What Price Alimony

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The question of the wife's right to alimony under the provisions of Articles 148 and 160 of the Louisiana Civil Code has been so woefully neglected and misunderstood by the bench and bar that it has not received the judicial consideration and appraisal to which it is certainly entitled. The purpose of the following is not to review every decision rendered on the subject, much less to scrutinize in detail the judicial reasoning behind some of the opinions contained in the so-called "leading cases." Nor is it the intention of the writer to advocate social policies or reforms, but rather to examine the law such as it may be and to suggest a possible solution of the many vexatious problems arising in connection with the subject.

A clear understanding of the basic concept of the rules governing the payment of alimony incident to separation and divorce cases is of the utmost importance. This is at once apparent when it is considered that a husband who has been ordered to pay alimentary allowances to his wife during a separation suit has often been unduly required to contribute toward the continued support of his separated wife until a final divorce. Perhaps with a little further analysis, it might have been shown that his duty terminated when the judgment of separation was rendered.

At first blush, this may appear to be a startling announcement indeed, for wasn't it the late Chief Justice who said that the right of a wife to the alimony granted under Article 148 continued until the bonds of matrimony were finally dissolved? Moreover, Justice Brunot permitted a wife to come into court, even after a judgment of separation had become final, to obtain

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1. "From the wording of that part of the decree which put an end to the payment of alimony pendente lite, it seems that the judge considered that the litigation was brought to an end by the decree of separation from bed and board, and hence that there was no longer any occasion for alimony pendente lite. The rendering of a decree of separation from bed and board, however, does not put an end to the wife's right to have alimony pendente lite—which means nothing more than the wife's right to have the financial support of her husband until the bonds of matrimony are dissolved." (Italics supplied.) Arnold v. Arnold, 188 La. 223, 327, 172 So. 172, 174 (1937).
alimony pendente lite. We need not go beyond the terms of Article 148 to show the fallacy of these decisions, for it clearly states:

“Art. 148. If the wife has not a sufficient income for her maintenance pending the suit for separation from bed and board or for divorce, the judge shall allow her, . . . a sum for her support. . . .” (Italics supplied.)

A comparative review of the historical background and development of the present codal provisions and of the early jurisprudence on the subject will, it is hoped, point the way to a better understanding of the problem and of the principles involved.

I. THE FRENCH CONCEPT

Divorce, as an institution, was given legislative recognition in France by a law of 1792. This law simultaneously repealed the existing provisions regulating the separation of spouses which merely put an end to their marital relations but prohibited them from contracting a second marriage. Thus, when the Projet of the Civil Code of 1804 was prepared, it contained only provisions relative to divorce and none governing the divortium quoad torum et mensam. The fact that the Code of 1804 did contain a chapter on separation is due to the insistence of the Conseil d'Etat. However, since the subject of divorce had already been dealt with extensively, it was not thought necessary to treat of separation from bed and board in as great detail, perhaps because it was regarded merely as a substitute proceeding for the use of those whose religious beliefs prohibited them from ever voluntarily dissolving the bonds of matrimony. The rules already included in the chapters pertaining to divorce were therefore to be applied to separation cases in the absence of positive law to

2. In Anzalone v. Anzalone, 182 La. 234, 161 So. 594 (1935), the husband had obtained a judgment of separation by default which had become final, it never having been appealed. Subsequently, the wife filed a rule on the husband to show cause why he should not be condemned to pay her alimony pendente lite. An exception of no right of action to the rule was maintained by the district court, but on appeal the supreme court held that Article 148 was applicable. The wife had alleged in the application that she was in necessitous circumstances and had no means of support and that the defendant was able to pay her $50.00 a month. The court disposed of the matter in the following language: “Inasmuch as these allegations must be accepted as true, Rev. Civ. Code, art. 148, as amended by Act No. 130 of 1928, has direct application to such a state of facts. . . . The quoted article of the Code is mandatory, if it be shown that the wife is in necessitous circumstances, or without income for her support.” 182 La. 234, 237, 161 So. 594, 595.
the contrary and whenever their application would not contravene the nature of the action. Thus it was that when divorce was suppressed in 1816, the rules formulated nevertheless remained applicable to separation from bed and board, which was the only remedy available until 1884, when divorce was re-established.

Necessarily then, what is said regarding divorce is equally applicable to the concept of separation from bed and board, unless a result inconsistent with the latter should arise. Thus, the causes for which a divorce can be obtained are also causes for separation, and the procedures for instituting the action of divorce, as well as the regulatory measures concerning the rights and obligations of the parties pending the litigation, become applicable to the action of separation from bed and board.

The Code Napoleon contained three articles dealing with alimony, two of which are found under the chapter on provisional regulatory measures in divorce suits, and the other under the chapter dealing with the effects of the judgment of divorce. The first two were adopted in the following terms:

"Art. 268. The wife, whether plaintiff or defendant in the suit for divorce, may leave the domicile of her husband during the proceedings, and demand alimony proportionate to the means of her husband. The court shall assign the house in which the wife shall be obliged to live, and shall fix, if there be occasion for it, the amount of the alimony which the husband shall be obliged to pay the wife."

"Art. 269. The wife shall be bound to prove her residence in the house assigned, as often as she shall be required to do so; if she fails to make such proof, the husband may refuse her alimony and, if the wife is the plaintiff in the suit"

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3. 1 Planiol, Traité Élémentaire de Droit Civil, 434, 435, n° 1214-1217 (4 ed. 1948).
4. 1 Planiol, Traité Élémentaire de Droit Civil, 454, n° 1306-1307 (2 ed. 1937).
5. "Article 268. La femme demanderesse ou défenderesse en divorce, pourra quitter le domicile du mari pendant la poursuite, et demander une pension alimentaire proportionnée aux facultés du mari. Le tribunal indiquera la maison dans laquelle la femme sera tenue de résider, et fixera, s'il y a lieu, la provision alimentaire que le mari sera obligé de lui payer."
6. "Article 269. La femme sera tenue de justifier de sa résidence dans la maison indiquée, toutes les fois qu'elle en sera requise: à défaut de cette justification, le mari pourra refuser la provision alimentaire, et, si la femme est demanderesse en divorce, la faire déclarer non recevable à continuer ses poursuites."
for divorce, he may have her declared without right to con-
tinue the prosecution of the suit."

The last, dealing with the alimony to be awarded following
the judgment of divorce, reads as follows:

"Art. 301. If the spouses shall not have conferred any
advantages on each other, or if the advantages conferred are
not sufficient to assure the maintenance of the party who has
obtained the divorce, the court may allow him or her, out of
the property of the other party, alimony which shall not
exceed one-third of the income of the other party. This ali-
mony shall be revocable in case it should become unneces-
sary."

