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Richard A. Tonry

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NOTES

CIVIL PROCEDURE — ABANDONMENT OF SUIT

Plaintiff and defendant had stipulated in accordance with the provisions of article 1421 of the Code of Civil Procedure,¹ that the depositions of any person might be taken at any time or place, upon notice given in any manner, and that these depositions could be put to the same use as any others. Plaintiff, four years after institution of the suit, finally identified, located, and took the depositions of the defendant's engineer, fireman, and other employees. However, there was no "formal action before the court." At the end of the fifth year, on motion of defendant, the trial court dismissed the suit on grounds of abandonment. By a divided court the third circuit court of appeals affirmed; rehearing was denied, two justices dissenting. *Held*, taking of discovery depositions under stipulation of counsel without filing formal motions in court did not constitute a step in the prosecution of suit within the five-year period sufficient to defeat a motion for dismissal on grounds of abandonment. *DeClouet v. Kansas City Southern Ry.*, 176 So. 2d 471 (La. App. 3d Cir. 1965), *writ refused*, 178 So. 2d 662 (La. 1965).

Prior to 1960, article 3519 of the Civil Code, dealing with abandonment of suit, provided that an action was 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."² The appellate courts interpreted "a step in the prosecution" of the case to be "formal action, before the court, intended to hasten the suit to judgment."³ After adoption of the new Code of Civil Procedure in 1960, the same interpretation was applied to article 561, which had replaced article 3519 of the Civil Code.⁴ Thus, the following were considered sufficient to constitute "steps in

1. LA. CODE OF CIVIL PROCEDURE art. 1421 (1960).

2. LA. CIVIL CODE art. 3519 (1870) has been amended by La. Acts 1960, No. 30, § 1, to remove all procedural rules. These procedural rules have been transferred to LA. CODE OF CIVIL PROCEDURE art. 561 (1960).

3. *Sliman v. Araguel*, 196 La. 859, 200 So. 280 (1941) and cases cited therein; *Sanders v. Luke*, 92 So. 2d 156 (La. App. 1st Cir. 1957); *Reagor v. First Nat'l Life Ins. Co.*, 85 So. 2d 312 (La. App. 2d Cir. 1956); *Newson v. Bailey*, 88 So. 2d 391 (La. App. 8d Cir. 1956).

4. "An action is abandoned when the parties fail to take any steps in its prosecution or defense in the trial court for a period of five years. This provision

the prosecution or defense":⁵ an assignment of case for trial at motion of plaintiff,⁶ entries made in the call docket,⁷ a demand in reconvention in answer to a demand in nullity,⁸ a petition by the heirs of a deceased party to be made parties in decedent's place;⁹ a motion to advance an appealed cause to the preference docket of the Supreme Court,¹⁰ and filing of a motion that the court order the opponent to post bond to cover cost of trial preparation.¹¹ The following were considered not sufficient to constitute "steps in the prosecution or defense"; an agreement to continue the case at the request of the defendant's counsel,¹² conferences and correspondence between counsel,¹³ the payment of court costs for the transcript of evidence,¹⁴ payment of reporter's fee,¹⁵ filing of transcript of evidence,¹⁶ the clerk's issuance and the sheriff's service of citations making certain persons parties,¹⁷ withdrawal of record on motion of counsel,¹⁸ and resistance to motions to dismiss the suit and to strike supplemental petitions.¹⁹

In the instant case, the plaintiff had definitely taken action "intended to hasten the suit to judgment" though, admittedly,

shall be operative without formal order, but on ex parte motion of any party or other interested person, the trial court shall enter a formal order of dismissal as of the date of its abandonment.

"An appeal is abandoned when the parties fail to take any step in its prosecution or disposition for a period of five years; and the appellate court shall dismiss the appeal summarily." After the adoption of the new Code, the same "formal action" test was applied to reach a perfectly sound result, without the appellate court noticing that this test might not prove workable when applied to other factual situations. *Henry v. Stephens*, 169 So.2d 422 (La. App. 3d Cir. 1964).

5. Note that article 561 expanded article 3519 by including "any steps in the prosecution or defense" in the trial court within a period of five years. (Emphasis added.)

6. *Shutzman v. Dobrowolski*, 191 La. 791, 186 So. 338 (1939).

7. *Cocke v. Cavalier*, 175 La. 151, 143 So. 33 (1932); *James v. American Bank & Trust Co.*, 175 La. 160, 143 So. 35 (1932).

8. *Continental Supply Co. v. Fisher Oil Co.*, 156 La. 101, 100 So. 64 (1924).

9. *Watt v. Ceppel*, 67 So.2d 341 (La. App. Or. Cir. 1953).

10. *Barbari v. Firemen's Ins. Co.*, 96 So.2d 252 (La. App. 1st Cir. 1957), *appeal transferred*, 231 La. 679, 92 So.2d 580 (1957).

11. *State ex rel. Shields v. Southport Petroleum Corp.*, 78 So.2d 201 (La. App. Or. Cir. 1955), *appeal transferred*, 230 La. 199, 88 So.2d 25 (1956).

