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PLEADING AND PRACTICE—WHAT CONSTITUTES ABANDONMENT OF SUIT—Sliman instituted a suit against Araguel. After a partial trial of the case, on March 8, 1933, it was continued to be re-assigned for trial. No further action was taken until June 20, 1940, when the case, on the motion of plaintiff, was placed on the call docket of the lower court for reassignment. During this period of non-prosecution, there had been correspondence between the parties, who were seeking an agreed statement of facts. Defendant moved to have the suit dismissed on the ground of non-prosecution for five years. *Held*, the failure to take any step in the prosecution of the suit during five years amounted to an abandonment under Article 3519 of the Civil Code. Only formal moves before the court, and not extra-judicial acts done in pais, are steps in the prosecution within the meaning of the article. *Sliman v. Araguel*, 200 So. 280 (La. 1941).

The filing of suit constitutes an interruption of prescription on the cause of action.¹ But if the suit is abandoned or voluntarily discontinued,² the interruption is considered as never having occurred.³ A suit is considered abandoned when "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."⁴

A step in the prosecution of a suit is "something more than a mere passive effort to keep the suit on the docket of the court; it means some active measure taken by plaintiff, intended and calculated to hasten the suit to judgment."⁵ The court in the

1. La. Act 39 of 1932 [Dart's Stats. (1939) § 2062.1], superseding Art. 3518, La. Civil Code of 1870.

2. "Discontinued" as here used means the dismissal of suit on motion resulting in a non-suit, as provided by Arts. 491, 492, 532, La. Code of Practice of 1870.

3. Art. 3519, La. Civil Code of 1870.

4. *Ibid.* The abandonment only prevents the continuing of that suit by the plaintiff. It does not bar the filing of another action. *Teutonia Loan & Building Co. v. Connolly*, 133 La. 401, 63 So. 63 (1913); *Charbonnet v. State Realty Co.*, 155 La. 1044, 99 So 865 (1924); *Franek v. Turner*, 164 La. 532, 114 So. 148 (1927); *Losch v. Greco*, 173 La. 223, 136 So. 572 (1931).

5. *Augusta Sugar Co. v. Haley*, 163 La. 814, 816, 112 So. 731, 732 (1927). See also *State ex rel. Yazoo & M. V. R. R. v. Edrington*, 11 Orl. App. 288 (La. App. 1914). Defending a premature motion to dismiss for want of prosecution is not a step within Article 3519. *Augusta Sugar Co. v. Haley*, 163 La. 814, 112 So. 731 (1927). A motion for permission to withdraw the record is not a step forwarding the progress of the case in court. *Lips v. Royal Ins. Co.*, 149 La. 359, 89 So. 213 (1921). Issuance and service of citation is not a step by the plaintiff. *Seligman v. Scott*, 17 La. App. 486, 134 So. 771 (1931). If an exception is pending so that a default judgment could not be entered, the filing of an answer by the defendant is not a step by the plaintiff. *Lips v. Royal Ins. Co.*, 149 La. 359, 89 So. 213 (1921). How-

present case reiterates the rule that the step must be taken before the court and cannot be a mere informal action by the plaintiff nor simple negotiations between the counsel in the case.⁶

The presumption of abandonment created by Article 3519 is not conclusive. The plaintiff is permitted to show the reasons for his failure to prosecute the case further.⁷ But in order to prevent the suit from being considered abandoned, the plaintiff must show that the reasons for non-prosecution were circumstances beyond his control and were such as to make it impossible for him to take any step.⁸ The case is not considered abandoned if the failure to take a step is due to the delay of a judge in rendering a decision on an exception or application for injunction,⁹ or is occasioned by the fact that the proceedings were stayed by a court order.¹⁰

Although five years elapse without any step having been taken by the plaintiff, the abandonment and dismissal is not automatic.¹¹ The defendant must move for the dismissal. The right to demand dismissal may be waived by the defendant by joining with the motion to dismiss a plea to the merits¹² or

ever, it has been said that the filing of an exception to plaintiff's action is a step by plaintiff. *Howcott v. Petit*, 130 La. 791, 797, 58 So. 574, 576 (1912). But if the case is "ripe for default," the filing of an answer to prevent a default judgment is under the stress of necessity created by the plaintiff and is considered as a step by the plaintiff. *Lips v. Royal Ins. Co.*, 149 La. 359, 89 So. 213 (1921); *Schutzman v. Dobrowolski*, 191 La. 791, 186 So. 338 (1939). A formal motion by the plaintiff to have the case placed on the summary call docket is a step in the prosecution. *Cocke v. Cavalier*, 175 La. 151, 143 So. 33 (1932); *Jones v. American Bank & Trust Co.*, 175 La. 160, 143 So. 35 (1932).