It is significant that, whereas the duty to pay alimony follow-
ing the divorce is reciprocal, the alimony spoken of in Articles
268 and 269 is due only to the wife, and then only in those cases
when in the language of the articles, "there is occasion for its
payment." Other points of difference are also noted: The ali-
mony payable under Article 301 is limited to one-third of the
income of the debtor, and it is revocable when no longer neces-
sary. No such limitation as to amount is made in Article 268,
and the alimony is payable pending, and up to the termination
of, the proceedings.

A distinction is at once recognized, therefore, between:

(1) Alimony pending the proceedings for separation or for
divorce;
(2) Alimony after divorce; and
(3) Alimony after a judgment of separation from bed and
board.

Each of these kinds of alimony is of a different nature, and
each is based on different concepts, as will be explained presently.

Alimony pending the proceedings. This alimony is con-
ditional. It is payable only to the wife, and although she may
claim it whether she appears as plaintiff or defendant, the court
will award it only when the circumstances warrant it, and only
when she has fully complied with the residence requirements of

7. "Article 301. Si les époux ne s'étaient fait aucun avantage, ou si ceux
stipulés ne paraissaient pas suffisants pour assurer la subsistance de l'épouse
qui a obtenu le divorce, le tribunal pourra lui accorder, sur le bien de l'autre
 époux, une pension alimentaire, qui ne pourra excéder le tiers des revenus
de cet autre époux. Cette pension sera révocable dans le cas où elle cesserait
d'être nécessaire."
the codal provisions. It goes without saying that if the wife does not leave the domicile of the husband (and this she is not bound to do) she will not be entitled to the alimony provided for in Article 268.8

The payment of this alimony is warranted, or, in the language of the article, “there is occasion for its payment,” when the wife does not have income sufficient for her maintenance and for the expenses of the litigation, even though the wife may be wealthy in her own right. The reason for this, and the only basis advanced by the French jurisprudence and by the commentators, is that, since ordinarily during the existence of the marriage the husband has the administration of the community and even of the revenues of the wife’s separate property, the wife who is thus unable to dispose of or enjoy her own income must necessarily look to the husband for assistance.9 This allowance which the husband is compelled to pay is, moreover, considered as an advance imputable to the wife’s share in the community upon the dissolution thereof by the judgment of divorce, or of separation, as the case may be.10 But the converse is also recognized: It may well be that the spouses are separated in property, or that, even under the community regime, the wife has income

8. “Article 268 presupposes that the wife will leave the marital domicile. If she remains, and if she receives sustenance, she cannot demand alimony properly speaking. But if the husband refuses to give her the sums necessary for her personal needs and for her children, she will be able to claim, in her own right, a sufficient amount for these needs as well as for the expenses of the proceedings.” 3 Laurent, Principes de Droit Civil Français, 302, 303, no 263 (2 ed. 1876).

9. Laurent states the rule as follows: “Under Article 268, the wife who leaves the matrimonial domicile during the pendency of the suit, may demand alimony in proportion to the means of the husband; but the article adds that the court shall fix the sum that the husband shall be obliged to pay, only if there be occasion for it. It may very well be that there may never be occasion for its payment. In general the spouses are married under the community régime. In such cases the wife does not have any revenue even when she actually has property in her own right because the husband has the enjoyment thereof. It will be the same where the spouses have stipulated against the community or dotal régime, if the wife does not have any paraphernal property. If the wife does not have any income, then it is necessary, naturally, that the husband pays her the necessary sums in order that she may defray her expenses pending the course of the litigation. But if the spouses are separated in property, and if the income of the wife is sufficient to furnish her the necessary, there will be no occasion to award her any alimony. Similarly, where the wife is receiving a pension from her parents payable to her rather than to her husband, which is sufficient to provide her with her needs, the husband can not be required to provide. This follows from the application of the principles regulating alimony in general: That there is no obligation to furnish alimony to one who is not in need.” (Italics supplied.) 3 Laurent, op. cit. supra note 8, at 300 et seq., no 260.

10. “Cette provision n’est qu’une avance faite par l’un des époux à l’autre; elle est donc imputable sur ce qui revient à celui-ci lors du règlement final de ses droits.” 1 Planiol, op. cit. supra note 4, at 433, no 1249.
from other sources sufficient to provide for her sustenance and for the expenses of the litigation; in which case, no alimony will be awarded.11

Where the circumstances permit the payment of alimony to the wife, the amount payable is to be determined according to the general principles governing alimentary allowances, in proportion to the needs of the wife and the means of the husband.12

As indicated, divorce was suppressed in France in 1816 and remained abrogated until 1884, during which period the code provisions regulating divorce remained applicable to separation proceedings. In 1886, new procedural rules were introduced which repealed the original Articles 268 and 269, but this repeal did not affect the basis on which the right to alimony pending the proceedings was predicated, although one of the effects of these procedural modifications was the extension of the right to alimony pendente lite to the husband as well. This is plain from the language of Planiol, commenting on the new Article 238 of the Code as amended in 1886. He states:

"The spouses having ceased to live together, there will almost always arise the necessity to regulate the provisional maintenance of the spouses during the proceedings. In nearly every case, it will be the wife who will be in need of alimony. . . . [But] the contrary situation may also arise. When the wife is separated in property or is a public merchant, she may be the one who has all the resources and the husband who may be in need of assistance."13

It is significant that, even as modified, the basis for alimony during the litigation is the lack of sufficient income of the spouse in whose favor it is given, and that the sum awarded is nothing more than an alimentary allowance and one which, of necessity,

11. Laurent, loc. cit. supra note 9; 1 Planiol, op. cit. supra note 4, at 433, n°1247 et seq.; 3 Baudry-Lacantinerie et Chauveau, Traité Théorique et Pratique de Droit Civil, Des personnes, 120, n° 199 (3 ed. 1902); 2 Planiol et Ripert, Traité Pratique de Droit Civil, 189, n° 604 (1926).

12. "The alimentary allowance is also governed by general principles. This results from the language of Article 268, under which the alimony is to be proportionate to the means of the husband, and, we must add as does Article 208, in proportion to the needs of the wife. In general this alimony comprises sustenance and maintenance." 3 Laurent, op. cit. supra note 8, at 301, n° 261.

