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Notes

ALIMONY PENDENTE LITE—ACCOUNTING

Separate actions were brought by both husband and wife for separation from bed and board. A judgment was rendered in favor of the wife for separation from bed and board and alimony of \$175 per month was awarded. The husband paid alimony for the time he continued to administer the "community" assets both before and after the separation from bed and board was rendered.¹ Subsequently, the wife instituted an action for partition of the community and for an accounting. Both the husband and wife appealed to the Supreme Court on issues concerning the partition of the community by the lower court. It was the wife's contention that the husband alone was responsible, either from his share of the community or from his separate means, for the alimony pendente lite. The husband, on the other hand, sought to have the alimony deducted from the "community" income from that period.² *Held*, the Supreme Court amended and affirmed the judgment of the lower court, allowing the husband to deduct the entire amount of alimony pendente lite paid the wife from income derived from the "community" assets for the same period. *Uchello v. Uchello*, 200 La. 1061, 58 So. 2d 385 (1952).

A proper analysis of the Civil Code provisions concerning alimony pendente lite would seem to indicate that the contentions of both the husband and wife were incorrect. The alimony, it is submitted, should properly have been deducted from the

1. There is no provision in our code for alimony after separation. Nevertheless, the Supreme Court has awarded such alimony by first considering separation as a mere step towards divorce and second by applying Article 148 to the situation. *Arnold v. Arnold*, 186 La. 323, 172 So. 172 (1937). For a complete discussion of this and other views, see Lazarus, *What Price Alimony*, 11 LOUISIANA LAW REVIEW 401 (1951).

Although this property is called community property, if a final judgment of separation from bed and board or of divorce is rendered, then such property is actually not community but separate property for that period.

2. At least this is the impression given by the opinion of the court. Counsel for the husband in their brief stated: "The sole contention is that a husband, against whom an alimony allowance has been impressed calculated on his income from community rentals, should not be made to pay a second time to his wife one-half of these rentals, which rentals have already been paid in alimony." Original Brief on Behalf of Anthony Uchello, Defendant and Appellant, Supreme Court of Louisiana, No. 40,063 and 40,260, consolidated, p. 16.

wife's share of income derived from the "community" assets for that period.

The criterion for alimony pendente lite as set forth by Article 148 of the Louisiana Civil Code is the wife's needs and relative lack of income.³ Naturally the purpose of such alimony is to assure the wife of adequate support pending a judgment of separation from bed and board or divorce. If the parties are separate in property and the wife manages her own affairs, the solution is simple. In such a case, the difference between the wife's income and her needs is supplied by the husband from his separate means. But difficulty is encountered in a case where a community property regime exists between the spouses. The difficulty lies in determining the wife's income for that period of time between the filing of petition and the rendering of a final judgment. It is impossible to determine her complete income for this period until judgment has been rendered granting either separation from bed and board or divorce. If the action is successful and a separation from bed and board or divorce is granted, the wife is entitled to one-half of the "community" assets and income therefrom for that period; or to phrase this another way, the community is split retroactively as of the date of the filing of the petition for separation or divorce.⁴ But during this period when the husband administers the "community" assets, the wife needs support and is hardly in a position to wait until a judgment of partition has been rendered. Therefore, the court should determine first the wife's needs and, second, the amount of income actually available to her. The difference between these two is the amount that the wife requires in order to support herself. The court, therefore, should simply order the husband to make available to her the difference between her needs and the amount of income actually available to her. If subsequently, however, the community is split by a final judgment of separation from bed and board or divorce, then one-half of the income from the "community" assets for that period belongs by right to the wife. The fact that such income is made available to her after such period is over should not relieve her of the obligation of using this income for her self-support. Thus, when the accounting is

3. "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, whether she appear as plaintiff or defendant, a sum for her support, proportioned to her needs and to the means of her husband." Art. 148, La. Civil Code of 1870.

