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The cases in this field require "more exacting judicial scrutiny"⁴² and a "correspondingly more searching judicial inquiry."⁴³ It is not suggested that the Court should turn the Bill of Rights into a "suicide pact";⁴⁴ but the Court might well re-examine Justice Stone's footnote in *United States v. Carolene Products Co.*,⁴⁵ and, where legislation affecting civil liberties is involved, allow "narrower scope for the presumption of constitutionality."⁴⁶

John M. Shaw

Discontinuance and Nonsuit

Common Law

In the early common law, a plaintiff could escape an impending adverse judgment by means of two procedural devices, discontinuance and nonsuit. The effects of these were similar and the terms "discontinuance" and "nonsuit" were sometimes applied interchangeably.

The term "discontinuance" originated in the law of real property and was first used in pleading and practice¹ to denote plaintiff's failure to proceed with his suit from day to day.² Later the term was applied to any actual discontinuance of plaintiff's suit, whether voluntary or by order of court. One noted authority stated that the plaintiff was allowed to discontinue his suit as a matter of right prior to commencement of trial but could only discontinue it with leave of court after argument or demurrer.³ Defective pleading or failure to prosecute the suit in due course was cause for involuntary discontinuance.⁴ The effect of a discontinuance was to put the parties out of court, to charge plaintiff with payment of costs, and to compel him to begin *de novo* should he decide to renew his demand.⁵

42. *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938).

43. *Id.* at 153, n. 4.

44. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949).

45. 304 U.S. 144 (1938). See page 179 *supra*.

46. *Id.* at 152, n. 4.

1. Head, *History and Development of Nonsuit*, 27 W.VA. L.Q. 20 (1920).

2. 3 BL. COMM. 296 (2d ed. 1766).

3. 2 TIDD, *THE PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS* 732 (2d Am. ed. 1828): "The rule to discontinue is a side-bar rule; and may be had, as a matter of course, from the clerk of the rules in the King's Bench, at any time before trial or inquiry. . . ."

4. STEPHEN, *A TREATISE ON THE PRINCIPLES OF PLEADING* 216 (3d Am. ed. 1875).

5. 2 TIDD'S *PRACTICE* 732 (2d Am. ed. 1828).

A nonsuit, obtained by the defendant, had, at early common law, the same effect as a discontinuance. In cases where the jury had deliberated and returned to the bar, but had not announced their verdict, the plaintiff was "demandable," or could be called to appear, by the defendant.⁶ If the plaintiff did not appear, the verdict could not be announced and the plaintiff was said to be "nonsuit."⁷ If the trial was not by jury, the defendant could, immediately prior to pronouncement of judgment by the court, demand the appearance of the plaintiff, who was similarly said to be nonsuit if he failed to comply. The practice of calling the plaintiff prior to rendition of the verdict originated long ago when the plaintiff was subject to amercement or fine on the theory that he had lost his suit because his claim was false.⁸ Later it became the practice for the court itself to call the plaintiff when he failed to make out his case.⁹

The principal difference between discontinuance and nonsuit was that a nonsuit could be obtained by the defendant as a matter of right, but a discontinuance was obtainable by the plaintiff after commencement of trial only at the discretion of the court.¹⁰ If the plaintiff had been refused a discontinuance, and the defendant felt that the verdict would be in his favor, he could prevent a nonsuit by simply not calling the plaintiff or by not requesting that a nonsuit be ordered.

Louisiana Law

Discontinuance or voluntary nonsuit. The *projet* of the Code of Practice of 1825 does not indicate the source of its articles on

6. Some of the very early cases indicate that it was once the practice to permit a nonsuit even after the verdict when the plaintiff was dissatisfied with the amount of damages awarded. Head, *History and Development of Nonsuit*, 27 W.VA. L.Q. 20, 23 (1920). This practice was abolished in 1400 by the statute of 2 HENRY IV, c. 7, which provided "That if the verdict pass against the plaintiff, that the same plaintiff shall not be nonsuited." Later cases, however, held that this statute applied only to general verdicts that passed upon the whole case, and that a plaintiff could still be nonsuited after a special verdict. *E.g.*, Washburn v. Allen, 77 Me. 344, 347 (1885).

7. 3 BL. COMM. 376 (2d ed. 1766).

8. *Ibid.*; 2 TIDD'S PRACTICE 916 (2d Am. ed. 1828).

9. The province of nonsuit was enlarged by the statute of 17 GEO. II, c. 17 (1741), which provided ". . . that where any issue is . . . joined in any action or suit at law . . . and the plaintiff or plaintiffs . . . shall neglect to bring such issues on to be tried . . . , it shall and may be lawful for the judge . . . at any time after such neglect, upon motion made in open court, (due notice thereof having first been given thereof,) to give the like judgment for the defendant or defendants in every such action or suit, as in the case of nonsuit."