13. "La vie en ménage ayant cessé, il y aura presque toujours lieu de statuer sur l'entretien provisoire des époux pendant le procès. Presque toujours ce sera la femme qui aura besoin d'une provision alimentaire. . . . La situation contraire peut se présenter. Quand la femme est séparée de biens où commercante, ce peut être elle qui a en main toutes les ressources du ménage, si bien que le mari a besoin de secours." 1 Planiol, op. cit. supra note 4, at 433, n°1247, 1248.
is merely provisional pending the outcome of the suit.\textsuperscript{14} It follows, therefore, that neither spouse will be entitled to his alimony if he has property, the administration or enjoyment of which furnishes him a sufficient income, or if he earns a livelihood by his own industry or labor.\textsuperscript{15}

\textit{Alimony after divorce.} This alimony likewise depends upon the fulfillment of certain conditions. It is predicated on Article 301 of the Code, and although there was some disagreement among the earlier commentators as to the nature of the duty imposed by this article, it is now well established that it is quasi-delictual, in that it imposes a penalty upon the guilty spouse. Since, upon the dissolution of the marriage, the mutual obligations of fidelity, support and assistance between the spouses is extinguished, the continued duty of one spouse to support the other can be predicated on a tort basis only.\textsuperscript{16} It is to be noted that the alimony is due only in favor of the innocent spouse. Thus, Planiol states:

\begin{quote}
"It [the duty to support] is founded on the principle already stated more than once that whoever causes damage to another by his fault, is bound to indemnify the person injured thereby. (Art. 1382). So long as the marriage subsists, each of the spouses has an acquired right therein on which they can rely. The fact of living together permits the poor spouse to partake of the riches and well being of the other; suddenly, by the fault of the latter, the resources of the former are cut off, and he finds himself destitute. It is always the case of making the guilty bear the responsibility
\end{quote}

\textsuperscript{14} "\textit{C'est donc tout ensemble une provision alimentaire et une provision ad litem.}" 1 Planiol, op. cit. supra note 4, at 433, no 1249.

\textsuperscript{15} Baudry-Lacantinerie et Chauveau summarize the jurisprudence in the following language: "... but alimony will only be awarded when the claimant does not have any income personally; if the property of which he has the administration or the enjoyment procure him a sufficient income, or if he earns his livelihood by his own work, no alimony will be awarded..." 1 Baudry-Lacantinerie et Chauveau, op. cit. supra note 11, at 120, no 199.

\textsuperscript{16} 1 Planiol, op. cit. supra note 4, at 437, no 1259. Laurent assimilates the payment of alimony by the guilty spouse to the payment of damages incident upon the breach of a contract. 3 Laurent, op. cit. supra note 8, at 357, no 308. Colin and Capitant have this to say: "The traditional answer to the question is that the basis of the alimony established by Article 301 is the damage that the guilty spouse has caused the other by making the divorce necessary through his fault, if the innocent spouse does not have sufficient resources for his maintenance. The basis of Article 301 must be found, not in Article 212, but in the principle of Article 1382; it is an ex delicto basis. The alimony granted to the successful spouse is the reparation of a tort unjustly committed..." (Italics supplied.) 1 Colin & Capitant, Cours Elémentaire de Droit Civil Français, 378, no 398(B) (8 ed. 1934).
of his own faults. It is to be observed that this obligation to support rests on a principle totally different from that of article 212: it is no longer a duty between spouses, since they are not such any more, but it is the obligation to repair, pecuniarily, the consequences of an illegal act. This obligation, after the divorce, is to a great extent, in the nature of an indemnity; its purpose is to permit the destitute spouse to have some of the property of which he has been deprived by the fault of the other.'

It follows from this principle that if both parties are at fault, no alimony will be granted, and that where a divorce is granted on the basis of a judgment of separation, the award will be made only to the spouse in whose favor the separation was granted. It also follows that alimony will be granted subsequently to a judgment of divorce only where it can be shown that the necessitous circumstances of the spouse claiming it was the direct consequence of the divorce, for if the indigence of the claimant is the result of extraneous circumstances, such condition cannot be attributed to the fault of the other spouse.

The payment of this alimony is further conditional, as already intimated, on the showing that the spouse claiming it be in necessitous circumstances. Although Article 301 merely provides for

17. "Son fondement se trouve dans un principe déjà signalé plus d'une fois. Quiconque a par sa faute causé un préjudice à autrui est obligé d'indemniser la personne lésée (art. 1382). Tant que le mariage durait, il constituait pour chacun des conjoints une situation acquise, sur laquelle il pouvait compter; la communauté de vie permettait à l'époux pauvre de participer au bien-être de son conjoint; brusquement, par la faute de celui-ci, ces ressources lui manquent et il se trouve plongé dans la misère. C'est le cas ou jamais de faire subir au coupable la responsabilité de ses fautes. On voit que cette obligation alimentaire repose sur un idée toute différente de celle de l'art. 212: ce n'est plus un devoir entre conjoints, puisqu'il n'y a plus de conjoints, c'est l'obligation de réparer pecuniairement les conséquences d'un acte illicite. Cette obligation après le divorce a donc au plus haut degré le caractère d'une indemnité; elle est destinée à restituer au conjoint pauvre un peu des ressources dont il est désormais privé par la faute de l'autre." 1 Planiol, op. cit. supra note 4, at 437, no 1259.

18. "It is only the innocent spouse who has the right to demand alimony. The guilty spouse could not claim it; and if both parties are at fault, neither will have the right. By the same token, if the divorce has been granted in favor of the wife, and the separation against her, the wife could not claim alimony from the husband, because she would not have the right to invoke Article 301 since the separation was granted because of her own fault." 1 Colin & Capitant, op. cit. supra note 17, at 377, no 368(B).

19. Devaye c. Ardisson (Cas. Oct. 18, 1926) Dalloz, (1927) I. 101. In the above case, the Court of Cassation said: "Mais, en raison de son fondement indemnitaire, la pension ne peut être accordée, postérieurement au jugement de divorce, qu'ayant que l'époux demandeur justifie que son état de besoin est la conséquence directe du divorce et ne provient pas d'événements ultérieurs qui ont entraîné la diminution de ses ressources."
the payment of alimony when the spouses have not made to each other any advantages, or when those that have been made are insufficient for their maintenance, the jurisprudence is well established that the determining factor is the actual need of the spouse. It is held, therefore, that in order to determine whether the claimant is entitled to the pension, regard must be had to the circumstances of each particular case. In this connection, Coulon has this to say:

"The legislator has intended that the innocent spouse should not be made to suffer the consequences of the divorce, and, foreseeing the case where he might be without means, it provided for the payment of a sum for his support by the guilty spouse, as an indemnity. Thus, it must be conceded that if the innocent spouse has means, there can no longer be a question of alimony nor of indemnity. Lest it be supposed that the law should be interpreted otherwise, it must not be forgotten that the court is not bound by article 301; but it is discretionary with the court to grant or deny the pension. The judge may therefore, according to the circumstances, grant the demand for the pension or reject it..."

"The pension will be due when the spouse who has obtained the divorce is in necessitous circumstances, that is to say, when, taking into consideration the age, sex, health, social condition, habits, and a thousand other circumstances of fact impossible of enumeration, the court finds that the personal means of the spouse are insufficient for his maintenance."20 (Italics supplied.)

