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## THE HISTORY AND DEVELOPMENT OF NONSUIT.

(With West Virginia Annotations)

BY NEIL C. HEAD\*

THE common law nonsuit is closely allied to several other modes by which the plaintiff's action came to an end before judgment, namely, discontinuance, *non prosequitur*, *nolle prosequi* and *retraxit*. Each of these has varied at different times in its development or decay, and while they overlap to a certain extent, they can be differentiated.

The term discontinuance at early common law was used in the substantive law of real property, this being the only meaning known to Lord Coke. But it soon came to be used in pleading and practice, being confined for a time to a failure by the plaintiff to continue the cause regularly from day to day, or term to term, between the commencement of the action and final judgment, but gradually being extended to mean practically any discontinuance of an action by the plaintiff. It may be either voluntary, as where the plaintiff withdraws his action, or involuntary, as where in consequence of some omission or misleading the action is deemed out of court. The common-law voluntary discontinuance and the nonsuit differed fundamentally in only one way, the plaintiff had no absolute right to discontinue, the consent of the judge being necessary,<sup>1</sup> while a nonsuit was a matter of right. The involuntary discontinuance arose from the plaintiff's error or failure to go forward.<sup>2</sup> A discontinuance was not a decision on the merits and left the plaintiff free to begin another action for the same cause.

*Non prosequitur* originally meant the judgment given against the plaintiff for not declaring, replying, or surrejoing. This was called judgment of *non pros.*, and later that came to be the name of the judgment entered against the plaintiff when he withdrew at

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<sup>1</sup> "Whatever may be said as to the absolute right of a plaintiff to suffer a voluntary nonsuit, it cannot be said that he ever had an absolute right either at common law or by statute to discontinue." *Lamb v. Greenhouse*, 59 Pa. Super. Ct. 329, 332 (1914).

any stage of the proceedings,<sup>3</sup> thus covering both discontinuance and, less frequently, nonsuit. The term is loosely used, and to-day conveys no very clear meaning.

A *nolle prosequi* in civil actions is an agreement not to proceed either against some of the defendants or as to a part of the suit.<sup>4</sup> Originally it was confused with a *retraxit*, and barred future action by the plaintiff, but it early became the same as a discontinuance, leaving the plaintiff free to begin another action for the same cause, except where the judgment rendered against the remaining defendants, or as to the part of the cause continued, is a satisfaction of all the damage sustained.<sup>5</sup>

A *retraxit* is a voluntary renunciation by the plaintiff in open court. It must be in person and not by attorney.<sup>6</sup> It operates to end the litigation, the plaintiff being barred from any new action on the same cause.<sup>7</sup> A *retraxit* as such is generally nonexistent today, the matter being covered by the statutes as to discontinuance and nonsuits. It is omitted from the English Judicature Act.<sup>8</sup>

Nonsuit at common law was the judgment given against the plaintiff when he was not in court to answer to the demand of the defendant. In early cases he was demandable at various times during the life of the action, but it soon became the practice to call him to hear the verdict of the jury only. If he was not in court no verdict could be given, and the judgment went against him. The origin of this necessity of his presence to enable any verdict to be rendered is shrouded in antiquity. It was well estab-

<sup>2</sup> Examples of discontinuance are: a failure to file pleadings after the declaration, a failure to enter judgment after verdict, or a failure to take advantage of the defendant's inadequate pleading. See STEPHEN, PLEADING, 216 and cases cited. And a demurrer to the defendant's demurrer is a discontinuance. *Campbell v. St. John*, 1 Salk. 219. See also *Buena Vista Freestone Co. v. Parrish*, 34 W. Va. 652, 12 S. E. 817 (1891); *Lawrence v. Winifrede Coal Co.*, 48 W. Va. 139, 35 S. E. 925 (1900); *Marcus v. McClure*, 63 W. Va. 215, 59 S. E. 1055 (1907).

<sup>3</sup> See 2 CHITTY, ARCHBISHOP PRACTICE, 1409; 3 BLACKSTONE, COMMENTARIES, 396; 3 CHITTY, PRACTICE, 10. See also West Virginia cases cited in note 2, *supra*.

