ALIMONY IN FRENCH LAW

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The problem of alimony has not reached in France the acute point which it has attained in some other countries. The probable reason is that the increase in the number of divorces is not so startling here as elsewhere. However, it would be too optimistic to say that there is no alimony problem in French law. The courts of this country have had to adapt the law, as set down in the Civil Code of 1804, to new conditions. A considerable change has taken place during and since the nineteenth century in the economic situation of France. Mainly agricultural at the outset, French economy has become increasingly industrialized. At the same time real property, originally the most important form of wealth, and the chief concern of the Civil Code, has declined before many other forms of riches, grouped under the general denomination of biens mobiliers (movable property). Many such forms of property, as for instance the so-called “ownership” of intellectual production like scientific invention, were totally unknown at the beginning of last century.—During the same period, the increasing speed of means of transportation has given a new rhythm to the entire life of the country and a much greater importance to its foreign trade.—Then, about half a century later another change occurred: the appearance of woman on the economic stage and her increasing influence on the business of the country since the end of the nineteenth century. This evolution reached its highest mark during the war of 1914-1918 and just after. Since the economic depression, one may notice a regression in the business activity of women in France. In the legal field, however, the status of woman tends every day towards equality with that of man. On February 19, 1938, a law was enacted to abolish the sections of the Civil Code putting married women in the category of juridically incompetent persons. It is only in the political life of the country that French women are still denied any official participation. But in private life woman has become the assistant (if not the competitor) of man in the struggle for life. As a result of all these changes, there is a striking discrepancy between the letter of the law, as it stands in the wording of the Code Civil, and the law as it is applied in fact by the courts in matrimonial causes.

Since the codification of 1804, French courts have endeavoured incessantly to adapt the law so as to give better protection to the wife during a divorce or separation

suit. The situation, as originally conceived by the legislator, left practically the whole
management of the family funds in the hands of the husband. Only real property
was efficiently protected by law. The situation grew more and more serious with the
increasing importance of movable property in private fortunes and the courts used
every device in their power to remedy this unsatisfactory state of affairs. One of the
fields where they exercised their influence in the matter was that of the wife’s alimony
pendente lite. Their efforts tended to instil greater flexibility to law on the subject, so
as not to leave the wife insufficiently provided for during the suit, while the husband
retained management of the funds until dissolution of the marriage and liquidation
of the marriage settlement. These efforts brought about some legislative reform.

The general economic depression has put another problem in the vanguard of
legal difficulties. A divorce decree, or a judgment of separation may, in certain con-
ditions, sentence the guilty spouse to pay to the other a permanent alimony. This
alimony is estimated, of course, on the basis of conditions as they stand at the time of
the decision. Courts are very often called upon at present to solve the technical diffi-
culties which oppose the revision of this estimation, made necessary by an altered
financial situation of either spouse. The difficulty is that the juridical basis for the
grant of a permanent alimony is apparently different from that of alimony
pendente lite, the very object of the decree being the destruction of the matrimonial tie. There-
fore, permanent alimony appears to be more in the nature of damages for the loss by
the innocent spouse of the right to claim support under Section 212 of the Civil Code.

This leads to the application of the stricter rules of estimation of damages rather than
the rules of estimation applying to allowances for necessaries between relatives, which
govern alimony pendente lite. Yet it is impossible to overlook the fact that, at one
time, there existed a marriage between the parties, since that is the very reason why
the one may claim alimony from the other. Moreover, the general community is
interested in the controversy. It is well known that the evolution of conceptions on
the Family tends to consider it less as an aim in itself and more as a social institution.
Therefore relatives are obliged to support one another, rather than let those in need
fall on public charity. If the divorce leaves the ex-spouse with inadequate support, he
or she may become a charge on the community. The solution of the controversy
touches public policy.

In other words, and to sum up the problems raised by alimony, a twofold evolu-
tion has taken place in French law on the subject since 1804. One tends to remedy, by
a judicious use of alimony pendente lite, some of the defects resulting in modern
times from a conception of marital authority and property law dating from the be-
inning of the last century. The other is founded on the necessity to adapt the law of
permanent alimony to a period of economic and financial crisis.