The personal means of the spouse spoken of, consist, among other things, of the property which the spouse may personally possess, or which he has or will eventually obtain upon the partition of the community at the dissolution of the marriage. If,

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20. "Le législateur a pensé que l'époux innocent ne devait pas avoir à souffrir des conséquences du divorce et, prévoyant le cas où il serait sans ressources, il a voulu que l'époux coupable fût tenu, à titre d'indemnité, au service d'une pension alimentaire. On conçoit donc que si l'époux innocent possède de la fortune, il ne puisse plus être question d'indemnité ni d'aliments. A supposer que la loi doive s'interprêter autrement, il ne faut pas oublier que le tribunal n'est pas lié par l'article 301; c'est une faculté pour lui d'accorder ou de refuser la pension... La pension sera due lorsque l'époux qui a obtenu le divorce se trouvera dans le besoin, c'est-à-dire lorsque, en tenant compte de son âge, de son sexe, de sa santé, de sa condition sociale, de ses habitudes, de mille autres circonstances de fait qu'il est impossible d'ennumérer, le tribunal estimera que ses ressources personnelles sont insuffisantes pour assurer sa subsistance." 5 Coulon, Le Divorce et la Séparation de Corps, 244 et seq. (1893-1897).
therefore, upon the partition of the community, the share coming to the spouses is sufficient to take them out of the category of needy persons, neither one would be entitled to alimony.21

Finally, the amount of alimony to be awarded is proportionate to the needs of the claimant, but with the limitation that it cannot exceed one-third of the income of the debtor. This follows from the very terms of the article itself.22

Alimony after separation. There are no specific provisions in the Code Napoleon regulating the payment of alimony after a judgment of separation from bed and board. There are, however, two alternative theories upon which the duty to pay this alimony may be based:

(1) the mutual obligations of support and assistance arising from the marriage;
(2) the provisions of Article 301, regulating alimony after divorce.

The latter has been applied on the grounds that in the absence of positive legislation, the articles on divorce are applicable to separation cases. This is generally true, but it overяет the fact that in this one instance, Article 301 cannot properly be extended because of the essential differences between divorce and separation. Moreover, the articles on divorce are applicable to separation cases only in the absence of positive law and when their application is not contrary to the nature of the action. It should be borne in mind that Article 301 is quasi-delictual in nature, and that this must be so because under no other logical theory can the obligation to support a former spouse be imposed. On the other hand, the separation, although it puts an end to the marital relations and brings about the dissolution of the community, does not dissolve the marriage, and consequently it does not extinguish the mutual obligations of fidelity, support, and assistance arising therefrom. There is thus a definite duty on the part of the spouses to continue to support each other, even after the separation, and there is no need for the application of Article 301.

However, it is unquestionably recognized that alimony after separation is due to the spouse in necessitous circumstances,

21. 2 Carpentier, Divorce et Séparation de Corps, 209, no 3527 (1899); 2 Planiol et Rlipert, op. cit. supra note 11, at 530, no 638.
22. 1 Planiol, op. cit. supra note 4, at 438, no 1281-1; 5 Coulon, op. cit. supra note 20, at 245.
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irrespective of whether the claimant is at fault, and that the amount to be awarded is proportionate to the needs of the claimant and to the means of the debtor spouse, without being necessarily limited to one-third of his income. Manifestly, therefore, Article 301, if applied, would have to be enforced in its entirety, with the effect that only the innocent spouse would be entitled to claim the alimony and the amount would have to be limited to one-third of the revenues of the debtor spouse. The fallacy of the argument is at once evident since it destroys the positive duty of mutual support previously established in the Code by Articles 212 and 214.23

The essential points of difference between the three kinds of alimony discussed are shown in the table on p. 411.

II. THE LOUISIANA CIVIL CODE UP TO 1928

Divorce as we now know it was not legislatively recognized in Louisiana until 1825 when the Code of that year was adopted. Prior thereto, the only relief possible was a separation from bed and board, which was regulated by the various articles contained in Title V of Book I of the Code of 1808. These articles were similarly arranged and organized in a definite pattern showing great similarity to that of the French articles on divorce contained in the Code of 1804. Thus, the various articles were collected into consecutive chapters treating, respectively: (1) of the causes for separation; (2) of the proceedings for separation; (3) of the incidental proceedings in connection with the suit; (4) of the exceptions to the action; and (5) of the effects of the judgment.

It is also interesting that not only was the organization of the material borrowed from the French Code, but that the articles included were so substantially similar to the divorce articles of the latter that there can be little doubt of the intention of the redactors of our Code to adapt these articles to the action of separation. Particularly is this true regarding the articles included in the chapter regulating the "provisional proceedings to which a suit for separation may give occasion."24 Thus provision was made for the keeping of the children of the marriage during the pendency of the action;25 for the separate residence of the wife,

23. See Baudry-Lacantinerie et Chauveau, op. cit. supra note 11, at 205, no 316; 1 Planiol, op. cit. supra note 4, at 461, no 1335; 2 Planiol et Ripert, op. cit. supra note 11, at 569, no 678; 3 Laurent, op. cit. supra note 8, at 401, no 348.
25. Id. at Art. 10 (Art. 146, La. Civil Code of 1870).
pending the suit; for the allowance for her maintenance during the proceedings, provided she has no sufficient income; and for the maintenance of the status quo regarding the property of the spouses during the proceedings by prohibiting the husband from contracting any debts on behalf of the community or alienating the property thereof, and permitting the wife to restrain the husband from disposing of any property in his possession until after the termination of the suit.

The Code of 1808, however, contained a provision difficult to explain in view of its antithesis to the corresponding French provision and its inconsistency with other portions of the code itself. It provided that in cases of separation, the donations made by the spouses to each other would be without effect, but it permitted the wife to demand alimony payments from the husband "according to the exigencies of the case." As the redactors of the Projet of the Code of 1825 put it, "this article is founded upon none of our ancient laws, and is in opposition with art. 44, chap. 5, tit. 7, book 1, of our Code itself."