10. Lamb v. Greenhouse, 59 Pa. Super. Ct. 329, 332 (1914).

discontinuance. However, in several cases¹¹ decided prior to the enactment of the code, the right of the plaintiff to discontinue his suit in cases tried by jury was determined by applying the common law as it existed under the Ordinance for the Northwest Territory of 1787.¹² In *Pritchard v. Hamilton*,¹³ decided in 1828, it was said that the adoption of the Code of Practice had made no change in the law of discontinuance.

The present Code of Practice permits discontinuance by the plaintiff in cases tried without a jury at any stage of the proceedings prior to judgment.¹⁴ This provision has been applied only to final judgments.¹⁵ In cases tried by jury, Article 532 provides that the plaintiff is at liberty to discontinue his suit "until the moment when the jury shall be about to withdraw."¹⁶

In *Crocker v. Turnstall*, decided in 1844, the Supreme Court distinguished between a plaintiff's right to discontinue and his right to obtain a voluntary nonsuit. There the plaintiff requested a nonsuit after the defendant had introduced his evidence. The court held that a party plaintiff "could not claim, as a right, to be nonsuited" but could only discontinue.¹⁷ The distinction appears to have been drawn because the court believed that prescription would be interrupted by a judicial demand dismissed as of nonsuit at plaintiff's request. This distinction appeared again in *Yorke v. Allen*, where the court said, "There is no law requiring the Judge to render a judgment of nonsuit on motion of the plaintiff."¹⁸ Since the decision of *Dennistoun v. Rist*,¹⁹ however, discontinuance and voluntary nonsuit have been treated as being essentially the same; the early cases disallowing voluntary nonsuits have been explained on the basis of their

11. *Chedoteau's Heirs v. Dominguez*, 7 Mart.(o.s.) 490 (La. 1820) and cases cited therein.

12. 1 STAT. 51, n. (a). This statute provided for trial by jury as at common law.

13. 6 Mart.(N.S.) 457 (La. 1828).

14. Art. 491, LA. CODE OF PRACTICE of 1870: "The plaintiff may, in every stage of the suit previous to judgment being rendered, discontinue the suit on paying the costs."

15. *Wright v. United Gas Public Service Co.*, 183 La. 135, 162 So. 825 (1935).

16. Art. 532, LA. CODE OF PRACTICE of 1870: "The plaintiff, until the moment when the jury shall be about to withdraw, is at liberty, on paying the costs, to discontinue his suit; but if the plaintiff allow the jury to withdraw, before discontinuing his suit, the verdict shall be binding on him."

17. 6 Rob. 354, 357 (La. 1844).

18. 20 La. Ann. 237, 238 (1868).

19. 9 La. Ann. 464 (1854).

peculiar facts²⁰ but *Crocker v. Turnstall*²¹ was not expressly overruled on this point until 1940.²²

One potentially broad limitation on the plaintiff's right to discontinue was the rule, established by the jurisprudence, that a plaintiff could not discontinue his suit to the prejudice of any "acquired right" of the defendant.²³ The difficulty of applying this rule lay in determining what was an "acquired right." For example, *Whittemore v. Watts*²⁴ held that a plaintiff's discontinuance could not defeat the right of an intervenor to obtain a judgment where dismissal of the intervention had been appealed from prior to the discontinuance. That decision was restricted to its facts and the rule it suggested was repudiated in *Walmsley, Carver & Co. v. Whitfield*.²⁵ The rule that an intervention falls with the dismissal of the main demand was considered settled in *St. Bernard Trappers' Ass'n v. Michel*.²⁶

Another variant of the "acquired right" limitation is that the plaintiff may not, by discontinuing his suit, defeat the right of a reconvening defendant to remain in court and prosecute the reconventional demand.²⁷ This has been explained, not as a denial of the plaintiff's right to discontinue his suit, but as a limitation on the effect of his discontinuance.²⁸ Since the reconventional demand is regarded as a separate suit, even when incorporated in the answer, it seems proper that a plaintiff should not be permitted to discontinue a "suit" filed by the defendant. The plaintiff in reconvention may discontinue in the same manner as an ordinary plaintiff.²⁹

20. *State ex rel. Gondran v. Rost*, 48 La. Ann. 455, 19 So. 256 (1896).

21. 6 Rob. 354 (La. 1844).

22. *Rives v. Starcke*, 195 La. 378, 196 So. 657 (1940).

