively upon the provisions of the Civil Code, and that this does not permit the granting of such alimony except in favor of a *wife*; and (3) that such status not having been established by a final judgment the court lacks jurisdiction to pass any judgment upon the matter of alimony.

I regard this decision as establishing an inequitable rule in cases of alimony, and also a practice in the granting of writs of prohibition not authorized by law. The learned Chief Justice in his opinion seems to have in view the practice prevailing in the ecclesiastical

tribunals formerly existing here, but'which have passed out with the Spanish domination.

These courts having ceased to exist, the practice peculiar to them has been abolished.

The jurisdiction of the ecclesiastical courts depended upon a canonical marriage, proof of which was jurisdictional and was the prerequisite to an action. Only one kind of proof was admissible—this was the evidence contained in the registers of the church. If this character of proof was not forthcoming and the marriage was disputed the party was sent to the civil tribunal to establish the marriage; the action would not be admitted otherwise. Again, alimony could not be granted in the ecclesiastical court, the court which had cognizance of the main suit, because the ecclesiastical decree produced no civil effects whatever; therefore, in order that it might be granted, the matter was remitted to the civil tribunals which had power to deal with the property of the parties, and this was usually done under the provisions of articles 1591-1599 of the Code of Civil Procedure formerly in force in these Islands. These provisions are for temporary maintenance and apply generally to all cases where the applicant is entitled to support under the law.

Actions for divorce were invariably brought in the ecclesiastical courts, but this was on account of the universal custom of the celebration of canonical marriages. The ecclesiastical courts, as stated, exercise jurisdiction only in cases of a canonical marriage. They had no jurisdiction in cases of civil marriage or any other form of marriage such as marriages under foreign laws. The civil tribunals had jurisdiction of divorce suits and suits for nullity of marriage in these cases, and not only had jurisdiction of the main suit but they were also given jurisdiction of the proceedings for alimony *pendente lite.* Articles 103 and 107 of the Civil Code, which vest this jurisdiction, read as follows:

> "(103) The civil tribunal shall take cognizance of the suits for nullity of marriages celebrated in conformity with the provisions of this chapter (regulating civil marriages) and shall adopt the measures indicated in article 68 (the article providing for alimony pendente lite), and shall give sentence definitely."

Article 107 is as follows:

> "The provisions of article 103 shall be applicable to suits for divorce and their incidents."

From this it will be seen that the ecclesiastical courts and the civil tribunals admitted suits in their respective jurisdictions on different principles—the former only where the marriage was not contested or where the status of marriage had been established in a civil tribunal. The latter did not require proof of marriage as a prerequisite to the exercise of its jurisdiction; marriage was only one of the issues involved in the suit. The decrees of the ecclesiastical courts produced no civil effects whatever, and it was necessary to call to their aid the civil tribunals in order to deal with the property of a party. On the other hand, the civil tribunal might settle the whole dispute in one proceeding, they having the power both to adjudge and to enforce their decrees upon the property of the parties. A party in this tribunal would never have been remitted to any other proceeding to establish the civil status of the wife, nor to any other proceeding to enforce its decrees against the property. Consequently the civil tribunals having the full power to adjudge every matter in dispute between the parties after taking cognizance of the cause would retain it until its final termination and the fruits of the judgment had been secured. In the clear language of the statute, it has jurisdiction of divorce suits and its incidents and the granting of the alimony; the law in express terms gives it this jurisdiction.

While section 68 of the Civil Code gives alimony to the *wife,*the jurisdiction of the court can not be made to depend upon this article, nor can the word "wife" in any manner be regarded as a word of limitation on the power to adjudicate alimony.

Nor do we apprehend that the Court of First Instance as now organized, with general jurisdiction and with its admitted power to hear divorce suits, can be circumscribed in its power by any such reasons as that the civil status of the wife is a prerequisite to its power to adjudicate the case.

If it is intended to be asserted in the decision that in order to obtain alimony it is necessary that the parties should resort to the special proceedings as provided in article 1591, a serious objection to such position is that it is probable these provisions of law are no longer in force. Our present Code of Civil Procedure contains a sweeping clause in the repeal of all other procedure. It reads as follows :

> "SEC. 795. All codes, statutes, acts, decrees, and orders or parts thereof heretofore promulgated, enacted, or in force in the Philippine Islands prescribed in the Procedure in Civil Actions or Special Proceedings in any court or tribunal are hereby repealed, and the procedure in all civil actions and special

> proceedings and all courts and tribunals shall hereafter be in accordance with the provisions of this Act."

However this may be, the courts organized under our present laws of procedure pursue their course in the exercise of jurisdiction in accordance with American laws. The Spanish system of procedure is scarcely recognized among its enactments.

In divorce suits, according to American practice, alimony is regarded as an incident to the suit and the granting of alimony as an auxiliary proceeding. (Encl. PI. and Prac, 408, alimony; 2 Am. and Eng. Encl. Law, 93.) Such a practice as dividing up the suit and trying the issues in the divorce suit in a separate and distinct action from the proceedings for alimony would not be tolerated in an American court. (Bennett vs. Southard, 35 Cal., 691.) Nor would it be practicable to separate the two proceedings. Alimony being a provision for the wife *pendente lite*, if the granting of it was separated from the main suit its adjudication might not reach a final conclusion until long after the principal suit, in aid of which it is supposed to be granted, has been disposed of; besides, it would require a multiplicity of suits without any compensating benefit whatever.