In the Revision of 1825, very little change was effected in the substance of the articles dealing with separation. Especially is this true in connection with the articles regulating the provisional proceedings, with the exception that they were also made applicable to divorce cases. In fact, the original pattern was retained, and the only changes of any significance were (1) the addition of divorce as a method of dissolving the marriage, and the "amendment" of the alimony article above referred to. The proposed amendment, after the fashion of Articles 299 and 300 of the French Civil Code, was to provide that in cases of separation the party against whom the judgment of separation was rendered would lose the advantages or donations conferred by the other, but would be entitled to retain them in all cases where the judgment was rendered in his or her favor. At the same time, the alimony features were to be omitted. These recommendations were adopted with the result that, as finally drafted, the

26. Id. at Arts. 11, 12 (Arts. 147, 148, La. Civil Code of 1870).
27. Id. at Arts. 13, 14 (Arts. 149, 150, La. Civil Code of 1870).
28. Title V, Chapter 5, Art. 18, La. Civil Code of 1808. "In case of separation, any donation which the husband or wife may have made the one to the other, in consideration of their marriage, shall be void and without effect, reserving to the courts of justice always the right of allowing an alimony to the wife, according to the circumstances of the husband and to the nature and exigencies of the case."
30. See proposed amendment by redactors, Projet of the Civil Code of 1825, 1 Louisiana Legal Archives 11 (1937).
Civil Code of 1825 contained absolutely no provisions on alimony, even following a judgment of divorce, except Article 146,\textsuperscript{31} providing for alimony to the wife, pending the proceedings.

The Revision of 1870 adopted the articles of the Code of 1825 virtually without any change. It did, however, supplement the divorce provisions by incorporating some of the implementing legislation on divorce which had been adopted in the interim. Some of these were Article 159, providing that the judgment of divorce dissolves the marriage; Article 160, providing for the payment of alimony to the wife who had obtained the divorce; and Article 161, prohibiting a subsequent marriage by the guilty party with his or her accomplice in adultery.

It can thus be seen that the Revised Civil Code of 1870 contains, virtually unchanged, the original laws on separation found in the Code of 1808, with the necessary modification adopted in 1825 and subsequent additions to adapt them to the action of divorce.\textsuperscript{32} It is also evident, in view of the great similarity of some of the articles in the Code of 1825 to those of the French Civil Code of 1804, that in adapting the original articles to the action of divorce, the framers of the Code intended to follow the French jurisprudence.

In view of the foregoing, it is evident that no further reference to the two earlier Louisiana Codes need be made, except where necessary to emphasize any points of distinction, particularly since the present pertinent provisions of the Code of 1870 are substantially the same as they appeared in the Code of 1808. What is said, therefore, with reference to the articles of the Code presently in force, is intended to apply to the corresponding earlier provisions, unless otherwise indicated.

Article 148 is found under that chapter of the title on divorce and separation entitled “Of the provisional Proceedings to which a suit for Separation or Divorce may Give Occasion,” and like the other provisions in this chapter, it is conditional in its application. There will be no occasion for the application of Article 146 if there are no children of the marriage;\textsuperscript{33} and if the wife does not leave the domicile of her husband or if she has sufficient

\textsuperscript{31} This article became Article 148 in the Revised Civil Code of 1870.
\textsuperscript{32} Cf. Compiled Edition of the Civil Codes of Louisiana, 3 Louisiana Legal Archives (1940).
\textsuperscript{33} The temporary nature of these provisions are evidenced by the fact that though the custody of the children is generally awarded to the wife pending the suit, permanent custody is given to the party who has obtained the separation or divorce. See Arts. 146, 157, La. Civil Code of 1870.
income for her maintenance during the suit, the husband will not be required to pay her the alimony provided in Article 148. Likewise, there will be no occasion for the application of Articles 149 and 150, if the husband does not intend to dispose of the property of the community.

Article 160, on the other hand, is found under the chapter dealing with the effects of a judgment of separation or divorce. As originally adopted, it authorized the court, in its discretion, to award alimony to the wife who had obtained the divorce, if she was "without sufficient means for her maintenance."35

Textually, Article 148 is more likely to have been taken from Article 34 of Book I, Title IV of the Projet du Gouvernement of 1800, rather than from the text actually adopted as Article 268 of the Code Napoleon of 1804. The article in the Projet reads as follows:

“If the wife has not a sufficient income for her maintenance during the suit for divorce, the court shall allow her a sum for her support proportionate to the means of her husband.

“The husband cannot be compelled to pay this allowance unless the wife proves that she has constantly resided in the house assigned by the court.”36

Article 160, however, is taken textually from Section 10 of an act of 1827, re-enacted in 1855, and included in the Revised Statutes of 1870 as Section 1197. It is supposed, because of the points of similarity, that its origin was Article 301 of the French Civil Code of 1804, but it is more likely to have been based upon the French jurisprudence interpreting that article as explained by the French commentators. Be that as it may, its source is essentially French, and, following the admonition of our own courts, the French jurisprudence on the subject should be at least consulted in aid of its interpretation and application.38

Although the Code of 1808 contained a provision governing
the payment of alimony after separation, the only provisions now included regulate the payment of alimony during the litigation, whether divorce or separation, and alimony to the successful spouse in a suit for divorce. Nevertheless, we know alimony after separation is often awarded to the wife and the question necessarily arises, on what basis?

At the outset, it must be accepted that, as in France, our courts have recognized the three kinds of alimony already discussed. Because of the essential differences among these kinds of alimony, the reasons on which they are based cannot be the same. If this premise is accepted, no difficulty will arise in application of the principles underlying these different concepts. An inquiry into each of these kinds of alimony is therefore pertinent.

Alimony pendente lite. Articles 147 and 148 of the code require the payment of alimony to a wife who has not sufficient income for her maintenance during and up to the termination of the suit, provided she has left the common dwelling or at least declared her intention to do so. But Article 147 is not mandatory, it is merely conditional, and no duty is imposed upon the wife to leave the common dwelling. Thus a situation may well arise where the wife has not left the domicile of the husband prior to or during the pendency of the suit; in which case, under the express provisions of Article 148, no alimony will be due.39 Article 148 is further conditional upon the wife's not having an income sufficient for her maintenance during the proceedings, so that where she has an independent source of income which will provide her with the necessary funds for her maintenance, no alimony will be awarded. These are the express terms of the law. What, then, is the reason for this alimony?

Our courts have not favored us with an analytical discussion of the question. It has sufficed to say that the duty to pay this alimony arises from the duty of the husband to support the wife during the marriage.40 This may very well be so in the last

40. "On the other hand, the alimony paid to the wife pending the suit for divorce arises solely from the marriage relation and the duty of the husband to support her," Player v. Player, 162 La. 229, 110 So. 332, 333 (1928). "In fact, the right of a wife to receive alimony during the pendency of a suit for divorce or separation from bed and board is merely the obligation of the husband to support his wife...." Arnold v. Arnold, 186 La. 323, 172 So. 172, 174 (1937). (Italics supplied.) In this connection Cf. Suberville v. Adams, 46 La. Ann. 119, 14 So. 518 (1894), where the wife who was plaintiff in the divorce suit and had been denied alimony pendente lite because of her failure to comply
WHAT PRICE ALIMONY

analysis, but if this is the only basis, why the existence of Article 148? It had already been provided that the spouses owed to each other mutually, fidelity, support and assistance. Was it because this reciprocal duty was to be limited to the husband only, and if so, why? Or was it because the obligation of support flowing from the marriage was to be modified, and enforced only in certain cases?