<sup>4</sup> See 1 CHITTY, PLEADING, \*426. See also 1 Wms. Saund. 207n (1668).

<sup>5</sup> *Cooper v. Tiffin*, 3 Term 511. See 1 Wms. Saund. 213, note A; *Beechers Case*, 8 COKE 58. See West Virginia cases cited in note 2, *supra*. See also *Henry v. Ohio River Railroad Co.*, 40 W. Va. 234, 21 S. E. 863 (1895).

<sup>6</sup> *Lowry v. McMillan*, 8 Pa. 163 (1846); *Barnard v. Dagget*, 68 Ind. 305 (1876); *Muse v. Farmers' Bank*, 27 Grat. 252 (Va. 1876). See *Forest Coal Co. v. Doolittle*, 54 W. Va. 210, 224, 46 S. E. 238, 242 (1903). See also 8 COKE 58a. In West Virginia, apparently, an attorney may enter a *retraxit* if he has express authority to do so. *Forest Coal Co. v. Doolittle*, *supra*.

<sup>7</sup> See COKE LITTLETON, 139a. The judgment was "*Quod nihil cap' per breve suum proced' sed sit in misericord' pro fals' claim' etc.*" *Forest Coal Co. v. Doolittle*, *supra*; *Hoover v. Mitchell*, 25 Grat. 387 (Va. 1874).

<sup>8</sup> See ARCHBOLD, PRACTICE, 13 ed., which states that as *retraxit* is very unusual in practice, it was unnecessary to consider it. See *Herbert v. Sayer*, 2 D & L. 49, 65 (1844). See also TIDD, PRACTICE, 9 ed., (1828), which covers it briefly, so it was evidently of some importance at that date.

lished by 1371, as the plaintiff is found taking a nonsuit by refusing to appear, in the case of *Wilkes v. Gernon*,<sup>9</sup> the nonsuit being noted without comment by the reporter. The explanation given by Coke, and Blackstone,<sup>10</sup> that it was because the plaintiff had not followed his suit, sounds like a specious reason put behind an accepted rule. The reason given by Tidd<sup>11</sup> that the plaintiff had to be present to be amerced, should judgment go against him, is clearly untenable, because the plaintiff was amerced if nonsuited, for not being present.<sup>12</sup> The theory was not, as might be supposed, that the dignity of the court had suffered, as the plaintiff could be nonsuited only at the demand of the defendant, so that if neither party appeared, judgment of nonsuit could not be entered.<sup>13</sup> The King could never be nonsuit, for he was considered as always present in court.<sup>14</sup> The custom of demanding the plaintiff when verdict was to be rendered became obsolete, and he was not called unless he had failed to make out his case or expressed a desire to become nonsuit.<sup>15</sup>

The great advantage of the nonsuit to the plaintiff was that, while it ended the particular action and made him liable for costs, it did not include him as to further actions on the same cause of action. It is clear that at common law the plaintiff had an absolute right to become nonsuit at any time before the jury rendered the verdict.<sup>16</sup> And it is equally clear that the plaintiff could not be nonsuited if he did not assent,<sup>17</sup> despite some opinion to the

<sup>9</sup> YEAR BOOK, 48 Edw. III 30, 17. See LIBRARY ASSOCIATION, 301, 312; S. C. *ibid.* 304-5. See also BELLEWE, 251-2, where Belknap, C. J., in 1382 asserted emphatically this power of becoming nonsuit "*a chesc. temps avant plein verdict dit.*"

<sup>10</sup> See 3 BLACKSTONE, COMMENTARIES, 376, citing Coke. See also COMYN, DIGEST, PLEADER, X, 3.

<sup>11</sup> See TIDD, PRACTICE 9 ed., 867. ". . . but before they gave their verdict, it was formerly usual to call or demand the plaintiff, in order to answer the amercement to which by the old law he was liable, in case he failed his suit."