6. *State ex rel. Yazoo & M. V. R. R. v. Edrington*, 11 Orl. App. 288 (La. App. 1914).

7. *Bell v. Staring*, 170 So. 502 (La. App. 1936); *Harrisonburg-Catahoula State Bank v. Meyers*, 185 So. 96 (La. App. 1938), noted in (1939) 13 *Tulane L. Rev.* 641.

8. *Bell v. Staring*, 170 So. 502 (La. App. 1936). Ignorance of the fact that the judge has acted on a pending motion is no excuse for plaintiff's inaction. *Ibid.* Death of an attorney who had an interest in plaintiff's suit, with the result that it could not be settled or compromised without permission of the attorney, was not cause for plaintiff's non-prosecution. *Nix v. Wight*, 3 La. App. 402 (1926). Failure of the clerk of court to file the transcript does not excuse plaintiff's inaction, since the plaintiff can compel the filing of the transcript. *Landry v. Dore*, 149 So. 321 (La. App. 1933).

9. *Barton v. Burbank*, 138 La. 997, 71 So. 134 (1916).

10. *Cotonia v. Richardson*, 4 Orl. App. 230 (La. App. 1907).

11. *Hibernia Bank & Trust Co. v. J. M. Dresser Co.*, 14 La. App. 555, 131 So. 752 (1931), cited with approval in *King v. Illinois Central R.R.*, 143 So. 95, 97 (La. App. 1932).

12. *Geisenberger v. Cotton*, 116 La. 651, 40 So. 929 (1906); *Continental Supply Co. v. Fisher Oil Co.*, 156 La. 101, 100 So. 64 (1924).

other plea.¹⁸ Likewise, the right of the defendant to have the case dismissed is waived by judgment being rendered without objection on the part of defendant.¹⁴

The failure of any party except the plaintiff to take active steps in the prosecution does not amount to an abandonment.¹⁵ Consequently, abandonment for failure to take steps under Article 3519 applies only to cases in courts of original jurisdiction, where the plaintiff must carry the case forward, and not to those on appeal.¹⁶ To hold otherwise would mean that a plaintiff-appellant would be required to take a step within five years while a defendant-appellant would not.

The instant case is merely another expression of the court evidencing an intention to carry out the legislative intent of punishing the plaintiff when he allows his case to be prolonged.¹⁷

M.M.H.

WORKMEN'S COMPENSATION—PREMATURITY OF CLAIM—In September of 1936 plaintiff, while performing his work, developed a hernia and submitted to an operation on February 25, 1937. He returned to work May 22, 1937; and on August 1, 1937, there was a recurrence of the rupture. Suit was filed on June 18, 1938. During this period plaintiff performed lighter duties. Nevertheless, up to the date of the trial he was paid his regular wages. He seeks compensation for permanent and total disability under Section 8(1) (b) of the Workmen's Compensation Act—compensation to run from September, 1936. *Held*, on rehearing, the plaintiff was

13. *King v. Illinois Central R.R.*, 143 So. 95 (La. App. 1932), where the joinder of a motion to revoke an order permitting the filing of a supplemental petition was held to waive the right to have the suit dismissed.

14. *Harrisonburg-Catahoula State Bank v. Meyers*, 185 So. 96 (La. App. 1938), noted in (1939) 13 *Tulane L. Rev.* 641.

15. *Reagan v. Louisiana Western R.R.*, 148 La. 754, 79 So. 328 (1918), where it was held that a defendant appealing to the district court from a justice of the peace court is not a plaintiff and that five years inaction on his part did not amount to an abandonment.

Likewise, only the plaintiff is precluded by abandonment from continuing the case. The abandonment by plaintiff cannot be raised against an expert seeking costs. *Hibernia Bank & Trust Co. v. J. M. Dresser Co.*, 14 La. App. 555, 131 So. 752 (1931).

16. *Verrett v. Savoie*, 174 La. 844, 141 So. 854 (1932). This case expressly repudiates the contrary ruling of *City of New Orleans v. New Orleans Jockey Club*, 129 La. 64, 55 So. 711 (1911); *Hibernia Bank & Trust Co. v. Jacob A. Zimmerman & Sons*, 167 La. 751, 120 So. 283 (1929); *Good v. Picone*, 18 La. App. 42, 137 So. 870 (1931).

17. For a discussion of the legislative intent, see *Lockhart v. Lockhart*, 113 La. 872, 37 So. 860 (1905).