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The Right of a Plaintiff to Dismiss an Action Without Prejudice

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the deadly weapon, when shown, will absolutely satisfy the factor which required it, but the element of specific intent should still be present. If in this latter case the defendant assumes the burden and proves no specific intent, the crime has not been made out, and the defendant should prevail.[14] If the factor is a type of conduct such as negligence, then the proof of that conduct is all that is required and specific intent does not enter. In this manner, consistency is achieved and the results of the cases are based on a reasonable interpretation of the statute.

SCOTT REED

THE RIGHT OF A PLAINTIFF TO DISMISS AN ACTION WITHOUT PREJUDICE

Under early English common law, the plaintiff in a civil cause might discontinue his suit at any stage of the proceedings prior to judgment.[1] Under this liberal rule, the plaintiff might await the verdict, and, in event it was adverse to his cause, he was privileged to discontinue his action as a matter of right and later bring another suit. Subsequently this rule was modified by a statute which denied to the plaintiff the right to dismiss after the verdict was rendered. The present English rule, providing that the plaintiff may not dismiss after the defense is filed except by order of the court, is the culmination of progressive restrictions of the right of dismissal.[2]

The trend in this country appears to be in the same direction. Under the new Federal Rules, the plaintiff may dismiss his action as a matter of right only in the interval between the filing of the complaint and the filing of the answer.[4] The right of dismissal is governed by statute in the various states, and no general rule can be framed which will adequately embrace the many variations. However, the statute in Illinois governing this subject probably represents the trend of future enactments; in this jurisdiction a plaintiff may dismiss his action only "before trial or hearing begins."[5] Under such a statute, the election to dismiss must be made quite early in the course of the suit, in marked contrast to the liberal rule prevailing in many jurisdictions, including Kentucky

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[14] The burden of proof is on the prosecution. Where a deadly weapon is used, the question of intent is one of fact for the jury If the defendant assumes the burden of proceeding and the jury believes his evidence of no intent, he is not guilty See n. 13, *supra*.

[1] Murphy v. Donlan, 5 Barn. & C. 178, 108 Eng. Rep. 66 (1826), Keat v Barker, 5 Mod. 208, 87 Eng. Rep. 612 (1696), 17 Am. Jur., Dismissal, Discontinuance and Nonsuit, sec. 14.

[2] Henry IV c. 7. 17 Am. Jur., Dismissal, sec. 64.

[3] Fox v. Star Newspaper Co., 81 L.T. 562 (1900)

[4] New Federal Rules, 41(a).

[5] Ill. Rev. Stat. (1937), c. 110, sec. 176.

The rule in Kentucky is stated in the Civil Code, Section 371, as follows: "An action, or any cause of action, may be dismissed without prejudice to a future action—1. By Plaintiff. By the plaintiff before the final submission of the case to the jury or to the court, if the trial be by the court." In interpreting this provision, the Court of Appeals has held that the right of the plaintiff to dismiss his action is absolute, and the court has no discretion but to grant the motion for dismissal when seasonably made.[6] The plaintiff acts seasonably when his motion is made before "final submission."[7] In three cases, the court has ruled that a premature submission may be set aside in the discretion of the court, and the plaintiff allowed to dismiss without prejudice.[8] In one case, the court went even further, saying by way of dictum, that even after a duly made submission, the court in its discretion might permit dismissal without prejudice.[9]

In a number of cases the court has held that a motion to dismiss is not made seasonably if the case has previously been submitted. This result inevitably follows from the wording of the statute and suggests forcibly this inquiry· What constitutes "final submission?" In *Vertrees* v. *Newport News, M. V R. Co.*,[10] this question arose. At the conclusion of plaintiff's evidence, which disclosed no facts that would allow a recovery, the defendant made a motion for a peremptory instruction. The motion was fully heard and sustained by the court, to which the plaintiff first excepted and then made a motion to dismiss without prejudice. The court refused this motion, and thereafter instructed the jury to find for the defendant. In holding that the court erred in refusing to sustain plaintiff's motion, the Court of Appeals said:

"Strictly and properly there can be no final submission of a case to the jury until all questions of law have been disposed of by the court, instructions and papers pertaining to the case have been actually delivered to the jury, and they are authorized, without further interposition or control of the court, to proceed to a judicial examination of the issue of fact submitted to them."

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[6] Ray v Ellis, 162 Ky 517, 172 S. W 951 (1915) Northwestern Mutual Life Ins. Co. v Barbour, 95 Ky 7, 15 Ky Law Rep. 394 (1893)

[7] Lowther v. Glenn, 189 Ky 687, 225 S. W 1066 (1920) Wm. Glenny Glass Co. v Taylor, 99 Ky 24, 17 Ky Law Rep. 1331, 34 S. W 711 (1896) Linn v Valz, 11 Ky Law Rep. 846 (1890)

[8] Wagner v Swoope, 246 Ky 19, 54 S. W (2d) 395 (1932) Wilhelm's Ex'x. v Bains, 147 Ky. 832, 145 S. W 1125 (1912) Williamson v American Reserve Bond Company's Rec'r., 140 Ky 15, 130 S. W 1072 (1910)

[9] Helm v. Helm, 5 Ky. Opinions 532 (1871)

[10] 95 Ky. 314, 25 S. W 1 (1894)· See also Wilson v Sullivan, 112 S. W 1120 (1908), where it is said that under Civil Code, section 371, "the court had the right after the motion for a peremptory instruction was made and sustained and before the case was finally submitted to the jury to entertain the motion of the plaintiff to dismiss the action without prejudice and to so order."