Alimony pendente lite is based on the obligation imposed on both spouses by
Section 212 of the Civil Code to support each other. As long as harmony reigns in the
home, this duty is performed by cohabitation, also one of the principal matrimonial
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obligations in French law. But when suit is brought for divorce or separation, the first measure to take place, when all efforts at reconciliation have proved useless, is the assignment to the wife, by order of the President of the Court of first instance, of a separate residence. Apparently this measure affects exclusively the personal relations of the spouses. Yet, owing to French law of marriage settlements, it has necessarily most serious immediate consequences on their patrimonial relations.

Parties about to marry may choose between several régimes matrimoniaux (marriage settlements). If no express contract is made regarding their property, the legal patrimonial status, called the régime de communauté (community property) will apply. Under this form of settlement, virtually all the spouses' movable property becomes community property. To this fund must be added the income from the spouses' separate estates. The husband, naturally, has the exclusive management of his separate estate and also of the common fund. In consequence, he has the exclusive right to administer the separate estate of the wife, because the income belongs to the community of which he is the natural manager.—If the spouses, by an express settlement, have chosen to be married under the régime doté, a special fund, the wife's dowry, is set apart. It cannot be disposed of, and the income is expressly destined to support the family. Here again, the husband is sole manager of the dot.—Even if the settlement rejects all community of interests (régime sans communauté), the spouses' property remains their own but, the income from the wife's being destined to the support of the family, the husband has a beneficial interest in it, called usufruit.—It is only if the adopted settlement is that of séparation de biens (separation of property) that the wife retains the management of her separate estate, under obligation, however, to contribute to domestic expenses up to one third of her income.

This brief synopsis of the French law of property of married people shows that in the great majority of cases the husband has in hand the larger part of available funds. And this rule applies until dissolution of the marriage. Thus, when the wife is authorized to have a residence of her own pending the divorce or separation proceedings, it becomes necessary to provide for her support, pursuant to Section 212 of the Civil Code.

The original conception of French law at the time of the Napoleonic codification provided an unwieldly procedure to solve this difficulty. When divorce, which was abolished at the time of the Restoration of the Monarchy in 1816, was again introduced in French law in 1884, it was followed, in 1886, by a law of April 18th which somewhat simplified the procedure. The plaintiff starts proceedings by an application to the President of the Civil Court of first instance in which he asks for leave to sue the other spouse. The President replies by an order summoning both parties to appear before him, and he may at the same time authorize the plaintiff to take a separate residence. The application and order are then served on the defendant. On the date fixed in his order, the President will try to reconcile the spouses. If the attempt fails, the President issues a second order to authorize the plaintiff to summon the defendant before the court. In this order, the President again decides on the
separate residence, the custody of children and also on the application for alimony. These various measures are known under the general denomination of "provisional measures" (mesures provisoires). They are essentially temporary, at the discretion of the judge and immediately enforceable because of their urgent character.

When the plaintiff has availed himself of the President's authorization to summon the other party before the court, jurisdiction then passes to the latter, which is seized of the case by the statement of claim. From that date, the court has exclusive jurisdiction, as a rule, to revise the provisional measures. Nevertheless, proceedings before the whole court are always slow and rather complicated. And measures regarding alimony are often of an urgent character. In such cases, the party interested can avail himself of the procedure of référé, which is a simplified procedure before the President of the court in cases of emergency. In its decision of May 4, 1910, the French Supreme Court (Cour de Cassation) decided that this procedure is available in all cases of emergency, even after the court is seized of the case, provided the measures ordered by the President are purely provisional and taken without prejudice to the issue before the court. Such are orders on claims in alimony, which merely concern the maintenance of the spouse pendente lite, without prejudice to the question whether the court will ultimately grant a divorce and against whom. On this point, the excessive rigidity of the law, which does not expressly provide for emergencies after the divorce proceedings have started in court, has been remedied by case law.