12. *Sliman v. Araguel*, 196 La. 859, 200 So. 280 (1941).

13. *Ibid.*

14. *Sanders v. Luke*, 92 So.2d 156 (La. App. 1st Cir. 1957).

15. *Reagor v. First Nat'l Life Ins. Co.*, 85 So.2d 312 (La. App. 2d Cir. 1956).

16. *Ibid.*; *Newsom v. Bailey*, 88 So.2d 391 (La. App. 2d Cir. 1956).

17. *Seligman v. G. A. Scott & Bro.*, 17 La. App. 486, 134 So. 771 (2d Cir. 1931).

18. *Lips v. Royal Ins. Co. of Liverpool, England*, 149 La. 359, 89 So. 213 (1921).

19. *Augusta Sugar Co. v. Haley*, 163 La. 814, 112 So. 731 (1927).

not a "formal action before the court." Yet, prior to 1952, plaintiff's action would have been "formal" simply because every time a deposition was taken, interrogatories on facts and articles propounded, or any of the older and less effective substitutes for discovery used, it had to be done under a court order, which was necessarily a "formal action before the court."²⁰ Thus, though the courts were ruling that a "step in the prosecution" must be a "formal action before the court," they were doing so in a context where the taking of depositions and the use of discovery devices were of necessity formal action before the court. However, under the Depositions and Discovery Act of 1952,²¹ borrowed from federal practice,²² the trial judge was relieved of the burden of signing these perfunctory orders with the result that the taking of depositions no longer constituted "formal action before the court."²³ The pertinent question then becomes, should the courts utilize the same "formal action" test in a context where the taking of depositions and the use of discovery devices no longer require formal action by the court?

DeClouet gives an affirmative answer. Judge Culpepper, writing the majority opinion, notes that legislative intent in enacting article 3519 was that suits, once filed, should not be allowed to linger indefinitely and thereby preserve stale claims from the normal operation of prescription. He further notes that judicial interpretation has called for a formal action in the judicial proceedings themselves to interrupt the running of the five-year period during which action is required.²⁴ Such reasoning overlooks the fact that the legislative intent spoken of and the judicial interpretation of article 3519 arose in a period when discovery procedures required formal action before the court. Thus, the procedural changes affecting discovery are ignored. It might just as logically have been argued that the judicial test of formal action arose because the courts were aware that discovery devices did require formal action of the

20. La. Code of Practice arts. 140, 175, 426, 430, 439 (1870). See also LA. R.S. 13:3771-3778 (1950), repealed by La. Acts 1960, No. 32.

21. La. Acts 1952, No. 202.

22. Hubert, *The New Louisiana Statute on Depositions and Discovery*, 13 LA. L. REV. 173, 175 (1953).

23. See former LA. R.S. 13:3752(A), 13:3781, 13:3784. Adopted in 1952, this approach and these provisions were repealed by La. Acts 1960, No. 32, but retained in the new procedural Code, LA. CODE OF CIVIL PROCEDURE arts. 1451, 4191, 1496 (1960).

24. 176 So.2d 471, 473 (La. App. 3d Cir. 1965).

court at that time. That is, one could reason: the legislature enacted article 3519 in order that suits should not be allowed to linger indefinitely; the judiciary, aware of legislative intent *and* aware that discovery devices required formal action, interpreted article 3519 as requiring formal action before the court. The latter reasoning has the added advantage of crediting the judiciary with some understanding of what would be included under a "formal action before the court" criterion applied to article 3519.

In squarely facing the question whether the taking of depositions and the use of discovery devices should be considered "steps in the prosecution or defense" under article 561, the basic consideration for abandoning the "formal action" test should be examined. The rationale in requiring a "step in the prosecution or defense" to be a "formal action before the court" was that if actual steps before the court were required then any uncertainty as to whether the other party had abandoned the suit would be eliminated.²⁵ Under the present procedural rules, however, there is little danger of uncertainty. The Code of Civil Procedure, article 1421, provides that if depositions are to be taken the parties must, first, agree to it in writing and, second, give formal notice of the time and place of the taking to the other party.²⁶ Thus, insofar as depositions are concerned, the uncertainty rationale would seem to fall and, along with it, the "formal action" test of abandonment. Judges Tate and Fruge make this point in their dissents.²⁷

That the "formal action" test should be retained for all but discovery procedures was proposed to the Louisiana State Law Institute. In drawing up the Depositions and Discovery Act of 1952, the Institute did not envision that discovery devices would no longer suffice to interrupt the period for abandonment. The proposed amendment to article 561 was designed to legislatively overrule *DeClouet* and at the same time to retain the "formal action" test by incorporating the "formal action" test into the article. Thus, any formal action before the court in the prosecution or defense would have interrupted the abandonment period.

25. *Sliman v. Araguel*, 196 La. 859, 200 So. 280 (1941); *Sanders v. Luke*, 92 So.2d 156 (La. App. 1st Cir. 1957); *State ex rel. Yazoo & M.V.R.R. v. Edrington*, 11 Orl. App. 288 (La. App. Orl. Cir. 1914).