4. Art. 2432, La. Civil Code of 1870.

made any income the wife has a right to for that previous period, by reason of the partitioning of the community, should be applied to the alimony pendente lite that has been paid her. If this is not done then the wife is in the enviable position of receiving income for a period of time, but not being required to use it. Such action would be in direct contravention to the provisions of Article 148, because in such case, the wife's support for that period would be paid for by the husband, even though she herself had some income. The early jurisprudence of the Supreme Court recognized this. Thus in *Hill v. Hill*,⁵ the court followed just such a theory. Alimony pendente lite paid to the wife was deducted from the wife's share of income from the "community" assets for that period. Subsequent jurisprudence, however, has failed to follow such reasoning. In *White v. White*,⁶ the Supreme Court deducted the amount of alimony, not from the wife's share, but from the community income. The reason for this change is not clear, since the court uses the *Hill* case as authority for its decision in the *White* case. Even though the present case follows the decision in the *White* case, the court cites both the *White* and the *Hill* cases as authority, but fails to distinguish between the two.

In determining what has been done in other states concerning this problem, only the old line community property systems were taken for comparison.⁷ The reason for this is obvious.⁸

Both California and Idaho have very definite statutes concerning the deductions of alimony pendente lite. In California such alimony is given to either party if he or she is in need of such support.⁹ In making the accounting "the court must resort (1) To the community property; (2) then to the separate property of the party required to make such payment."¹⁰ The Idaho statute differs only in that the wife alone may receive such alimony.¹¹ Thus the decision in the case under discussion would be correct under the laws of these jurisdictions.

5. 115 La. 490, 39 So. 503 (1905).

6. 159 La. 1062, 106 So. 567 (1925).

7. "In addition to the eight old-line community-property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington), six jurisdictions, Hawaii, Michigan, Nebraska, Oklahoma, Oregon, and Pennsylvania partially adopted the community-property system in 1945 and 1947 in order to secure federal income-tax advantages for their more affluent citizens." Marsh, *Marital Property in Conflict of Laws*, 9, n. 1 (1952). See also McKay, *A Treatise on the Law of Community Property* (1925).

8. If no community exists and the wife is in need of support, the only place such aid can be obtained is from the husband.

9. Cal. Code Civ. Proc. Ann., § 1955 (Deering 1946).

10. *Id.* at § 141.

11. Idaho Code 1947, § 32-708.

In Washington, Arizona, Nevada and Texas the division of the community is left to the discretion of the court.¹² The Texas statute concerning alimony pendente lite is most similar to ours, for it is proportioned to the wife's needs and the husband's means.¹³ But even in that state the results reached may differ substantially from ours, for Texas spouses may dissolve the community at will by mutual agreement.¹⁴

Thus it is seen that the statutes and jurisprudence of other community property states shed very little light upon the problem in Louisiana. The major reason for this is the unique stand taken in Louisiana, as opposed to the other states, that the spouses have a very definite vested interest in the community assets. Other states either do not have such a vested interest by the spouses or such interest is indefinite and may be changed by the court depending upon the circumstances.¹⁵ It is believed, therefore, that the solution to the problem lies wholly in a more complete analysis of Article 148 and in a re-examination of prior jurisprudence.

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CONTRACTS—PRE-EXISTING LEGAL DUTY—LOUISIANA LAW

Plaintiff, under a verbal contract of employment, sought to recover from defendant the value of his services for the demolition and removal of a "steel reenforced" concrete foundation of a diesel engine in defendant's plant. The day after work was begun on the removal of the foundation, the plaintiff informed the defendant that he could not afford to work any longer under the original contract, for it had not been contemplated that the concrete would be "full of iron." Another contract was executed at that time whereby the plaintiff agreed to carry on the work until Tuesday morning, meaning the second day after that on

12. However, in some states the court may not only (1) award the husband's entire share of community assets to the wife, but also (2) may order some of the husband's separate assets to be paid over to her. As to (1) above, see N.M. Stat. 1941, § 25-716. Cf. *Harper v. Harper*, 54 N.M. 194, 217 P. 2d 857 (1950). In this case the court called the award of assets "lump-sum alimony." As to (2) above, see *Remington's Wash. Rev. Stat. 1932*, § 26.08.110. Cf. *Hale v. Hale*, 76 Wash. 34, 135 Pac. 481 (1931).

13. *Vernon's Tex. Stat. 1948*, Art. 4637.

14. *Id.* at Art. 4624a.

15. The rights of both parties depend on the discretion of the court. Thus the court's only restraint is its own sense of justice. See notes 12 and 13, *supra*.