If we now examine the legal characteristics of alimony pendente lite in itself, we are led to class it in the category of other allowances for necessaries attached by French law to certain family relations. In this respect it may be compared to allowances of Sections 203, 205, 206 of the Civil Code between parents and children, grandparents and descendants, sons- or daughters-in-law and fathers- or mothers-in-law, governed, as to their valuation, by Section 208. In other words, alimony pendente lite is a substitute for the matrimonial obligation of mutual support under Section 212 of the Civil Code. In consequence, alimony pendente lite may be granted without regard to the fact that the spouse in need may be the guilty spouse from the point of view of the ultimate decision on divorce or separation. It may be granted either to the wife or husband (although the former is the more frequent beneficiary because of the French law of marriage settlements already outlined); like other allowances for necessaries it is based on a reciprocal obligation, resulting from the family relation.

As to its valuation, alimony pendente lite is subject to the general provisions of Section 208: it is proportionate to the needs of the creditor and the paying capacity of the debtor. The needs of the creditor include all necessaries of life: food, lodging and clothing, and even the costs of the pending suit. They may include also family charges of the creditor such as children of a former marriage. On the other hand, all personal resources of the creditor must be taken into account. But the possibility that the creditor can get support from his or her parents is no defense for the debtor, because the reciprocal duty of support between spouses ranks first amongst such family obligations. Amongst the resources of the debtor, if it be the husband, one
must include the income from the wife's personal estate, if he administers it under the marriage settlement. It must be noted that alimony is chargeable on income only.

On the other hand, to determine who shall bear the ultimate burden of the debt, one must look to the final distribution of property on winding up of the marriage settlement. Under Section 252, the court's decision, so far as regards patrimonial relations between spouses, dates back to the day when proceedings were started. As a result, if the spouses were married under community property, the income from the personal estate of either spouse, of which the community has the benefit, will cease to fall in the common fund from that date. Therefore, if it appears on the winding up that the wife has no personal estate, the alimony will be really and truly an allowance for necessaries, chargeable to the husband under Section 212. But if the wife has any income—producing property, the alimony paid pendente lite will offset this income during the same period.¹

Such is the general outline of measures taken during proceedings to carry out the reciprocal duty of support of Section 212. However, because of the exceptional situation resulting from the divorce or separation suit, the courts have found it necessary to complete them by other remedies to meet the emergencies. They were naturally brought to utilize here the right which they have recognized to the wife to charge her husband's credit, although, as has been noted, the married woman was legally incompetent until the law of February 19, 1938. Yet the more recent decisions indicate a tendency to reject the theory in this particular case.² Some courts even went further and appointed a sort of trustee to pay the alimony for the husband's account, or, more frequently, restored to the wife the right to administer her personal estate, pendente lite. The legislator himself assisted the courts in this direction. A law of July 13, 1907, reserves to married women the administration and disposal of the property derived from their personal professional activity, and gives them the right to attach their husband's salary, should he fail to provide for them. Nor is this the only procedure to enforce payment of the alimony granted by the court. Faced by the considerable number of cases in which the debtor did not satisfy his obligation, and owing to the practical inefficiency of the civil modes of enforcement, a law of April 7, 1924 (amended April 3, 1928) made a penal offence of the non-payment of alimony. The debtor may be sentenced from three to twelve months imprisonment and to a fine from 100 to 2000 francs. If the offence is renewed, other penalties may be incurred, such as destitution from paternal authority.

Because of its object and juridical basis, alimony pendente lite ceases to be due when divorce is pronounced. The judgment dissolves the marriage. With it disappears the reciprocal duty of support. Moreover, the matrimonial property is wound up, each spouse recovers full and free control of his or her estate and can then support himself or herself. There is only some hesitation as to whether the debt is extinct when the decision becomes final, no longer subject to appeal, or whether it

¹ Decision of the Paris Court of Appeal, May 25, 1917, SIREY, 1928, 2, 4.
² Decision of the Court of first instance of the Seine, October 15, 1930, SEMAINE JURIDIQUE, 1931, 17.
should be prolonged until the end of the liquidation of the matrimonial estate. Court decisions are rather in favour of this last solution.