26. LA. CODE OF CIVIL PROCEDURE art. 1421 (1960).

27. 176 So.2d 471, 474, 475 (La. App. 3d Cir. 1965).

However, it would also have amended the article to provide that the taking of any depositions or the use of any other discovery devices (if done according to statutory directives) would constitute "steps in the prosecution or defense" sufficient to interrupt the five-year abandonment period.²⁸

It should, perhaps, be noted that one might justifiably argue for a reduction of the period necessary to constitute abandonment. Under article 561 an action is not abandoned unless five years have elapsed without any steps having been taken by any of the parties.²⁹ Such a lengthy period has frequently been used by plaintiff attorneys in an effort to force settlement in cases they recognize to be weak which they are not anxious to prosecute. Further, there is no denying that the five-year period places a heavy burden on the already overcrowded civil dockets. On the other hand, one must balance the time-consuming difficulties in obtaining depositions and discovery information often experienced in this complex day and age. A shorter period with liberal provisions for extension would seem more appropriate. Perhaps attention should be given to the rule of the United States District Court for the Eastern District of Louisiana under which the clerk calls all actions pending and undisposed of in which no steps in the prosecution have been taken within six months.³⁰ If combined with liberal provisions for extension, this rule would seem to thwart the protracted threat of prosecution as well as alleviate the problem of a crowded docket, yet it would

28. The following amendment of the first paragraph of article 561 was recommended by the Reporters on the Code of Civil Procedure projet: "An action is abandoned when the parties fail to take any action, consisting of a formal move in the trial court to further its prosecution or defense, the taking of a deposition, or the use of any of the discovery devices, 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 trial court shall enter a formal order of dismissal as of the date of its abandonment."

The Reporters' Advisory Committee approved the proposed legislative reversal of the *DeClouet* case but, fearing that the proposed amendment would unduly lengthen the period for abandonment, qualified its approval by a recommendation that the five-year period be shortened to three years. The Council of the Law Institute expressed the view that, even under the *DeClouet* decision, the present period was ample and decided not to recommend any amendment of the first paragraph of article 561.

The Council did recommend an amendment of the second paragraph of this article, but only to grant plenary power to the appellate courts to determine the period for abandonment on appeal, to avoid conflict with the appellate courts' rules. Cf. RULES OF THE SUPREME COURT OF LOUISIANA rule VII, § 3 (1962).

29. LA. CODE OF CIVIL PROCEDURE art. 561 (1960), quoted in note 4 *supra*.

30. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, GENERAL, CIVIL, AND ADMIRALTY RULES, rule 12 (1944, as amended, 1965); LOUISIANA COURT RULES 229, 237 (1965).

assure counsel ample time to discover whatever information he might need to effectively prosecute his case.³¹

Richard A. Tonry

INSURANCE — RESIDENT OF THE SAME HOUSEHOLD

Upon graduation from high school in Arkansas, Daniel Taylor, an unemancipated minor, left the home of his parents and went to live with his uncle in Louisiana, where he accepted a job with his uncle's employer. On the morning of the accident, Daniel and his uncle were on their way to their place of employment; Daniel was driving his uncle's pickup truck with his consent. Daniel lost control of the vehicle, which overturned, resulting in serious injuries to his uncle. The uncle sued his own liability insurer and the liability insurer of the father. The trial court ruled in favor of the plaintiff against both insurers. The Third Circuit Court of Appeal affirmed. The Supreme Court granted certiorari but limited its consideration to the question of whether Daniel Taylor was a resident of his father's household at the time of the accident. *Held*, Daniel Taylor was a resident of his father's household at the time of the accident, thereby rendering his father's insurer liable under its family automobile liability policy.¹ *Taylor v. State Farm Mut. Auto. Ins. Co.*, 248 La. 246, 178 So. 2d 238 (1965).

31. Moreover, it would seem wise to demand consistency between the periods within which a case will be considered abandoned on the trial level (presently five years), on appeal to an appellate court (presently five years), and on appeal to the Supreme Court (recently revised from five years to one year by the Supreme Court in RULES OF THE SUPREME COURT OF LOUISIANA rule VII, § 3 (1962); LOUISIANA COURT RULES 7, 13 (1965).

In order therefore to effect consistency throughout the judicial system, and because five years does seem unduly long, it is suggested the last paragraph of article 561 should be amended to allow the appellate court to provide by rule for the dismissal of appeals for the failure to take any steps in the prosecution or defense for a lesser period than five years. Such a revision is presently being considered by the Louisiana State Law Institute.

1. The pertinent parts of the insurance policy are as follows:

"*Named Insured*—means the individual so designated in the declarations [Garnie Taylor] and also includes his spouse, if a resident of the same household.

"*Insured*—the word 'insured' includes (1) the named insured, and also includes (2) his relatives, (3) any other person while using the automobile, provided the actual use of the automobile is with the permission of the named insured

"*Relative*—means a relative of the named insured who is a resident of the same household.

"INSURING AGREEMENT II — NON-OWNED AUTOMOBILES. Such insurance . . . applies to the use of a non-owned automobile by the named insured or a relative"