South Carolina Law Review

Volume 11
Issue 5 *SPECIAL ISSUE 3-A*

Article 10

Spring 1959

Voluntary Nonsuit Or Dismissal

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VOLUNTARY NONSUIT OR DISMISSAL

The rule in South Carolina as to a voluntary nonsuit used to be that a plaintiff in a law case had an absolute right before delivery or publication of the verdict to take that step. *Usher v. Sibley* (1806), 2 Brev. 32. But later the rule was changed so that, if a counterclaim was pled, then such absolute right was gone. *Inman v. Hodges* (1908), 80 S. C. 455, 61 S. E. 958. The latest decisions by reiteration leave no doubt that a plaintiff has no such absolute right now. Unless the adversary consents, a motion must now be made for such voluntary nonsuit or dismissal, and whether or not it should be granted is entirely in the judge's discretion.

Romanus v. Biggs et al. (1950), 217 S. C. 77, 59 S. E. 2d 645, gives a comprehensive view of the subject from the standpoint of both law and equity. As said therein beginning on page 85:

> This being a suit in equity, *Bouland v. Carpin*, 27 S. C. 235, 3 S. E. 219; *Romanus v. Biggs et al.*, 214 S. C. 145, 51 S. E. (2d) 503, and motions for nonsuit not being entertained or granted in suits in equity, *Jefferson Standard Life Ins. Co. v. Boddie* et al., 202 S. C. 1, 23 S. E. (2d) 817, it may be that Respondent's motion and the Court's order thereon are not technically accurate in referring to the motion as a motion for a voluntary nonsuit. It has been held that there is a distinction between a discontinuance and a nonsuit, 27 C. J. S., Dismissal and Nonsuit, §§ 2 and 3, but the result being the same and the distinction being wholly technical and unimportant we have no hesitation in treating respondent's motion as a motion to discontinue.
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> It has long been the rule that motions to discontinue in equity cases are addressed to the discretion of the Court and will be refused when discontinuance will work prejudice to the defendant, but at one time the rule was otherwise as to actions at law, in which a plaintiff was permitted to discontinue or take a nonsuit as a matter of right. However, dissatisfaction arose with this wholly artificial distinction, and the well settled rule now is that motions to discontinue are addressed to the discretion of the Court both in suits in equity and in actions

at law. *State v. Southern Ry. Co.*, 82 S. C. 12, 62 S. E. 1116.

At one time it was also apparently thought that the granting of a motion for a voluntary nonsuit or a discontinuance made after the commencement of the trial rested within the discretion of the Court, but that a plaintiff was entitled as a matter of absolute right to the granting of such a motion if made before trial. The syllabus of the case of *Cunningham v. Independence Ins. Co.*, 182 S. C. 520, 189 S. E. 800, appears to indicate that this is the rule in South Carolina, but we think due consideration of the case will show that it does not so hold and that the syllabus is not justified and is misleading. In any event the question is put at rest by the later case of *Parnell v. Powell et al.*, 191 S. C. 159, 3 S. E. (2d) 801, 802, in which the true rule is thus stated: "From a review of our own decisions and those from other jurisdictions, we are unable to perceive any sound reason for holding that a plaintiff has an absolute right to take a voluntary nonsuit before trial, irrespective of a showing of substantial prejudice by the defendant. In our opinion, the Court should exercise its discretion in passing upon such motions, whether made prior to the commencement of the trial or after the trial has been entered upon."

The exercise of the Court's discretion to refuse a motion for a voluntary nonsuit or a discontinuance is perhaps usually invoked in those cases where the defendant has set up a counterclaim or asked for affirmative relief, and it has been somewhat debated by appellants and respondent as to whether the affirmative defense contained in the answer of the defendant D. F. Biggs, individually and doing business as Biggs Wholesale Liquors, and therein designated as a counterclaim, is in reality a counterclaim, but we do not think that the determination of this question is necessary or even of any special importance in the decision of this case. The vital question here, as in all cases of this character, is whether defendants will suffer prejudice by the discontinuance. [Cases cited.]

See *Moore v. So. Coatings Chem. Co.* (1952), 221 S. C. 522, 71 S. E. 2d 311, which also calls attention to the fact that

when a voluntary nonsuit is granted within the court's discretion, the situation is then as if no action had been brought. The plaintiff, upon payment of accrued costs under circuit court Rule 59, can bring a similar action.