Thus it would seem that divorce severs all personal and all patrimonial ties between the spouses, and puts an end to alimony. But the problem is more difficult to solve. Under Section 301 of the Civil Code, "unless the marriage settlement provided some advantage on dissolution of the marriage, or provided insufficient advantages for the spouse who obtained the divorce, the court may grant such spouse an alimony, guaranteed on the property of the guilty spouse, in an amount not to exceed a third of the latter's income. Such alimony will be revocable if it ceases to be necessary." Thus, alimony pendente lite is replaced by a permanent alimony, granted in the above conditions exclusively to the spouse who obtained the divorce. The juridical nature of this alimony differs to a large extent from that of alimony pendente lite, with resulting differences in practice which have recently been submitted to the courts, under pressure of present economic instability.

The permanent alimony granted after divorce is, in principle, in the nature of an indemnity compensating damages. Although designated by the same terminology—pension alimentaire—it is recognised that it cannot be governed by the general rules on other allowances for necessaries attached to certain family relations between debtor and creditor. This for the simple reason that there is no longer any family tie between divorced spouses. The difference of nature appears from the provisions of the law which, although it uses the expression "pension alimentaire" and subordinates its grant to the absence of stipulations in the marriage settlement advantageous to the creditor, nevertheless makes it the exclusive privilege of the innocent spouse and takes the paying capacity of the debtor into account only up to one third of his or her income. Because it can be granted only to the innocent spouse, permanent alimony becomes the penalty of a tort: the matrimonial offence—which led to the divorce. Should both spouses be recognised guilty and divorce pronounced "against both," no alimony would be due, the reason being that the less serious of either offences was enough to justify dissolution of the marriage. The damage caused to the innocent spouse by the matrimonial offence is the loss of the benefit of Section 212 and the claim to support from the other spouse. This section is precisely (as we have seen already) the legal basis of alimony pendente lite. Thus has arisen a frequent confusion between them. But it must always be remembered that, whereas the former is a particular mode of performance of the duty of mutual support in exceptional circumstances, the latter is a compensation for its disappearance because of the divorce. The legal basis is the same, but the technique of either institution is quite different. There is no problem, concerning permanent alimony, as to the final charge of the debt. It cannot be deducted from any property allotted to the innocent spouse on liquidation of the marriage settlement and must be borne definitely by the guilty spouse. Also, the grant of such alimony is no obstacle to the grant of an indemnity for any damages, other than the loss of support, which the divorce may cause to the innocent spouse.
Moreover, because it is in the nature of damages rather than an allowance for necessaries, permanent alimony may be claimed in a separate suit, after the divorce, provided the damage on which the claim is founded be the direct result of the divorce. This precisely because it is founded on the damage caused by the dissolution of the marriage. If, on the contrary, it were in the nature of an allowance based on Section 212, the divorce, having destroyed the matrimonial tie, would be a bar to any future claim on this ground. But one must always remember that permanent alimony is the compensation of a particular damage: the loss by the innocent spouse of the claim to support from the other. It is directly connected with the existence in the past of the matrimonial tie and many characteristics of permanent alimony resemble those of other allowances for necessaries attached to family ties. Permanent alimony exists only because there has been a marriage, and although it has been dissolved by divorce this important factor in the past cannot be ignored altogether in the future. Even after its destruction it continues to influence the law of alimony and gives it its peculiar legal "climate." So strong is the tendency to permanence of the institution of marriage, even in liberal legislations admitting of divorce. The result is that permanent alimony stands half way between damages and allowances. This peculiar situation has been brought to the light more vividly in the recent evolution of case law on the matter.