23. *Barbara, Inc. v. Billelo*, 212 La. 937, 940, 33 So.2d 689, 690 (1947): "It is the settled jurisprudence of this court that a plaintiff may discontinue his suit at any time prior to the rendition of judgment 'unless thereby some acquired right of the defendant would be impaired.' [citing numerous cases]."

24. 7 Rob. 10 (La. 1844).

25. 24 La. Ann. 258 (1872).

26. 162 La. 366, 110 So. 617 (1926).

27. *Breffelth v. Breffelth*, 221 La. 843, 856, 60 So.2d 457, 462 (1952), and numerous cases cited therein.

28. *Rives v. Starcke*, 195 La. 378, 389, 196 So. 657, 660 (1940), 3 LOUISIANA LAW REVIEW 457 (1941): "The rule, that the right of a plaintiff to discontinue his suit at any time before judgment is rendered does not give him the right in that way to dispose of a demand in reconvention that was filed before the plaintiff moved to discontinue his suit, is merely an explanation of the effect of the plaintiff's availing himself of his right under article 491 of the Code of Practice, and is not an exception to the rule stated in such unqualified terms in the article of the Code."

29. *Barbara, Inc. v. Billelo*, 212 La. 937, 941, 33 So.2d 689, 690 (1947): "It enjoys the status of an independent suit and, as such, is subject to all of the rules of pleading relative to the petition, the defendant, quoad the reconventional demand, becoming the plaintiff in this separate cause of

In order to protect the defendant from being put out of court unjustly through plaintiff's discontinuance, the courts have taken a liberal view of what constitutes a reconventional demand. In *Rives v. Starcke*³⁰ a plea of acquisitive prescription urged by the defendant in a petitory action was treated as a reconventional demand for the purpose of limiting the plaintiff's right to discontinue. Anything which can be considered as being in the nature of, or analogous to, a reconventional demand seems to suffice to prevent the plaintiff's discontinuance from defeating the defendant's demand.³¹ Although the courts have been liberal in their interpretation of what constitutes a reconventional demand for these purposes, they have otherwise narrowed the scope of the term "acquired rights." The decision in *Breffelth v. Breffelth*³² seems to make it clear that "acquired rights" could mean only the rights of the defendant arising out of a reconventional demand. The plaintiff in that case sued his wife for a divorce. She answered the suit and filed a reconventional demand for alimony. Prior to judgment she moved to discontinue the reconventional demand. The motion was denied by the lower court, because it was thought that an "acquired right" of the plaintiff (defendant in reconvention) would otherwise have been impaired or prejudiced. The Supreme Court, on rehearing, held that since the defendant's motion to discontinue the reconventional demand did not affect the plaintiff's demand, no acquired right would be prejudiced.

Another limitation on the plaintiff's right to discontinue was established by the court in *Succession of Baum*,³³ where the rights of a plaintiff in a suit had been seized under a writ of *fieri facias*. The plaintiff under those circumstances was not permitted to discontinue his suit. The rule of this case was subsequently adopted by the legislature.³⁴

action and the plaintiff in the original suit becoming the defendant [citing numerous cases]."

30. 195 La. 378, 196 So. 657 (1940).

31. For example, a plea of acquisitive prescription has been considered equivalent to a reconventional demand, being "something more than a defense to the suit. . . ." *Id.* at 384, 196 So. at 659.

32. 221 La. 843, 60 So.2d 457 (1952).

33. 11 Rob. 314 (La. 1845).

34. "The seizing creditor shall have a notice of seizure served upon the parties to the suit, and the effect thereof shall be to give such seizing creditor a lien or preference on whatever is realized by his debtor out of the suit. After such notice of seizure the litigants cannot dismiss the suit or make any valid sale, compromise or adjustment of the suit to the prejudice of the seizing creditor or without his consent unless the amount to be received by the debtor in the compromise is sufficient to satisfy the seizing creditor's claim. . . ." La. Acts 1928, No. 85, § 2, p. 86, LA. R.S. 13:3865 (1950).