It must be remembered, and it cannot be overemphasized, that Article 148 is conditional, and that the conditions upon which its application rests are not necessarily those under which the general duty of support is exacted. Whereas Article 148 depends for its enforcement on the wife's having been assigned a separate domicile and in not having a sufficient income for her maintenance, the husband's duty of support flowing from the marriage depends solely upon the reciprocal duty of the wife to live with him and to follow him wherever he chooses to reside. It is evident, therefore, that there must have been other immediate reasons for the specific provisions contained in Article 148. The fact remains that as a result of the marriage, the husband becomes the head and master of the community, and as such, the sole administrator. This being so, the wife has no control over the sources of revenue, nor of the revenues themselves, and consequently, the husband must be called upon to give her a sufficient amount for her maintenance while the suit is pending, and while she resides in a dwelling other than the conjugal domicile. But what if the wife has other independent sources of income? The answer lies in the article itself, for it provides that the wife must show that she lacks sufficient income for her maintenance in order to receive the alimony provided for. Further, the fact that the wife may have sufficient means in her own right is immaterial, lack of income or inability to use that income if she has it being the determining factor.

The basis for Article 148, therefore, is not technically the husband's duty of support (although this may be the ultimate

with the separate residence requirements of Article 147, alleged that the husband was nevertheless duty bound to support her during the suit because of Articles 119 and 120. The court answered this contention as follows: "In answer to the contention that the husband owes to the wife support and assistance, ... it is sufficient to say that those are among the obligations that the law imposes under the title of 'Husband and Wife.' ... But they are not actionable during the existence of the marriage, and can only be enforced after the marriage has been dissolved."

reason for it) but rather the wife's incapacity or inability to enjoy the revenues of her property during the marriage.

**Alimony after divorce.** Article 160 of the Civil Code finds its counterpart in Article 301 of the French Code of 1804, and although it is not identically worded, its meaning is the same.  

There has been little or no difficulty in the application and understanding of Article 160. It is generally recognized that the obligations it imposes are quasi-delictual in nature, the only condition being that the wife who is entitled to claim the alimony be in necessitous circumstances. The difficulty, if any, has been in what is meant by "necessitous circumstances."

Obviously, a person cannot be in necessitous circumstances if he has property or other assets. A person may have no appreciable income and yet have sufficient property which would take him out of the category of needy persons entitled to alimony. The question, therefore, as to whether a person has sufficient means for her maintenance is necessarily one of fact to be determined in each particular case; and with regard to the rights to demand alimony under the provisions of Article 160, the wife is held to the duty of proving her necessitous circumstances.

As used in Article 160, therefore, the word "means" must be interpreted to convey the idea of property and not necessarily income. It is used in the same sense that the word "means" is employed in connection with Article 148 when it speaks of the

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42. See note 35, supra.
43. Abbott v. Abbott, 199 La. 65, 5 So. 2d 504 (1941); Smith v. Smith, 217 La. 646, 47 So. 2d 32 (1950). In the Abbott case, alimony was denied to a wife who owned real estate valued at about $1200, an automobile, and "a lot of valuable household furniture." In the Smith case the court said: "In other words, under Article 160, the Court is not concerned with the wife's income as such, but only with the means she has, including income, and whether they are sufficient for her maintenance." Alimony was denied because the wife had assets valued at $20,000 producing an income of $35.00 per month. See also Bocage v. Lombard, 114 La. 1005, 81 So. 604 (1919); Jackson v. Burns, 118 La. 685, 41 So. 40 (1908). Cf. Russo v. Russo, 208 La. 17, 22 So. 2d 671 (1945).
44. Jackson v. Burns, 112 La. 854, 36 So. 756 (1904); Abbott v. Abbott, 199 La. 65, 5 So. 2d 504 (1941). In the Abbott case, the court stated (199 La. 65, 74, 5 So. 2d 504, 507): "The burden of proof is on the divorced wife claiming alimony under Article 160 of the Civil Code to show that she is in necessitous circumstances. In the absence of such proof, the court must decline to decree that alimony is due by her former husband." Contra: Bernard v. Gonzales, 170 La. 474, 128 So. 281 (1930).

It is to be noted, however, that our courts do not require that the wife be absolutely destitute in order to qualify under the article. Though the term "necessitous circumstances" has come to be used as synonymous with "insufficient means," it has been held that under the express language of Article 160, it is presumed that the wife should have some means, which, however, are not sufficient for her maintenance. Smith v. Smith, 217 La. 646, 47 So. 2d 32 (1950).
alimony to be paid to the wife by the husband “in proportion to his means.”

Finally, in order to determine whether the wife is in need, regard must be had, among other things, to the property she may possess in her own right, as well as the property she may have obtained from the liquidation of the community of acquets and gains upon the dissolution of the marriage.

Alimony after the separation. It is in connection with the award of alimony after separation that most of the confusion arises. Like the French Code, the Louisiana Civil Code is silent on the subject. At least it does not expressly provide for or regulate its payment. On what basis, then, is it or should it be awarded?

It is not at all clear from the reported cases, how and by virtue of what authority an order for the payment of alimony is incorporated in a judgment of separation. But this seems to be the accepted practice and, as far as it has been possible to deter-

45. In interpreting the word “means,” as used in Article 148, the Supreme Court said: “Nothing is said in this article [Art. 148] about the income or earnings of the husband. While the separation or divorce proceedings are pending, the Code says that the husband must pay for the support of his wife out of his ‘means.’ The word ‘means’ as used in this article refers to the husband’s resources and not necessarily to his income. His ‘means’ may consist either of property of a physical character, frequently referred to as assets, or it may consist of income from such property or income from labor or services performed. The word ‘means,’ as used in this article of the Code signifies any resources from which the wants of life may be supplied. The amount necessary for the support of a wife under such conditions as those referred to in this article is a debt which the husband must discharge out of his means, and his means may consist of money in his pocket, cash in bank, income from whatever source, or assets in the way of real or personal property. . . .” (Italics supplied.) Bowsky v. Silverman, 184 La. 977, 982, 168 So. 121, 122 (1936).