In the *Vertrees* Case, the court enunciated the rule that has ever since been adhered to in Kentucky as appears from the cases that follow. In *Doss* v. *Illinois Central Ry. Co.*,[11] the defendant moved for a directed verdict at the conclusion of the evidence for both parties. While the motion was under consideration and before the court had announced its ruling, the plaintiff moved to dismiss. *Held,* plaintiff's motion was made before final submission. In a very recent case, *McBurney's Heirs* v. *Hopper*[12] the defendant moved the court for a peremptory instruction in his favor. The motion was argued, following which the court indicated that it would sustain the motion, but before the instruction in favor of the defendant was actually delivered to the jury, the plaintiff moved to dismiss without prejudice. *Held,* plaintiff's motion was timely. Even more illustrative of how late in the proceedings the plaintiff may dismiss as a matter of right is *Ohio Valley Electric Ry. Co.* v. *Lowe.*[13] In this case the defendant moved for a peremptory at the conclusion of all the evidence. After the motion was argued, the court sustained it and directed counsel to prepare a verdict accordingly The verdict was prepared and read in open court in the presence of the jury But before the verdict was delivered to the jury or signed, plaintiff moved to dismiss without prejudice, and this motion was held to be in time.

A brief consideration of cases holding that plaintiff did not act in time will serve to reveal more fully the meaning of "final submission." In *Trimble* v. *Powell County,*[14] it was held that plaintiff's motion was too late. Here the defendant moved the court for a peremptory at the conclusion of plaintiff's evidence, whereupon the court sustained a demurrer to plaintiff's petition, ordered the petition dismissed and entered judgment against plaintiff for all costs. The following day the plaintiff moved the court to set aside the order dismissing the petition and to allow plaintiff to dismiss without prejudice. *Held,* the order sustaining the demurrer and dismissing the petition was a final order. The dividing line between what is seasonable and too late is perhaps most precisely indicated by the case of *Illinois Central Ry. Co.* v. *Seibold.*[15] There the court sustained defendant's motion for a directed verdict. After the verdict had been written out, and the court had appointed one juror to act as foreman and sign the verdict, the plaintiff made a motion to dismiss. It was held that the case had been finally submitted and plaintiff's motion was made too late. Where the case is tried to the court only, it has been held that the plaintiff moved too late where the court had sustained the defendant's motion to dismiss and had so ordered.

Section 371 of the Kentucky Civil Code, as construed by the

[11] 198 Ky. 222, 249 S. W 346 (1923)
[12] 280 Ky. 295, 133 S. W (2d) 100 (1939).
[13] 167 Ky 132, 180 S. W 61 (1915).
[14] 237 Ky. 501, 35 S. W (2d) 882 (1931)
[15] 160 Ky 139, 169 S. W 610 (1914)

Court of Appeals, seems to confer upon a plaintiff, where the issue is one to be submitted to a jury, the absolute right to dismiss his action at any stage of the proceedings prior to the departure of the jurors from the court room to begin their deliberations. While the question has not arisen in precisely this form, it is submitted that the language of the Court in the *Vertrees* Case,[16] together with the steadfast adherence of the Court to that decision for more than 45 years, justifies that conclusion. Where a motion for a peremptory verdict for the defendant is sustained, the plaintiff's right to dismiss is unimpaired, at least until the direction is actually delivered to the jury, and, perhaps, if no jury foreman has been appointed, the right continues until that is done. The extreme liberality of the Kentucky rule is emphasized by the fact that this is a merely formal procedure, since the court has the power of its own accord to enter the verdict.[17]

Where the case is being tried to the court, the exact point at which "final submission" takes place is not clearly indicated. It is believed, however, that to be seasonable, the plaintiff's motion would have to be made soon after completion of counsel's arguments.[18] Where the defendant makes a motion to dismiss and the court sustains it, a motion made thereafter by the plaintiff is made too late.[19]

Apart from the practical considerations that discourage repeated and fruitless suits, there is nothing that would preclude the subjection of a defendant to recurrent litigation, prosecuted to the very threshold of submission and then dismissed by the plaintiff as a matter of right without prejudice to the bringing of another action. This liberal right of dismissal accorded the plaintiff invites waste of the court's time and encourages the bringing of ill-prepared actions. It is suggested that a modification of this Code section to provide that plaintiff might dismiss as of right at any time before commencement of the trial and thereafter only in the discretion of the court and for proper cause is a needed reform in Kentucky practice.

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MEASURE OF DAMAGES FOR CONVERSION OF PROPERTY OF FLUCTUATING VALUE

The standard of value normally used in assessing damages is the market value, that is, the price at which the property could probably have been sold in the ordinary course of voluntary sale by a leisurely seller to a willing buyer. However, if the property is such

[16] *Supra*, note 10.
[17] Curran v. Stein, 110 Ky 99, 60 S. W 839 (1901)
[18] Hill v Small & Bros., 7 Ky Law Rep. 376 (1885)
[19] Jarvis Ex'x. v Interstate Coal Co., 257 Ky 656, 78 S. W.(2d) 926 (1935)