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A Discussion of Pennsylvania Procedural Rules 229, 230, 231, and 232

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A DISCUSSION OF PENNSYLVANIA PROCEDURAL RULES 229, 230, 231 AND 232

New rules of civil procedure pertaining to the discontinuance and the nonsuit, their effect on a second action on the same cause of action, and their effect on a counterclaim of the defendant have been promulgated by the Supreme Court of Pennsylvania and took effect April 1, 1950. The purpose of this note is to discuss the change brought about by these rules.

Rule 229 provides:

> (a) A discontinuance shall be the exclusive method of voluntary termination of an action, in whole or in part, by the plaintiff before commencement of the trial.
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> (b) A discontinuance may not be entered as to less than all defendants without leave of court after notice to all parties.
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> (c) The court, upon petition and after notice, may strike off a discontinuance in order to protect the rights of any party from unreasonable inconvenience, vexation, harassment, expense, or prejudice.

It is to be noted that a trial is deemed commenced for the purpose of this rule when the case is called for actual trial.[1]

Prior to the promulgation of the present rules, the rule seems to have been that the plaintiff could discontinue even after the commencement of the trial. In *Kennedy* v. *McNickle*[2] it was held that a case could not be discontinued after final judgment. *Lawrence* v. *Burns*[3] held that a petition for leave to discontinue came too late when it was presented after a general verdict. In *Cooper* v. *Cooper*[4] it was held that if no objection is made, a discontinuance may be allowed at any stage of the proceedings.

Therefore, Rule 229(a) clarifies previous procedure and definitely states the point after whch a discontinuance may not be taken. In a note by the Procedural Rules Committee, it is stated, "The nolle prosequi and the retraxit are abolished by Rules 229(a) and 230(a)."

The prior practice as to a discontinuance where there are two or more defendants and with regard to the striking off of a discontinuance apparently has been continued.[5]

Rule 231(a) provides that "after a discontinuance . . . the plaintiff may commence a second action upon the same cause of action upon payment of the

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1 2 ANDERSON PENNSYLVANIA PRACTICE 118.
2 2 Brewst. 536.
3 2 Browne 60.
4 1 Phila. 129.
5 Consolidated National Bank v. McManus, 217 Pa. 190, 66 A. 250 (1907).

costs of the former action." This also is a continuation of prior practice. In the case of *Gibson* v. *Gibson*[6] the court ruled that a discontinuance of an action, when made in the ordinary form, is not such a determination thereof as to be a bar in another action between the same parties on the same cause of action.

Rule 232(a) substantially confirms prior practice. This rule provides "a discontinuance . . . shall not affect the right of the defendant to proceed with a counterclaim theretofore filed."

As late as 1945 in the case of *Bily* v. *Bd. of Property, Assessment, Appeals and Review of Allegheny County*, 353 Pa. 49, 44 A.2d 250, the court said that the discontinuance of an action is subject to the consent of the court and it should not be permitted if prejudicial to the rights of others. In several other cases the court has ruled to the same effect.[7] But the court has also stated that in practice leave to discontinue is assumed in the first instance without the formality of an application, i.e., the discontinuance is ordinarily entered without leave of court actually being obtained, it being presumed to be entered with such leave.[8] In such an event, however, the presumed leave of court is subject to be withdrawn.[9] Since the granting of the discontinuance or its withdrawal was within the discretion of the court, the court could impose conditions thereon, to wit, that the counterclaim of the defendant should be prosecuted.[10]

In regard to the rules on discontinuance, one may summarize as follows. The point is now definitely established after which a party may not discontinue. Prior practice regarding the commencement of another action on the same cause of action between the same parties and the prosecution of a counterclaim after a discontinuance has been continued.

Rule 230 brings about a definite departure from prior practice. Rule 230 provides:

> (a) A voluntary nonsuit shall be the exclusive method of voluntary termination of an action, in whole or in part, by the plaintiff during the trial.

It is to be noted that this subsection by implication does away with the petition for a discontinuance during trial.

> (b) After a plaintiff has rested his case in chief he may not suffer a voluntary nonsuit without leave of court and cannot do so after the close of all the evidence.

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[6] 20 Pa. 9 (1852).
[7] Donosa v. Ueltzen, 97 Pa. Super. 556 (1930); Adam Hat Stores Inc. v. Lefio et al, 317 Pa. 443, 176 A. 734 (1935).
[8] Shapiro v. Phila., 306 Pa. 216, 159 A. 29 (1932); See note 5.
[9] Comm. to the use of Backingham v. Magee, 224 Pa. 166, 73 A. 346 (1909).
[10] Lamb v. Greenhouse, 59 Pa. Super. 329 (1915); Baumgartner v. Whinney, 156 Pa. Super. 167, 39 A.2d 738 (1944).