46. Upon a judgment of separation or divorce, the community of acquets and gains is dissolved and the wife becomes the owner in her own right of one-half thereof. In those cases where the assets of the community are substantial, there should be little difficulty in establishing the ineligibility of the wife to alimony because she will certainly not be in necessitous circumstances. Cf. Abbott v. Abbott, 199 La. 65, 5 So. 2d 504 (1941); Smith v. Smith, 217 La. 646, 47 So. 2d 32 (1950). It will be the same even where the community assets are negligible, if the wife is shown to have other means of support, as for example where her income from other sources is considered sufficient for her maintenance. Russo v. Russo, 205 La. 17, 22 So. 2d 671 (1945). See also Jackson v. Burns, 116 La. 695, 41 So. 40 (1906), overruled in Abrams v. Rosenthal, 153 La. 459, 466, 96 So. 32, 34 (1923), where the court states: “A better statement of the rule is that a wife, without property of her own, who sues her husband for a separation from bed and board, is not required to go out into the arena of business in order to obtain the funds necessary to support herself, as the law imposes that obligation upon the husband, but, if she does choose to earn her own living pending the issue of the suit, she thereby takes herself out of the provisions of article 148 of the Civil Code to the extent of her earnings.” (Italics supplied.)
mine, a practice which has not been seriously contested.\textsuperscript{47} Apparently it is based on the erroneous belief that Article 148, under which alimony pendente lite has been awarded at the beginning of the suit, authorizes the continuance of the alimony during the period of separation. Nothing can be more illogical and unsound. But the fault seems to be a false interpretation of the basic concepts and the failure to comprehend the purport of the jurisprudence which the courts have admonished should be followed in interpreting the alimony provisions of the Code.\textsuperscript{48}

The early jurisprudence on the subject was more in line with the French concept of limiting the application of Article 148, as its language unmistakably requires, to the time it took the controversy to be finally decided, for until then, the litigation continued to pend. But then, its application terminated.\textsuperscript{49}

\textsuperscript{47} Notice the statement of the case by the court in Smith v. Smith, 217 La. 646, 47 So. 2d 32, 33 (1950), as follows: "The judgment [rendered in 1947] decreed a separation from bed and board, partitioned the community of acquets and gains then existing between them, awarded custody of the minor child to the wife and allowed alimony pendente lite to the wife in the sum of $125.00 per month for her support and maintenance," which alimony, as can be gleaned from the opinion, continued to be paid by the husband after the separation until a divorce was rendered some 18 months later, the petition for divorce having been filed in October, 1948.

It is submitted that if the wife's share in the community property (which was partitioned by the judgment of separation) was $20,000.00 and constituted "sufficient means" so as to declare her ineligible to alimony under Article 160, the wife was not in necessitous circumstances during the period following the judgment of separation, and consequently, not eligible to alimony subsequently therefor. The erroneous belief that the suit for separation under which the order for alimony pendente lite is made is never final is responsible for the inequitable result reached. Despite judicial expression to this effect, a suit whether for divorce or for separation terminates when the final judgment is rendered, either decreeing or rejecting the plaintiff's demands. Notice that Article 148 provides for the payment of alimony pendente lite either "in a suit for separation from bed and board or for divorce," and if the alimony granted pendente lite in a suit for divorce, terminates upon final judgment, why does it not terminate also if the final judgment is one decreeing the separation from bed and board?

\textsuperscript{48} On more than one occasion the court has indicated its acceptance of the French jurisprudence on the subject as determinative of the intent and purpose of the alimony articles of the Louisiana Civil Code. Cf. State ex rel. Hill v. Judge, 114 La. 44, 38 So. 14 (1905); Player v. Player, 162 La. 229, 110 So. 332 (1926).

\textsuperscript{49} In State ex rel. Hill v. Judge, 114 La. 44, 38 So. 14, 15-16 (1905), the court indicates that alimony granted the wife under Article 148 terminates when the judgment rendered becomes final: "Immediately after the judgment will have become final... then her right to alimony will fall, and whatever is accorded her as a pension or support will immediately take the place of and succeed to the judgment of alimony. . . ." In Lee v. Koester, 155 La. 756, 737, 99 So. 588, 589 (1924), the rule is stated as follows: "Alimony pendente lite, in a suit for separation, or for divorce, is merely an incident of such suit. The suit for separation having been finally determined, and no appeal having been taken from the judgment rendered therein, the right to alimony, because of the suit, fails." (Italics supplied.)

In Bienvenue v. Bienvenue, 186 La. 429, 172 So. 517 (1937), after a judg-
cannot logically be said, therefore, that, after a judgment of separation has become final, an order for alimony to be paid thereafter is authorized under Article 148. Nevertheless, this is what appears to have been done, and insignificant as it may seem, it is the very point which brings about the inequities and abnormal results complained of.

The French found no necessity for any specific provision authorizing the payment of this alimony, since the duty to pay it arises, as our courts have intimated, from the mutual and reciprocal obligation of support and assistance flowing from the marriage relationship. But, since the payment of any alimony, whether as an incident to a divorce, separation, or otherwise, is warranted only where the claimant is in need, and then only in proportion to the means of the debtor, the spouse claiming it must show that he or she is in necessitous circumstances.

The following excerpt from an early decision of Justice Breaux is pertinent at this point. He says:

"It follows there is scant analogy between alimony paid during the separation from bed and board and the pension or support required to be paid in the judgment of divorce. The latter is an indemnity to which the one who obtains the divorce is entitled.

The judgment of divorce had been rendered against the wife on grounds of four year separation and had presumably become final, she ruled the former husband into court to show cause why he should not be compelled to pay her alimony, alleging she was not at fault. Alimony pendente lite had been granted the wife and it was contended in her behalf that "since the judgment granting [it] was not modified or set aside by the final judgment of divorce, the former is in full force and effect and enforceable." The court disposed of this contention as follows: "This ... is without merit because alimony pendente lite is authorized by article 148 of the Civil Code, as amended by Act No. 130 of 1928, 'if the wife has not a sufficient income for her maintenance pending the suit ... for divorce,' and necessarily the judgment granting alimony pendente lite ceases to have any effect when a final judgment of divorce is rendered in the case."

However, where the judgment is appealed, whether by the defendant or by the plaintiff, the litigation necessarily continues until a final judgment is rendered on appeal, and the order for alimony pendente lite necessarily continues in force until a final judgment on the merits is rendered. This is well illustrated in Donnels v. Bouillion, 165 La. 145, 147, 115 So. 439, 440 (1928) in the following language: "In our opinion the order for alimony pendente lite did not cease to continue in force after the signing of the judgment on the merits. The purpose of that alimony is to provide for the sustenance of the wife pending the litigation. ... The suspensive appeal from the judgment on the merits was taken promptly after that judgment was signed. The litigation therefore continued to pend after the judgment on the merits was signed, and for that matter is still pending, though pending on appeal. ..."