Involuntary nonsuit. Article 536 of the present Code of Practice provides that where the plaintiff does not appear after the case has been set for trial, the defendant is entitled to a judgment of nonsuit. This in effect subjects the plaintiff to payment of costs, since a second suit on the same cause of action is subject to the exception of *res judicata* when plaintiff cannot show that he has paid the costs of the first suit.³⁵

The Louisiana Revised Statutes 13:4522 provides that failure of the plaintiff to give proper security for costs upon demand by the defendant is another ground for a judgment of nonsuit.³⁶

A judgment of nonsuit is granted in the interests of justice when the plaintiff fails to introduce sufficient evidence to prove his case and it appears that he may later be able to supply the deficiency.³⁷ One of the recent decisions applying this rule is *Logan v. Schuler*,³⁸ where the plaintiff failed to prove that he was entitled to commissions on the sale of insurance policies because he was unable to produce a license to act as agent, a statutory prerequisite to obtaining such commissions. Since he could later obtain the license and satisfy the statutory requirement, a judgment of nonsuit was granted. This does not mean that the court will allow defendant to be prejudiced in any manner by a judgment of nonsuit under these circumstances. If the defendant is able to establish a valid defense, he can obtain a final judgment in his favor.³⁹

Conclusion

The Louisiana legislation allowing a plaintiff to discontinue his suit at will exposes the defendant to abuse. Much of the

35. Art. 536, LA. CODE OF PRACTICE of 1870: "If, after the cause has been set down on the docket for trial, the plaintiff does not appear, either in person or by attorney, to plead his cause, on the day fixed for trial, the defendant may require that judgment of nonsuit be rendered against such plaintiff, with costs.

"But such judgment can not be pleaded, as *res judicata*, or in bar of another suit, for the same cause of action, provided the plaintiff show that he has paid the costs of the first suit."

36. LA. R.S. 13:4522 (1950): "The defendant before pleading . . . may by motion demand and require the plaintiff, third opponent or intervenor to give security for the cost in such case, and on failure to do so within the time fixed by the court such suit, third opposition or intervention, as the case may be, shall be dismissed as in case of nonsuit. This section shall not apply to the parish of Orleans and to cases brought in forma pauperis, nor to the state or any political subdivision thereof." See also LA. R.S. 13:1215 (1950) applicable to Orleans Parish.

37. *Logan v. Schuler*, 220 La. 580, 57 So.2d 193 (1952); *Arthur v. Dupuy*, 130 La. 782, 58 So. 570 (1912); *South Louisiana Land Co. v. Waterhouse*, 128 La. 458, 54 So. 941 (1911); *Kimball v. Dreher*, 1 La. 208 (1830).

38. 220 La. 580, 57 So.2d 193 (1952).

39. *Linman v. Riggins*, 40 La. Ann. 761, 5 So. 49 (1888).

expense incurred by him in the preparation of his defense cannot be taxed as costs of court. He is not protected against frivolous discontinuance unless he has filed a reconventional demand or is otherwise able to show that he has an "acquired right" in the suit.

The virtually absolute privilege of the plaintiff to discontinue accorded by our statutes no longer exists in the English judicial system, from which it was taken.⁴⁰ It was found in the federal system prior to the adoption of the new Federal Rules of Civil Procedure, and it is allowed to remain in the law of many states of the Union.⁴¹ Under the new Federal Rules⁴² a plaintiff may cause the dismissal of his suit without leave of court at any time prior to service of an answer or a motion for summary judgment by the adverse party. Thereafter, the granting of a motion to dismiss without prejudice is within the discretion of the court and subject to conditions which the court may deem proper. A dismissal with prejudice operates as an adjudication of the controversy on the merits. These features of the federal practice might profitably be incorporated by the Louisiana legislature in a revision of the articles of the Code of Practice relating to discontinuance and nonsuit. Such legislation would permit the courts to continue the salutary practice of rendering a judgment of nonsuit where the plaintiff has failed to substantiate his claim as a result of a deficiency of evidence which may be remedied later. At the same time, it would rid the present law on discontinuance and nonsuit of its inherent susceptibility to abuse.

Carl F. Walker

40. *Fox v. Star Newspaper Co.* [1900] A.C. 19, 20: "Our whole system has been changed, and I think the reason why the word 'nonsuit' itself is not now to be found in the rules is that it was determined that the power of a plaintiff at common law to claim a nonsuit, or the plaintiff in equity to dismiss his bill at his own option, should no longer be permitted; and it is probable that the word 'discontinuance' was supposed to apply to both forms of procedure, both at common law and in equity. Accordingly, by Order XXVI. r. 1, the only mode by which a plaintiff can submit to defeat is under that order, unless he allows the proceedings to go on until the verdict is recorded against him." See Note, 89 A.L.R. 13, 18 (1934).

41. Arkansas, Iowa, Kansas, Kentucky, Nebraska, Ohio, Oklahoma, and Wyoming have statutes similar to the statutes in Louisiana on the subject of discontinuance and nonsuit. Notes, 89 A.L.R. 13, 62 (1934), 126 A.L.R. 284, 294 (1940).

42. FED. R. CIV. P. 41.