Formerly the plaintiff had the absolute right to take a voluntary nonsuit at any time before verdict was rendered.[11] The Act of March 28, 1814, P.L. 248, 12 P.S. 649 provided that "whenever, on the trial of any cause, the jury shall be ready to give in their verdict, the plaintiff shall not be called, nor shall he then be permitted to suffer a nonsuit." The courts have declared this rule in many cases.[12] Under prior practice then, only one situation was possible.

A striking change has been brought about, however, by the promulgation of Rule 230(b). This subsection creates three periods during which the plaintiff's right to take a nonsuit may be affected. The first of these periods is between the commencement of the trial and the close of the plaintiff's case in chief. During this period the plaintiff's right to suffer a nonsuit is absolute—the court cannot exercise any discretion in the matter. In this instance, prior practice has been continued. In the opinion of the writer, there is room for improvement at this point. There are various reasons why the plaintiff may wish to suffer a voluntary nonsuit. In presenting his case the plaintiff's attorney may discover that he lacks proof of an essential element, which proof may be available to him, but if he were to continue the case, the verdict should surely go against him. Or the plaintiff's attorney may fully present all the facts at his disposal without hope of attaining any more proof on pertinent points. Upon discovering this, but before completion of the case in chief, the attorney may take a voluntary nonsuit. In both cases, under present rules, the plaintiff is entitled to commence another action on the same cause of action. While this may be an entirely proper procedure in regard to the first case, it is inexcusable in the latter. Furthermore, under the present rules, the plaintiff may suffer as many voluntary nonsuits as he feels is necessary and thus the harassment of the defendant is further enhanced.

In the opinion of the writer a course of action patterned after the procedure set forth in the Federal Rules of Civil Procedure would be a great improvement over the present Pennsylvania system. These rules provide that "an action shall not be dismissed at the plaintiff's instance *save upon order of the court and upon such terms and conditions as the court deems proper. . .*"[13] (Emphasis supplied). Rule 41(1) provides in substance that if the plaintiff has once dismissed, a subsequent dismissal will operate as an adjudication on the merits.

The second period during which the plaintiff's right to take a nonsuit may be affected is between the close of his case in chief and the close of all the evidence. The rule provides that the plaintiff cannot suffer a nonsuit during

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11 It may be noted at this point that Rule 2231(e) protects persons who are secondarily liable by providing that a plaintiff who joins persons who are liable to him in different capacities may not suffer a voluntary nonsuit as to the one primarily liable without also suffering it as to all the others.

12 Felts v. Delaware, Lackawanna & Western R.R., 170 Pa. 432, 33 A. 97 (1895); Axelrod v. Howell, 328 Pa. 297, 195 A. 879 (1938).

13 Rule 41(2).

this period without leave of court. This is a very important change and a vast improvement over prior practice. Formerly the attorney for the plaintiff could present his case in chief and then wait to hear the defendant's evidence before deciding whether he would take a voluntary nonsuit In other words, the P could, by taking the nonsuit, prevent a decision on the merits (which would be res judicata) after he heard the defendant's case. Under the present rule, however, the judge in his discretion may determine the effect of the judgment of nonsuit. I wish to emphasize at this point that the practice under the present rule places a great deal more responsibility on the plaintiff's attorney. He must decide, before the close of his case in chief, whether he is willing to go to the jury. A motion for nonsuit after this point may be denied in the discretion of the court.

The third period during which the plaintiff's right to take a nonsuit may be affected is after the close of all the evidence. Under the present rule [Rule 230 (b)], the right to take a nonsuit after the close of all the evidence is absolutely denied. This could mean that, if at the end of the plaintiff's case in chief, the defendant was willing to waive his evidence, or if he asked for a directed verdict and thereby impliedly waived his evidence, the plaintiff could not obtain a voluntary nonsuit. This is indeed a radical departure from the old rules, and in view of the trend toward liberality seems to be a strict and arbitrary rule. Where the defendant asks for a directed verdict it denies the plaintiff the right to restate his case. It is hoped that in such a situation the trial judge will allow the plaintiff to reopen his case as if to receive more testimony in order to allow the plaintiff to be granted a voluntary nonsuit. To do this is within the discretion of the trial judge,[14] and although it would not be within the wording of the rule, this writer feels that it would be one way to get around a rather bad situation. For if the trial judge, by the rule, cannot in his discretion grant a voluntary nonsuit, he must pass upon the motion for the directed verdict, and a technical error or a mere oversight on the part of the plaintiff's attorney would be fatal and final.