The proper parties being duly before the court and the court having the power to hear and determine the matter at issue between them constitutes its jurisdiction. The Court of First Instance in this case clearly had the power to hear and determine all the issues involved in the main suit and in the application for alimony, and having the power to hear and determine these questions, in both of which marriage is an issue, it did not exceed its jurisdiction, and prohibition will not lie to correct any errors that may have been committed in the hearing.

If it be admitted that the court was not acting without or in excess of its jurisdiction the language of our statute authorizing prohibition seems too plain for controversy. Section 226 reads as follows:
"When the complainant in an action pending in any Court of First Instance alleges that the proceedings of any inferior tribunal, corporation, board, or person where exercising functions judicial or ministerial were without or in excess of the jurisdiction of such tribunal, corporation, board, or person, and the court on trial shall find that the allegations of the complainant are true and that the plaintiff has no other plain, speedy, and adequate remedy in the ordinary course of law, it shall render a judgment in favor of the complainant including an order commanding the defendant absolutely to desist or refrain from further

proceeding in the action or matter specified therein."

In order for a party to avail himself of this remedy the inferior tribunal must be acting without or in excess of its jurisdiction, and in addition to this there must be no other plain, speedy, and adequate remedy in the ordinary course of law.

As we have attempted to show, the Court of First Instance had the jurisdiction to hear and determine the issues upon which the right to alimony depended, and whether the remedy by an appeal from an erroneous exercise of this jurisdiction is a plain, speedy, and adequate remedy it is unnecessary to determine. It is the only remedy that has been provided, and if cases occur in which it does not afford adequate relief it is the fault of the legislative power and it rests with it to provide additional remedies. The case of Havemeyer vs. Superior Court, 84 Cal., 327, is in no way in conflict with these views, but rather supports them. The same may be said of the other cases cited.

Let us now examine the nature of alimony *pendente lite* and the principles upon which it is granted. Article 68 of the Civil Code provides that after a petition for a nullity of marriage or for a divorce has been interposed and admitted certain provisions shall be adopted during the pendency of the suit, among which is a provision for the support of the wife and such children as do not remain under the power of the husband. This provision of law contemplates a separation of the consorts in every case. This character of suit is generally marked by obstinacy and bitterness. For here is found property and the offspring as the stake at issue. Passions engendered by resentment, pride, cupidity, and affection find scope in the action.

The husband and wife thus involved in litigation and their position as to the right and wrong of the matter being as yet unascertained, we find with reference to their resources the law has placed them in the following condition: The wife's estate consists of her dowry, paraphernalia, and one-half of the conjugal community property. Her dowry is composed of the property and rights brought as such by her to the marriage at the time of contracting it and those which she acquires during the marriage by donation, inheritance, or legacy as dotal property. The dowry may have been obligatory, i. e., such as the law has required the parents to give to their legitimate daughter on marriage. Now, dowry, if it be an *estimated dowry*—that is, if the property of which it consists was appraised at the time of its constitution—is transferred in ownership to the husband, who only upon the dissolution of the marriage is pledged to return its value. Of this he has absolute control and power of disposition.

The ownership of the dowry *not estimated* is retained by the wife, but she can alienate, encumber, or mortgage it only with the license of the husband, who, in case of such litigation, is not likely to consent Of this part of the dowry the husband is the administrator and usufructuary.

The paraphernalia is the property which the wife brings to the marriage, not included in the dowry and what she acquires after the constitution of the same, and which is not added to the dowry; of this the wife still retains the dominion as well as its management, unless she has delivered the same to the husband with the intent that he may administer it. This property she can not alienate, encumber, or mortgage without the like permission of her husband, and when it consists of available property, such as money or public stocks, or valuable personal property, the husband has the right to require that it be deposited or invested in such a way that the alienation of the same should be impossible without his consent.

With reference to the conjugal community property, which is the earnings or profits indiscriminately obtained by either of the consorts during the marriage and which belongs to the husband and wife share and share alike, when the marriage is dissolved she finds herself in no better position, for the husband is the administrator of his property and has the exclusive disposition of it.

So we find that the husband at the beginning of this litigation, in which a separation is contemplated, has all of his individual separate property brought to the marriage or acquired during the marriage by him with the absolute power of control and disposition; he is the administrator of the conjugal community property and has the power of its control and disposition; he is the owner, and has the control and disposition over the wife's *estimated dowry,* and is administrator and usufructuary of the dowry *not estimated*; he has a veto power upon the right of the wife to alienate, encumber, or mortgage the dowry not estimated and the paraphernalia. The wife has been shorn of power over all of that which she possesses in her separate right as well as that held in her conjugal community right.

In this situation she turns in despair to the law and finds that it has done her scant justice by making provisions for her alimony.

But this court so construes the law as to substantially deprive her of this benefit. She asks for support while she carries on the litigation; she is told that she must institute an independent action to establish her status as a wife, and that this action must be prosecuted

to final judgment. Upon her is thus imposed the additional burden of another suit, in which no provision has been made for alimony; and further, this second suit being commenced subsequent to the divorce suit and: the judgment being alike appealable, according to the natural course of events, will probably not reach a final determination until the main suit has been settled; as a result alimony *pendente lite* is made impossible.

She is also met by another objection, which is that she is totally without resources and will be unable to return the amount of the alimony received from the husband in the event that she fails in the litigation unless she gives security for it. We have seen that the law absolutely prohibits her from encumbering, without the license of her husband, that part of her separate property which it has not taken from her and given to the husband.

The law thus mocks her in the helplessness in which it has placed her. She asks for bread, a stone is given her.

Conclusions leading to such inequitable results ought not to be readily adopted by a court of justice.

For the reasons stated I dissent from the opinion of the court.

Date created: April 10, 2014