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Louisiana Practice - Waiver of Right to Claim Abandonment

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The burden imposed by hypertechnical procedure and the injustices which often result call for a re-examination of this phase of our procedure and the formulation of more workable rules.

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LOUISIANA PRACTICE — WAIVER OF RIGHT TO CLAIM ABANDONMENT

After a ten-year delay in the prosecution of the suit, defendant filed a motion requesting the court to order plaintiff to post bond as security for court costs. Three days later defendant filed another motion asking that the suit be dismissed for reason that plaintiff had permitted more than five years to elapse without having taken any steps in the prosecution. On appeal by plaintiff from judgment of dismissal to the Orleans Court of Appeal, *held,* reversed. The defendant, by filing a motion requesting the court to order plaintiff to post bond for court costs, expressed a willingness to proceed with the trial, and thus waived its right to invoke a plea of abandonment based on five years non-prosecution. *State* ex rel. *Fred Shields v. Southport Petroleum Corp.*, 78 So.2d 201 (La. App. 1955).[1]

The filing of suit in a court of competent jurisdiction operates to interrupt prescription of a cause of action.[2] Article 3519 of the Civil Code provides that this interruption will be considered as never having occurred if plaintiff allows five years to elapse without having taken any "steps in the prosecution" of the suit.[3] A step in the prosecution is "some *formal* move before

1. A companion case now pending before the Supreme Court is State *ex rel.* Shields, Inc. v. Southport Petroleum Corp., 78 So.2d 201 (La. App. 1955). The court of appeal transferred this case to the Supreme Court for lack of jurisdiction.

2. LA. R.S. 9:5801 (1950): "The filing of a suit in a court of competent jurisdiction shall interrupt all prescriptions affecting the cause of action therein sued upon, against all defendants, including minors and interdicts." See LA. CIVIL CODE art. 3518 (1870).

3. LA. CIVIL CODE art. 3519 (1870), *as amended*, La. Acts 1954, No. 615, p. 1119: "If the plaintiff in this case, after having made his demand, abandons or discontinues it, the interruption shall be considered as having never happened.

"Whenever the plaintiff having made his demand shall at any time before obtaining final judgment allow five years to elapse without having taken any steps in the prosecution thereof, he shall be considered as having abandoned the same.

"Any appeal, now or hereafter pending in any appellate court of the State, in which five years have elapsed without any steps having been taken in the prosecution thereof, shall be considered as abandoned, and the court in which said appeal is pending shall summarily dismiss such appeal." See Note, 3 LOUISIANA LAW REVIEW 835 (1940).

the court, intended to hasten judgment."[4] It is "something more than a mere passive effort to keep the suit on the docket of the court."[5] The presumption of abandonment created by article 3519 is not conclusive, as plaintiff may show that his inaction was caused by circumstances beyond his control.[6] In early decisions the courts held that article 3519 is not self operative, and that defendant must move for dismissal of the suit after the lapse of five years.[7] Under these decisions the right to demand a dismissal is waived by defendant if his actions have been inconsistent with an intent to treat the case as abandoned.[8] However, in recent cases interpreting article 3519 the court has held that abandonment results as a legal consequence of plaintiff's inaction in failing to prosecute the suit for a period of five years.[9] The leading case supporting this view is *Evans v. Hamner*,[10] where the Supreme Court held that plaintiff's cause of action was *ipso facto* abandoned, without the necessity of a motion by defendant to have the abandonment judicially declared. This ruling appears to have been accepted by the legislature in a recent amendment to article 3519.[11]

In the instant case the Orleans Court of Appeal has reasserted the position taken in the early decisions that there could be a waiver of the right to claim abandonment if defendant's actions indicated an intent not to treat the case as abandoned. By doing so, however, the court appears to have overlooked the

4. State v. Edrington, 11 Orl. App. 288 (La. App. 1914); see Note, 16 LOUISIANA LAW REVIEW 182 (1955), for a discussion of this problem in criminal cases.

5. Augusta Sugar v. Haley, 163 La. 814, 112 So. 731 (1927).

6. Barton v. Burbank, 138 La. 997, 71 So. 134 (1916); Bell v. Staring, 170 So. 502 (La. App. 1936); Cotonio v. Richardson, 4 Orl. App. 280 (La. App. 1907).

7. Hibernia Bank & Trust Co. v. J. M. Dresser Co., 14 La. App. 555, 131 So. 752 (1930), cited with approval in King v. Illinois Central R.R., 143 So. 95, 97 (La. App. 1932).

8. Continental Supply Co. v. Fisher Oil Co., 156 La. 101, 100 So. 64 (1924); Geisenberger v. Cotton, 116 La. 651, 40 So. 929 (1906); King v. Illinois Central R.R., 143 So. 95 (La. App. 1932). In the *King* case, defendant was held to have waived its right to have the suit dismissed for abandonment by moving to revoke an order permitting the filing of a supplemental petition.