<sup>12</sup> The judgment of nonsuit was "*Ideo considerat' est quod prae'd' querens et plegit sui de proseguendo sint inde in misericordia. . . et prae'd' def. est inde sine die.*"

<sup>13</sup> *Arnold v. Johnson*, 1 Str. 266 (1720); *Heath v. Walker*, 2 Str. 1117. But curiously, in an undefended action, the plaintiff may be nonsuited with his consent. 4 B. & Ald. 413.

<sup>14</sup> See COKE, 227b (f). As to whether he might take a voluntary nonsuit, *quaere?* <sup>15</sup> Note 11, *supra*. In *Jackson v. Williamson*, 2 T. R. 281 (D. & E.), it appears that the plaintiff was not in court when the verdict was rendered.

<sup>16</sup> Note 9, *supra*. *Robinson v. Lawrence*, 21 L. J. (N. S.) Exch. 36; *Outhwaite v. Hudson*, 7 Exch. 980, 21 L. J. Exch. 151.

<sup>17</sup> *Minehin v. Clement*, 1 B. & Ald. 252; *Stanciliff v. Clark*, 7 Exch. 439, 21 L. J. (N. S.) 128; *Mounson v. Redshaw*, 1 Wms. Saund. 195 d, 6 ed., note (i). *Marcus v. McClure*, 63 W. Va. 215, 59 S. E. 1055 (1907). See *MacBeath v. Haldimand*, 1 T. R. 172, 175. See also 1 CHITTY, ARCHBISHOP, PRACTICE, 13 ed., 377. In West Virginia, certain statutes provide for dismissal of an action when the plaintiff fails to plead or otherwise to prosecute his action. W. VA. CODE, c. 125 §§. 6, 7; *idem*, c. 127, § 8. But since the dismissal results from the plaintiff's negligence, it is practically based on his assent. *Lawrence v. Winifrede Coal Co.*, 48 W. Va. 139, 35 S. E. 925 (1900).

contrary.<sup>18</sup> This contrary opinion has probably resulted from two things. The judgment of nonsuit at the early common law where the plaintiff was inadvertently absent when demanded was called an involuntary nonsuit, which is not the sense in which the term peremptory nonsuit is used today. And further, when the judge expressed an opinion that the plaintiff should become nonsuit, he usually did so, because of the power of the judge to direct a verdict against him if he persisted in his action. This in effect amounted to a peremptory nonsuit, although the plaintiff could insist on going to the jury.<sup>19</sup> An illogical distinction was drawn between the voluntary withdrawal and the withdrawal under threat of a directed verdict. When the plaintiff took a nonsuit of his own motion he was out of court, and could not move to set aside the nonsuit.<sup>20</sup> When he submitted to a nonsuit on the advice of the judge, the cases are in conflict as to his further rights. Lord Mansfield laid down the rule that where a judge at *nisi prius* nonsuits the plaintiff and is mistaken the court upon motion may set aside the nonsuit.<sup>21</sup> There are some decisions *contra*.<sup>22</sup> On principle it seems that if the plaintiff doubts the correctness of the judge's advice he should be required to base his claim of error on the directed verdict and not on a judgment of nonsuit to which he need not have assented, and which leaves his action unconcluded. An exception might be made where the trial court wishes to get the opinion of the full bench on the law applicable to the case, and takes this method.<sup>23</sup>

Some early English cases allowed the plaintiff to take a nonsuit after verdict for him, when he was dissatisfied with the damages, but this right was taken away by the statute 2 Hen. 4, c. 7, which provided "that after verdict a plaintiff shall not be nonsuit."<sup>24</sup>

<sup>18</sup> See STORY, PLEADING IN CIVIL ACTIONS, 2 ed., 726, introduction. See also Johnson's dissenting opinion in *Elmore v. Grymes*, 1 Pet. 469 (U. S. 1828).

<sup>19</sup> *MacBeath v. Haldimand*, *supra*.

<sup>20</sup> *Barnes v. Whiteman*, 9 Dowd. 181; *Austin v. Evans*, 2 M. & G. 430. See *Hutchinson v. Brice*, 5 Burr. 2692.

