

Statement.

Ana Maria Gonzales, was divorced from her husband Jose Maria Castanares, February 19th 1842. by Jose B Fernandez Judge of First Instance of the First District of California, after a proceeding in Reconciliation. The decree of divorce was for separation, and that the said Ana Maria, should remain at absolute liberty to live wherever it suited her, and that the house of her father should be her home.

Castanares, soon after, left California, and has ~~never~~ since returned; and Ana Maria continued to live at her father's house till after 1853.

In 1852 her father conveyed to her a tract of land by deed of absolute gift. In 1853 she conveyed this land by deed of bargain and sale in the usual form, as a femme sole. In 1857 she sold and conveyed the same land as a femme covert, and as the wife of said Castanares, under the act of February 14th 1855, the Deed being acknowledged according to Sec 2^d of that act.

Opinion.

II. Assuming the decree of divorce or separation made in 1842. to have been made in due form and by proper authority, and the deed of conveyance in 1853 to have been properly executed by A. M. G. as a femme sole, was it sufficient in law to transfer the land?

II. Is the Certificate of divorce which is presented executed in due form, by competent authority?

and sufficient for the purpose intended - a separation from bed and board?

II. Was A M G, affirmes sold in 1853 and as such capable of conveying away her own estate?

If she was such in the adoption of our Constitution, and the passage of the laws of 1850, her status was not thereby changed; ~~we~~ must therefore ascertain what was her status under Mexican Law.

1. The marriage contract in Spanish Law, is of two fold character, - civil and religious. A divorce is a dissolution of the civil contract: the religious contract remains and neither party can marry again until the marriage is dissolved by the death of one of the spouses, or by its formal annulment by ecclesiastical authority. A divorce is therefore not a dissolution of the matrimonial bond (el vinculo matrimonial) but a separation of property and habitation: (separacion de bienes y habitacion)

(a)

2 A divorce or separation from bed and board dissolves the matrimonial community, precisely the same as the death of one of the spouses, and is followed, in the same way, by a separation of rights and property. It is a civil dissolution of the marriage, leaving each of the spouses independent of the other, in whatever relates to civil rights.

(b)

3 This is best illustrated by reference to the community property. While the community exists both husband and wife have the dominion and ownership of the

financial property, with this difference, that the husband holds it in habito & in acto, and the wife only in habito, passing to the acto when the marriage is dissolved.

From the date of the marriage to the date of its dissolution, all property acquired by either of the spouses, is prima facie community property, but when the spouses are lawfully separated, the acquisitions of each are the separate property of each, for the reason that there is no longer a community. On the dissolution of the community each spouse has the control and disposition of his or her portion of the community property entirely uncontrolled by the other; for how much stronger reason, then, should each have the control and disposition of his or her separate property which is acquired after the dissolution. While the community lasts the wife cannot alienate her separate property, without the consent of the husband, but if the husband improperly refuses his consent or is absent without the probability of an immediate return, the wife, under an order of court, may so alienate, without his consent. For how much greater reason is such consent dispensed with after the dissolution of the marriage.

(c)

6. We are therefore of the opinion that if lawfully divorced from her husband in 1842. A. M. G. was a femme sole in 1853. and had full power to alienate and convey property conveyed to her by deed of gift in 1852.

II. Was she lawfully divorced in 1842. as shown by the certificate?

1st As to the jurisdiction of the Court.

It is very clear, that by the Spanish Law, divorces can be declared by the ecclesiastical courts alone, and that the ordinary civil courts cannot take cognizance of the question of divorce, although they may of all matters incidental thereto. But was this law in force in California in 1842?

The Mexican Law of May 23^d 1837 suppresses all special courts (juegados especiales) and directs that all proceedings and causes before them be transferred to the courts of ordinary jurisdiction, — the courts of first instance and superior tribunals.

If no ecclesiastical tribunal was subsequently established in California, or if none existed in 1842, it seems plain, ^{that} the ordinary civil courts had jurisdiction in matters of divorce; for it is a well established principle of Spanish and Mexican jurisprudence that where jurisdiction of any particular matter is given exclusively to a special tribunal, in the absence of such special tribunal, such matters revert to the ordinary tribunals, without any law or order being requisite to give jurisdiction, de novo.

(e) It is believed to be a matter of fact that in 1842, there were no ecclesiastical tribunals in California and that the courts of first instance assumed and exercised jurisdiction of questions of divorce. But this usage must be proved, like any other fact. (f)

2 Assuming then that the Court of first instance had jurisdiction of the question of divorce, is the divorce properly decreed and certified to?

The decree of May 18th 1821. Art 4. requires a proceeding in conciliation in causes of divorce; but by Art 90 of the law of May 23^d 1837, such proceeding was declared unnecessary. We know of no subsequent Mexican Law which required it. But in this case it was resorted to and the report of the hombres buenos made before the decree. It certainly could do no harm and was followed by the proper decree of the Court. The decree itself seems to comply with the requisites of the law, and it must be presumed that the proceedings prior to its being pronounced were regular and proper and that there were sufficient grounds for a divorce.

(9)

¶ But it may be said that the cause of divorce as stated in the decree of the Court, was insufficient to authorize the decree, and that therefore it must be regarded as null and of no effect.

We are of opinion that it is immaterial whether or not the grounds for the divorce be stated in the decree, or if those stated be insufficient to authorize the divorce, it must be presumed that the judge had good and sufficient grounds for making the decree.

other

We do not suppose that a Court could now go behind the decree to examine whether the facts of the case authorized the divorce, or, if those recited in the decree are insufficient, whether there were not other sufficient reasons not recited.

The question of divorce was ^{res} judicata and cannot now be inquired into.

h

We are therefore of opinion, upon the statement, that
A. M. G. was lawfully divorced from her husband in 1842;
that by such divorce she became, in law, a femme sole;
that as such she could, in 1853, convey real estate
which she had acquired by deed of gift in 1852;
that the deed made in 1853, if duly executed by her
as a femme sole, and recorded, is good against the
one executed by her in 1857, as the wife of Castaneda,
under the act of February 14th 1855. It will be
observed that this conclusion is based upon
the supposed fact that there were no
ecclesiastical tribunals in California in 1842,
and that it was at that time the usage
of the country for courts of first instance
to exercise jurisdiction in granting divorces.

On Smokey
Opinion to J. Tallon
1857.

15

History