As stated above, prior to the promulgation of the present rules the plaintiff could take a nonsuit up to the time the jurors were ready to deliver their verdict.[15] The change occasioned by the adoption of the present rule, in this writer's opinion, instead of improving a poor practice has made it worse. Generally the plaintiff's attorney should realize any weak point of his case before this point. But should the attorney at this late date find that proof of an essential allegation is missing, which proof might reasonably be available to him, he should be allowed to suffer such a nonsuit as would not be prejudicial to his client. If the nonsuit were not allowed, the effect of a judgment would be res judicata

14 Seaboard Container Corp. v. Rothschild, 359 Pa. 51, 58 A.2d 800 (1948).
15 Cherniak v. Prudential Ins. Co. 339 Pa. 73, 14 A.2d 334 (1940).

on the cause of action, and a plaintiff with a perfectly good cause of action, would by a mere technicality, be denied recourse in the courts of justice. It is submitted, therefore, that the trial judge should be allowed to grant a nonsuit at this point on such conditions as to him seem proper. If the courts were to follow the rule that is to be applied regarding nonsuits during the period between the close of the plaintiff's case in chief and all the evidence, the above described inequitous practice would be remedied, i.e., the judge should have discretion in granting the nonsuit.

It is to be remembered that the purpose of rules of procedure is to bring about an orderly presentation of a case. But at the same time such rules must promote and not hinder justice.

With regard to the compulsory nonsuit, the same situation as above described exists. Prior to April 1, 1950, even though the plaintiff suffered a compulsory nonsuit, he could bring another action on the same cause of action. Rule 231(b) provides "after the entry of a compulsory nonsuit the plaintiff may not commence a second action upon the same cause of action." He must pursue the remedies given under the Act of March 11, 1874, P.L. 6, 1; 12 P.S. 645. (The right to take off and appeal.) Now the reasons for a compulsory nonsuit, just as in the case of a voluntary nonsuit, may vary. First, the plaintiff may be nonsuited at the insistance of the defendant because he has failed to prove his case. Second, the plaintiff may be nonsuited because in his proof he has affirmatively shown that he has no legitimate cause of action. In the first case the plaintiff may be able to acquire such proof as is missing; but nevertheless, he is barred from bringing another action on the same cause of action. It is submitted that the judge should have the same discretionary power in determining the effect of compulsory nonsuit as was discussed in connection with the voluntary nonsuit.

There remains one final point to be discussed—the effect of a nonsuit on the prosecution of a counterclaim. The effect of the rules prior to April 1, 1950 may be shown by the case of *Duke* v. *Wagner et ux.*[16] This was an action of trespass which resulted from a collision between two tractor-trailer trucks. The defendant had entered a counterclaim for damages to his equipment and for personal injuries. During the trial the plaintiff took a voluntary nonsuit, and the question was whether the defendant could proceed with his counterclaim. The plaintiff contended that since the nonsuit was entered, the defendant could not prosecute the counterclaim, and the court in an opinion by Rupp, J. so ruled. Unless authorized by statute, after a voluntary nonsuit by the plaintiff, the defedant is not entitled to proceed with a counterclaim or set-off asserted by him.[17] The reasoning of Judge Rupp in denying the defendant the right to proceed with his counterclaim was as follows. The Practice Act of May 14, 1915, P.L.

[16] 59 D. & C. 569 (1947).
[17] See note 5; Severance v. Hayl and Patterson, 115 Pa. Super. 36, 174 A. 787 (1934).

483, § 14 as amended, 12 P.S. 431, provides that the defendant may counterclaim in an action of assumpsit, and if the plaintiff dismisses or discontinues, or suffers a voluntary nonsuit, the defendant may proceed with the counterclaim. Section 13 of the above mentioned act as amended by the Act of April 4, 1929, P.L. 140, 12 P.S. 412, permits a counterclaim in an action of trespass. But nothing is said about proceeding with the counterclaim in case a voluntary nonsuit is suffered by the plaintiff. Even under the Practice Act of 1915, therefore, it is doubtful whether the defendant would have been permitted to prosecute his counterclaim after the plaintiff took a nonsuit. Rule 1452(1), however, suspended absolutely sections 13 and 14 of the Practice Act. Lacking statutory authority, the defendant in the *Duke* case[18] was prevented from proceeding with his counterclaim.

The question whether the defendant can proceed with his counterclaim or whether he will be forced to bring a new action is of very great importance in the situation where the statute of limitations has run. If the period of the statute has expired between the time of filing the counterclaim and the bringing of the new action, the defendant will be precluded from bringing a new action. Rule 232(a) remedies this situation by providing ". . . a nonsuit shall not affect the right of the defendant to proceed with a counterclaim theretofore filed."

In conclusion, it may be stated that while the Rules of Civil Procedure with regard to the discontinuance, and voluntary and compulsory nonsuits have to some extent remedied the situation which previously existed, there is indeed room for vast improvement.

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[18] See note 16.