<sup>21</sup> *Sadler v. Evans*, 4 Burr. 1894. In accord with this are: *Minehin v. Clement*, *supra*; *Alexander v. Barker*, 2 Cromp. & J. 133, *Sweet v. Lee*, 4 Scott N. R. 86, 3 M. & G. 452. *Contra*: *Ward v. Mason*, 9 Price 291, 294, 296.

<sup>22</sup> *Cossar v. Reed* 21 L. J. Q. B. 18, 17 Q. B. 540; *Hartley v. Atkinson*, 2 Barnes 255; *Simpson v. Clayton*, 2 Bing. N. Cas. 467.

<sup>23</sup> *Treacher v. Hinton*, 4 B. & Ald. 413. In West Virginia, a statute reads as follows: "Any circuit court may on motion, reinstate on the trial docket of the court, any case dismissed, and set aside any nonsuit that may be entered by reason of the non-appearance of the plaintiff, within three terms after the order of dismissal may have been made, or order of nonsuit entered." W. VA. CODE, c. 127, § 11.

<sup>24</sup> *Keat v. Barker*, 5 Mod. 203.

<sup>25</sup> See SMITH, ACTION AT LAW, 2 ed., 129.

This does not preclude a nonsuit when verdict was for the plaintiff by consent with a point reserved.<sup>25</sup>

The common-law nonsuit is the result of a legal rule retained in our law after its purpose has been lost sight of and any possible reason for its existence has disappeared. In its inception it was under the control of the magistrate because of the power of amercement wielded by him.<sup>26</sup> A plaintiff did not lightly subject himself to this punishment. But the amercement very early ceased to be enforced, Lord Coke speaking of it as a bygone custom. The exact time when it became obsolete cannot be fixed because the form of the judgment contained the amercement clause down to modern times, and the judgment was not perfect without it. The plaintiff's privilege of becoming nonsuit is obviously unjust to the defendant. The plaintiff could bring his action, carry it through several years of litigation, subject the state and defendant to expense and loss of time, and then, having uncovered all the defenses, at any time before the jury rendered its verdict, assert his uncontrolled right to become nonsuit, leaving himself free to commence another action on the same cause immediately. He could not even be forced to become nonsuit. The mere statement of the results discloses the obvious injustice and inequality of giving that right, but it has taken modern statutes to give any remedy. As far back as 1371 it was causing trouble, as the reporter in *Wilkes v. Gernon*<sup>27</sup> gives a record of many days' litigation with the result best pictured in his own words. "And the jurors were under guard for three days before they could agree: now when they were finally at the bar ready to have rendered their verdict the plaintiffs were nonsuited *etc.*" Five hundred years later the Judicature Act brought relief in England. By the Hilary rules nonsuit and discontinuance had been combined, making it a matter of right to discontinue at any time before verdict on payment of costs.<sup>28</sup> In 1873 the Judicature Act cut down the discontinuances as a matter of right. By R. S. C., O. 23, r. 1, "The plaintiff may at any time before receipt

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<sup>25</sup> The judgment was that the losing party be at the mercy of the court (*sit in misericordia*). The penalty was then liquidated by the affectors. As distinguished from a fine, the amercement was for a lesser offense, might be imposed by a court not of record and lay in the discretion of the court, while a fine was for a serious offense, such as in appeals of death or robbery where the judgment was that the losing party be fined and imprisoned. BACON, ABR., FINES AND AMERCEMENTS.

<sup>27</sup> Note 9 *supra*. The injustice and hardship of the rule has been recognized in the local court. *Henry v. Ohio River Railroad Co.*, 40 W. Va. 234, 21 S. E. 863 (1895).