9. State v. United Dredging Co., 218 La. 744, 50 So.2d 826 (1951); Sandfield Oil and Gas Co. v. Paul, 7 So.2d 725, 732 (1942); Evans v. Hamner, 209 La. 442, 24 So.2d 814 (1946), discussed in *The Work of the Louisiana Supreme Court for the 1945-1946 Term — Procedure*, 7 LOUISIANA LAW REVIEW 270 (1947); Senseley v. First National Life Insurance Co., 205 La. 61, 16 So.2d 906 (1944).

10. 209 La. 442, 24 So.2d 814 (1946).

11. La. Acts 1954, No. 615, p. 1119: "Any appeal, now or hereafter pending in any appellate court of the State, in which five years have elapsed without any steps having been taken in the prosecution thereof, shall be considered as abandoned, and the court in which said appeal is pending *shall summarily dismiss such appeal.*" (Emphasis added.)

automatic abandonment rule laid down by the Supreme Court in the *Evans* case.[12] Under the *Evans* case, defendant is not required to take any action as the case is automatically dismissed. Thus, any action taken by defendant after the expiration of five years cannot be considered a waiver since the case stands as if it had already been dismissed. By holding that there can be a waiver of the right to plead abandonment in the instant case, however, the Orleans Court of Appeal in effect has held that defendant must file a motion to dismiss the suit. The implication of this decision is that the intermediate appellate court has returned to the old rule that abandonment is not self operative and must be pleaded. If defendant takes any action inconsistent with an intent to treat the case as abandoned, he will be considered to have waived the right to claim abandonment.[13] It is difficult to reconcile this holding with the rule of automatic abandonment of the *Evans* case. In addition, the decision in the instant case appears to be inconsistent with the new language of article 3519.[14]

The Louisiana State Law Institute has recommended a provision much broader than article 3519 of the Civil Code to cover the subject of abandonment. Under the proposed Code of Practice,[15] an action is not abandoned unless five years have elapsed without any steps being taken by *any of the parties* in the *prosecution or defense.* Moreover, the rule of abandonment in the proposed article is intended to be self operative, patterned after the *Evans* case, and to apply to both principal actions and reconventional demands. This new article goes even further than the jurisprudence in keeping the suit on the docket, as action by either plaintiff or defendant is sufficient to preclude abandonment. A much simpler rule is that of the United States District

12. The *Evans* case was not mentioned in the instant decision, but was relied on by defendant in his brief.

13. In Geisenberger v. Cotton, 116 La. 651, 40 So. 929 (1906), the Supreme Court qualified the rule as to waiver by holding that any plea to the merits of the case, coupled with the plea for dismissal would constitute a waiver. From the instant case, it is quite clear that the only requisite for waiver is conduct on the part of defendant that indicates a willingness to continue with the trial. *Any plea* by defendant in addition to the motion for dismissal seems to meet this test. The rule is apparently no longer limited to a plea on the merits of the case.

14. See note 11 *supra.*

15. Article 18: "An action is abandoned when the parties thereto, prior to judgment, fail to take any bona fide step in the prosecution or defense thereof for a period of five years. This provision shall be operative without formal order, but on *ex parte* motion of any party or other interested person the court shall enter a formal order of dismissal as of the date of its abandonment." LOUISIANA STATE LAW INSTITUTE, CODE OF PRACTICE REVISION, EXPOSE DES MOTIFS No. 5, at 64 (1953).

Court for the Eastern District of Louisiana. Under that court's rule[16] the clerk calls all actions pending and undisposed of in which no steps in the prosecution have been taken within *six months*. To maintain his position on the docket, plaintiff must appear and show that the failure to take steps was not due to his fault or lack of reasonable diligence. This federal rule adequately solves the problem of a docket crowded with cases which the parties are not interested in prosecuting. By the application of a presumption of abandonment to every case which has not been prosecuted actively during each six-month period, the court effectively expedites the administration of justice and keeps its docket clear of driftwood. An added advantage in this rule is the elimination of the technicality of waiver. The parties to the suit have no discretion in matters relating to dismissal, as the clerk assumes all responsibility for keeping the docket clear. The proposal of the Law Institute fails to attain either of these highly desirable results.

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16. Rule 12: "*General Call of Docket.* On the third Monday of May and November of each year, or on such other days at least once each 6 months as the court may by order designate, the clerk under the supervision of the judge and in open court, shall call all actions pending and undisposed of in which no steps or proceedings appear to have been taken within 6 months.

"Notice of all general calls of the docket shall be given by mailing copies of such notice to all attorneys of record in each case to be called. If none of the parties or their attorneys appear at the time and place stated for the general call and make answer when an action is called, the court may direct the clerk to enter an order dismissing the action for want of prosecution. (As Am'd. April 7, 1953)

"If at the call it is shown that the failure to take steps or proceedings is not due to the plaintiff's fault or lack of reasonable diligence on his part the action will hold its place on the docket.

"The court may make such other orders as may facilitate the prompt and just disposition of any action." GENERAL, CIVIL AND ADMIRALTY RULES, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, Rule 12 (1944), 8 FED. RULES SERV. 978 (1945).