The principal instance of the hybrid character of permanent alimony is given by its mode of valuation. If it were purely an indemnity, it would be estimated on the amount of the loss, irrespective of the debtor's means of payment. Now we have seen that the law itself limits alimony after divorce to one third of the debtor's income, somewhat as in the case of allowances estimated according to the means of both parties. Moreover, if it were purely in the nature of an indemnity, it would be estimated proportionately to the damage at the time when it was caused, i.e., at the time of the divorce, and this estimation would be final. Future changes in the means of creditor and debtor would not have to be taken into account. Or, if they could be considered, it would be only insofar as the change in the means of either party was the direct result of the debtor's tort. The older decisions refused to increase the alimony when the needs of the creditor were increased because of new circumstances independent of divorce itself, such as the rise in the cost of living. But the force of circumstances led the courts gradually to yield on their principles. The fact that, after all, alimony, although in the nature of damages, exists only because there has been a marriage between the parties influenced them irresistibly in favour of applying some rules proper to allowances for necessaries attached to family relations. The first step was to grant a revision when the necessity to increase resulted directly from the divorce. Then, under pressure of economic conditions, the courts ceased to require this direct connection. In a decision of June 28, 1934, the Supreme Court said that alimony "subject to all the rules governing allowances for necessaries could be reduced or even suppressed if the divorced spouse came to better fortune, just as it could be

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4 Cassation, Jan. 17, 1934, SIREY, 1934, I, 377, annotated by Prof. Esmein.
5 SIREY, 1934, I, 377.
revised by taking into account new circumstances of the debtor and fresh needs of the creditor.” Permanent alimony may thus be revised after divorce, if the needs of the creditor have increased since then, whatever may be the cause of that increase. Nevertheless, the evolution from the characteristics of an indemnity toward those of an allowance is not yet quite completed. The courts are still opposed, as we have seen, to the grant of alimony after the divorce, unless the cause of the claim dates back to the divorce itself.⁶

This evolution has led some authors to consider that the duty of mutual support under Section 212 survives dissolution of the marriage by divorce.⁷ In their opinion, the same social necessity which imposed the creation of that obligation imposes its maintenance. It is the necessity to find, whenever possible, a responsible person to support poor citizens, rather than let them become a burden on public relief organizations. During marriage, it is only natural that the spouses be responsible for one another’s support. After marriage, it is equally natural that the burden of supporting the innocent spouse should rest on the guilty spouse, rather than lie on the community. The argument is that, granting an alimony to compensate the loss of the benefit of Section 212 amounts to the same thing as substituting to the normal mode of performance of the obligation to support (normally performed in kind by cohabitation) the payment of an allowance in money, sole possible means of performance between divorced spouses. The guilty spouse, it is true, is deprived of the corresponding benefit attached to the condition of ex-spouse. But this is the penalty for his tort. Moreover, the Criminal Section of the Supreme Court appears to favour this view. In its decision of August 5, 1927⁸ it declared the law of February 7, 1924 applicable in case of non-payment of the alimony. This law, as we have seen, has made default a penal offence. It is known as a Law on Neglect of Family Obligations (abandon de famille). Its application in the case of permanent alimony after divorce clearly shows that, in the eyes of the Criminal Section of the Supreme Court, there is a “family obligation” subsisting between divorced spouses.⁹ Although this theory is still proposed with much prudence and raises many serious objections, yet it must be admitted that it gives a satisfactory theoretical account of many of the solutions adopted by case law and that it provides a convenient answer to the problem of the precise juridical nature of permanent alimony. It shows also at any rate how difficult it is, even for the Law, to ignore a state of fact established in the past under its auspices, and destroy all its consequences in the future. Here, for example, the parties were married once. They may become divorced. But they will always be “divorced spouses,” i.e., something different from total strangers.

⁵ Cassation, Feb. 15, 1938, DALLOZ HEBDOMADAIRE, 1938, p. 210. The creditor must show that his condition “is the direct consequence of the divorce and does not result from later events.”
⁶ Cassation, Jan. 17, 1938, DALLOZ, 1938, I, 37, annotated by J. Vandamme.
⁷ DALLOZ, 1928, I, 32, annotated by Prof. Nast.
⁸ The Aix Court of Appeal, in its decision of March 19, 1915, and the Cour de Cassation, Civil Chamber, on April 21, 1921 (DALLOZ 1924, I, 91) held that remarriage of the beneficiary put an end to permanent alimony, thus apparently supporting the theory that it is based on an obligation to support which, in that case, passes to the second spouse. However, there are conflicting decisions, based on the theory that permanent alimony being an indemnity for damages should be maintained, as the second marriage has no effect on the first husband’s tort.