<sup>28</sup> See R. G., H. T., 1853, Rule 23. See also 2 CHITTY, ARCHBOLD, 12 ed., 1483.

of the defendant's statement of defense, or after the receipt thereof, before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action . . . ." The nonsuit was retained in name, but it was made to act as a *retraxit*, concluding the plaintiff. R. S. C., O. 41, r. 6., "Any judgment of nonsuit, unless the court or judge otherwise directs, shall have the same effect as a judgment on the merits for the defendant; but in any case of mistake, surprise, or accident, and judgment of nonsuit may be set aside on such terms . . . as to the court or judge shall seem just." In 1883 this section was repealed and the above section as to discontinuance was left unchanged, making it cover both discontinuance and nonsuit.<sup>29</sup> To summarize, in English practice of today the plaintiff has lost his common-law right to become nonsuit. When he once commences his action and any step is taken after receipt of the defense, he must carry the action through or lose his right of action, unless given leave by the judge to discontinue.<sup>30</sup>

The common-law nonsuit in the United States has in the main followed the English rules. The plaintiff could take a nonsuit at any time before verdict, and by the great weight of authority could not take it after verdict.<sup>31</sup> There is, however, a split of authority as to the common-law right of the judge to order a peremptory nonsuit. Many jurisdictions including the federal courts followed the English decisions and held that there could be no peremptory nonsuit.<sup>32</sup> Others established a peremptory nonsuit by decision, helped by the prevalent belief that it had been allowed by the English common law.<sup>33</sup> In these states the judge may nonsuit the plaintiff on his opening statement, although this power obviously must be wielded with caution. The same result was reached in Pennsylvania by statute.<sup>34</sup> The peremptory nonsuit is no infringement of the right to trial by jury.<sup>35</sup>

The time after which the plaintiff could not of right become nonsuit was too firmly fixed in the common law to be changed by the

<sup>29</sup> See *Fox v. Star Newspaper Co. Ltd.*; [1898] 1 Q. B. 636, 639; [1900] A. C. 19. See also SCOTT, *CASES ON PROCEDURE*, 308.

<sup>30</sup> *Merchants' Bank v. Rawls*, 7 Ga. 191 (1849); *Washburn v. Allen*, 77 Me. 344 (1885). See *Van Wagenen v. Chladek*, 27 S. D. 436, 439, 131 N. W. 507, 508 (1911).

<sup>31</sup> *Elmore v. Grymes*, 1 Pet. 469 U. S. 1823; *Rankin v. Curtenius*, 12 Ill. 334 (1851); *Hudson v. Strickland*, 49 Miss. 591 (1873); *Smith v. Crane*, 12 Vt. 487 (1840). Such is the rule in West Virginia. See cases cited in note 17, *supra*.

<sup>32</sup> *Ensminger v. McIntire*, 23 Cal. 593 (1863); *Bailey v. Kimball*, 26 N. H. 351 (1853); *Deyo v. N. Y. Cent. R. R.*, 34 N. Y. 9 (1865); *Spensley v. Lancashire Ins. Co.*, 54 Wis. 433, 11 N. W. 894 (1882).

<sup>33</sup> LAWS PA., Act March 11, 1836.

<sup>34</sup> *Coughran v. Bigelow*, 164 U. S. 301 (1896).

<sup>35</sup> *Whitted v. S. W. Tel. Co.*, 217 Fed. 835 (Ark. 1914); *Westby v. Gray*, 116

courts of the states, and statutes were required to cut down the right of the plaintiff. In some states the plaintiff may not become nonsuit after the cause is finally submitted to the court or jury, or after the jury has retired.<sup>36</sup> Under such statutes there is a conflict of authority as to whether the plaintiff may take a nonsuit after the court grants a motion to direct a verdict. The majority hold it is then too late,<sup>37</sup> with some decisions *contra*.<sup>38</sup> These *contra* decisions would seem to defeat the intent of the statutory change, as a verdict could never be directed against an alert plaintiff without his consent. A few states do not allow nonsuit as of right, after argument on the facts.<sup>39</sup> In Massachusetts, by decision, the plaintiff has been limited to the period before the trial commences,<sup>40</sup> and many states have the same rule by statute.<sup>41</sup>

When the defendant has filed a counterclaim or set-off there is much diversity in the cases. There are three possible holdings, (a) that the plaintiff may not thereafter take a nonsuit, (b) that he may take a nonsuit and defeat the counterclaim, or, (c) that he may dismiss his own action, leaving the defendant to prosecute his counterclaim. In a majority of the jurisdictions either by statute or decision, the plaintiff's right to a nonsuit is lost after counterclaim or set-off has been interposed.<sup>42</sup> In North Carolina this rule is limited to cases where the counterclaim arises out of the same cause of action.<sup>43</sup> Other jurisdictions by statute allow the plaintiff to become nonsuit but retain the counterclaim for trial.<sup>44</sup> This rule obviously is not applicable in those states in which the defendant may not obtain an affirmative judgment.