It would seem, therefore, that the order for alimony pendente lite is rendered ineffective as soon as the delays for taking an appeal from the judgment on the merits of the suit have elapsed, or, if the judgment on the merits is timely appealed, when it becomes final in the appellate court.
... We compared the articles of our Code with the Code of France, and consulted the jurisprudence under the latter. "The laws are substantially similar, and the jurisprudence accentuates the difference between the two—judgment for alimony during the marriage and judgment of mere support after the divorce. Article 212 of the French Code corresponds to Article 148 of our Code, and Article 301 of the same Code corresponds to Article 160 of our Code, and under each of the articles of the Code Napoleon, the courts of France are of opinion that there is no analogy of the one to or with the other."\(^5\)

The court was speaking, of course, of the difference between alimony after a judgment of separation and alimony after divorce. True it is that there is, according to the French, no analogy between the two. The court was in error, however, in saying that Article 212 of the Code of France upon which alimony after separation is based, corresponded to our Article 148. As a matter of fact, Article 212 of the French Code is the exact counterpart of Article 119 of our Civil Code, which imposes the reciprocal duty of fidelity, support, and assistance between the spouses. It is submitted, therefore, that what the court had in mind was that the alimony payments during the interim period between the judgment of separation and the divorce were payable because of the duty of support established in the code; but whether or not in error as to the import of the French jurisprudence regarding the application of Article 148, the fact remains that the court accepted the principle that the alimony which is payable subsequent to the judgment of separation is based on the duty of support flowing from the marriage relationship. This being so (and in view of innumerable decisions upholding this rule it could not be seriously contested), a novel but logical conclusion must be reached—in a proper case, the wife owes alimony to the husband, the obligation of support being mutual and reciprocal.\(^5\)

51. Art. 119, La. Civil Code of 1870. "The husband and wife owe to each other, mutually, fidelity, support and assistance." (Italics supplied.) It is on the basis of Article 212 of the French Civil Code which differs not at all from ours, that the French impose upon the wife the duty to pay alimony to the husband during the separation when he is in necessitous circumstances. (1 Planiol, op. cit. supra note 4, at 433, nos 1247, 1248). It is true that Article 120 would seem to indicate that the duty of support is one-sided only, but it should be noted that the French Code also contains an identical provision in Article 214 of their Code. As a matter of logic, Article 120 is the complement of Article 119. Once the reciprocal duty of support is established, Article 120
It also follows that since the award to be made is in the nature of an alimentary allowance, it likewise must be governed by the general rules governing alimony,⁵² and consequently, no award should be made unless it is proved that the claimant is in necessitous circumstances. In this respect, alimony after separation and alimony after divorce are subject to the same rules.

Further following the French jurisprudence, other distinctions should be made between alimony after divorce and alimony after separation. Whereas alimony after divorce is limited to one-third of the income of the debtor, no such limitation should be imposed in alimony following a judgment of separation. Again, whereas alimony after divorce cannot be obtained if the claimant is at fault, alimony after separation is awarded to the claimant regardless and in spite of guilt. In this latter respect, alimony after separation is similar to alimony pendente lite.

III. EFFECT OF AMENDMENTS SINCE 1928

Heretofore an attempt has been made to interpret the codal provisions as they were prior to 1928. Since then, Article 147 has been repealed, and Article 148 has been amended to provide for the payment of alimony pendente lite to the wife, whether she appears as plaintiff or defendant in the suit, omitting the residence requirements which formerly existed. Article 160 has also been amended to provide for the payment of alimony to the wife who is not at fault, when a divorce has been obtained on the basis of a voluntary separation. In addition a separate statute had been enacted providing for alimony to a wife in whose favor the judgment of separation from bed and board was rendered, when a judgment of divorce is rendered in favor of the husband based on the judgment of separation.⁵³

The effect of these amendments and subsequent legislation should not be considered as destroying the fundamental basis of the alimony articles. True it is that Article 147 was repealed, but this merely means that the wife claiming alimony pendente lite

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need no longer prove a separate residence before being entitled to the allowance. On the other hand, the effect of the amendments to Article 160 and the independent statute is merely to bring our law more in line and in accord with the French laws on the subject. In this connection, it must be noted that in France, it is only the innocent spouse who has the right to alimony after divorce; if both parties are at fault, neither will be entitled to it, and, if the divorce has been granted in favor of the husband, but the separation on which the divorce is based has been granted in favor of the wife, she will be entitled to alimony because she is not deemed to have been at fault.

IV. CONCLUSION

In the last analysis, our problem is both procedural and substantive in nature. As has been pointed out, the Civil Code articles on divorce and separation regulate, not only the substantive private rights of the parties, but also prescribe the procedure to govern the institution of the action.\(^{54}\)

Once the bases for the respective rights and duties of the parties regarding alimentary allowances is established, there only remains the question of the mechanics to be employed in enforcing them. The following is suggested as the proper procedure to be followed:

1. Upon the institution of a suit, either for separation or for divorce, the wife may, by rule, bring the husband into court to show cause why he should not be ordered to pay her alimony pendente lite. This rule should, for greater protection, be filed with the petition if the wife is plaintiff, or with the answer or even prior thereeto, if she is defendant. The court should, after hearing the rule, order the husband to pay the necessary allowance, if the wife qualifies under the provisions of Article 148.

2. During the hearing of the case on the merits, testimony regarding the financial situation of the claimant should be heard in order to determine whether or not an order for alimony after the separation or after the divorce should be made.

3. If it is shown that the claimant is not in necessitous circumstances, or will not be in necessitous circumstances after the community property is partitioned, then the judgment decreeing the separation or the divorce, as the case may be, should not contain an order for alimony.

\(^{54}\) See Book I, Title V, Cs. 2, 3, 4, Arts. 140-154, La. Civil Code of 1870.
(4) The burden will be on the claimant to show necessitous circumstances to warrant an order for alimony in the judgment of separation or of divorce. In addition, if the suit is for divorce, the wife must also show that she has not been at fault.

(5) Upon rendition of the judgment of separation or for divorce, as the case may be, the alimony pendente lite will cease, and the claimant will be entitled to alimony only if the judgment on the merits contains such an order, issued in conformity with (2), (3), and (4), above.

(6) Should the judgment (which may or may not contain the order for alimony) is appealed, then the provisional alimony granted on the rule to show cause will continue, since the litigation is not ended until the suit is finally determined.

(7) If the judgment does contain an order for alimony, and the judgment is affirmed on appeal, the order for alimony will immediately take the place of the order preliminarily issued on the rule to show cause. It will be the same if the judgment is not appealed, in which case the judgment of the lower court becomes final.

On appeal, the parties should be entitled to have the court pass upon the rights of the claimant vel non to alimony whether ordered or not included in the judgment appealed from.

(8) In all cases, an appeal should be allowed on the question of alimony pendente lite, that is, from the temporary order for alimony issued on the rule to show cause.

The essential factor is that no order for alimony should be incorporated in the judgment granting the separation or the divorce, unless upon proof of the necessitous circumstances of the claimant (taking into consideration the value of one-half of the community property to be partitioned as a consequence of the judgment) and, in cases of divorce, upon a showing that the wife is not at fault.