The principle of *stare decisis* is relatively unimportant in procedure and practice, and the defects in the rules as to nonsuit could have been corrected by decision in our courts. But there has been

Cal. 660, 48 Pac. 800 (1897); *Dunn v. Wolf*, 81 Ia. 688, 47 N. W. 887 (1891). In West Virginia, the statute reads: "A party shall not allow to suffer a nonsuit, unless he do so before the jury retire from the bar." W. VA. CODE, c. 131, § 11. The rule is the same upon a demurrer to evidence. *Frymley v. Lorama R. Co.*, 103 S. E. 366 (W. Va. 1920).

<sup>36</sup> *Whitted v. S. W. Tel. Co.*, *supra*; *Dobkin v. Dittmers*, 76 N. J. L. 235, 69 Atl. 1013 (1908).

<sup>37</sup> *Oppenheimer v. Elmore*, 109 Ia. 196, 80 N. W. 307 (1899).

<sup>38</sup> *Easter v. Overlea Land Co.*, 128 Md. 99, 99 Atl. 893 (1917).

<sup>39</sup> *Truro v. Atkins*, 122 Mass. 418 (1877).

<sup>40</sup> *Day v. Mountin*, 89 Minn. 297, 94 N. W. 887 (1903); *State v. Pitchford*, 171 Pac. 448 (Okl. 1918); *Hutchings v. Royal Bakery Co.*, 60 Ore. 48, 118 Pac. 185 (1911).

<sup>41</sup> *Wood v. Jordan*, 125 Cal. 263, 57 Pac. 998 (1899); *Long v. McGowan*, 16 Colo. App. 540, 66 Pac. 1076 (1901); *Means v. Welles*, 12 Metc. 356 (Mass. 1847); *Griffin v. Jorgenson*, 22 Minn. 92 (1875) (by decision).

<sup>42</sup> *McLean v. McDonald* 173 N. C. 429; 92 S. E. 148 (1912).

<sup>43</sup> *Gurr v. Brinson*, 138 Ga. 665, 75 S. E. 979 (1912); *Hamlin v. Walker*, 228 Mo. 611, 128 S. E. 945 (1910); *Railroad v. Sater*, 1 Ia. 421 (1853) (by decision).



a uniform refusal to modify the common-law nonsuit, with the one exception of the peremptory nonsuit. Legislative action has been necessary to bring relief, but it has been only partial. It is difficult to see why the court should not have the power to direct a peremptory nonsuit, as to deny him the power is to force him to send the case to the jury with instructions to find for the defendant. When it is apparent that the plaintiff cannot recover, and a verdict will have to be directed against him, the court should be allowed to stop the action at once, subject to a review by an appellate court for abuse of discretion. In those states which do not allow it today it is due either to fear of giving the judge too much power, or to mere inertia, neither of which is a valid ground for inaction. The second problem, which has been met by the Codes, is the setting of the time after which the nonsuit ceases to be a matter of right. The old common law time of the rendering of the verdict is indefensible, and the legislative change to the time of submission of the issue to the jury is but a slight improvement. When the plaintiff has once fairly launched his cause of action the discontinuance of it should be within the control of the judge. There are three points at which the limit might be set, namely, the filing of the complaint, at some point in the pleadings, or the commencement of the trial. No jurisdiction has adopted the first, and this seems wise, because the plaintiff should be allowed a chance to see the defense before being compelled to elect. There is no serious objection to his withdrawal when the defense is filed. There is little to choose between the second and third; it is a matter of practical expediency. What arguments there are for one or the other favor the English rule (receipt of the defense and the taking of any further step). This has the advantage of definiteness, and elimination of unnecessary steps. Either of these rules safeguards both the parties and protects the state, and is in harmony with the tendency of the day in conferring broader discretionary powers on the magistrate.