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1898

March 10.

[IN THE COURT OF APPEAL.]

FOX v. STAR NEWSPAPER COMPANY.

Practice—Nonsuit—Discontinuance—Order xxvi., rr. 1-4.

Under the existing rules of procedure a plaintiff cannot elect to be nonsuited. The only way in which an action can be discontinued is by discontinuance under Order xxvi., r. 1.

APPLICATION by plaintiff for judgment or new trial in an action tried before the Lord Chief Justice and a special jury.

The action, which was one of libel in respect of a report of proceedings in a county court published in the defendants' newspaper, came on for trial immediately after another action for libel brought by the plaintiff in respect of a report of a similar character published in another newspaper, in which action the defendants obtained a verdict. After the jury had been sworn, and the pleadings opened, the plaintiff claimed to be nonsuited. The Lord Chief Justice ruled that he was not entitled to be nonsuited, and that there must be a verdict for the defendants.

The plaintiff in person. The plaintiff had a right to be nonsuited. In the Rules of 1875 it was provided by Order xli., r. 6, that a judgment of nonsuit, unless the Court or a judge should otherwise direct, should have the same effect as a judgment on the merits for the defendant. That rule was repealed by the Rules of 1883, and no similar provision is contained in those rules. The rule assumed the continued existence after the Judicature Act of the common law practice as to judgment of nonsuit, but imposed certain limitations upon it. By the repeal of the rule those limitations are removed, and therefore the matter now stands as it did before the Judicature Act. A plaintiff is therefore entitled to elect to be nonsuited.

Blake Odgers, Q.C., and Temple Franks, for the defendants. There is no such thing now as a nonsuit in the old sense of the term, according to which the plaintiff had a right voluntarily

to elect to be nonsuited, and could then bring a fresh action for the same subject-matter. Under the Rules of 1875 the plaintiff could not of his own accord elect to be nonsuited, but, if the judge held that he had shewn no cause of action, then he might by leave of the judge be nonsuited with liberty to bring a fresh action. It is contended that the effect of Order XLI., r. 6, of the Rules of 1875 is preserved by Order LXXII., r. 2, which provides that, where no other provision is made by the Judicature Acts or rules, the existing procedure and practice shall remain in force. If that be not so, it is contended that Order XXVI., r. 1, under the heading "Discontinuance" provides exhaustively for the withdrawal by a plaintiff of his case or part of it, and by that rule he can only discontinue the action without leave before receipt of defence or, after receipt thereof, before taking any other proceeding in the action, save any interlocutory application. It is plain that that rule is not confined to "discontinuance" in the old technical sense of the term, for it provides for discontinuance at or after as well as before the trial. The existence of the old right of voluntarily being nonsuited is inconsistent with the scheme of procedure established by the rules.

The plaintiff, in reply.

A. L. SMITH L.J. In this case the plaintiff claimed to be entitled as of right to be nonsuited; but the Lord Chief Justice held that he was not so entitled, and in my opinion that decision was correct. It is quite true that since 1883 the term "nonsuit" has been used in some cases instead of "judgment for the defendants," as appears from the books; but in my opinion there is now no such thing as a nonsuit in the proper sense of the term. Before the Judicature Act a plaintiff, after he had brought the defendant into court, if he found the case going against him, or that he had not the requisite materials to support his claim, could elect to be nonsuited, with the result that he could bring a fresh action. It was intended, I think, by those who framed the Rules of 1875, that the power of a plaintiff thus to harass the defendant with further litigation on the same subject-matter after he had been

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 1898 provided by Order XLI., r. 6, of the Rules of 1875, that "any
 Fox judgment of nonsuit, unless the Court or a judge otherwise
 v. directs, shall have the same effect as a judgment upon the
 STAR merits for the defendant; but in any case of mistake, surprise,
 NEWSPAPER or accident any judgment of nonsuit may be set aside on such
 COMPANY. terms as to payment of costs and otherwise as to the Court or
 A. L. Smith L.J. a judge shall seem just." That rule put a fetter upon the
 power of a plaintiff to demand as of right to be nonsuited in a
 common law action. It was argued that that rule still remains
 in force. I am clearly of opinion that it does not, because it
 was repealed by the existing rules, and Order LXXII., r. 2,
 cannot have the effect of keeping it alive. I agree with what
 was said on this subject by Kay J. in *Magnus v. National Bank
 of Scotland* (1), and by Cotton L.J. in *In re Busfield*. (2) I
 think that Order XLI., r. 6, of 1875 has been advisedly omitted
 from the Rules of 1883, because there is really no such thing
 now as a judgment of nonsuit, and it was found that the
 matter with which the rule dealt is provided for by the rule as
 to discontinuance, namely, Order XXVI., r. 1, which provides
 that, after a certain stage, the plaintiff cannot without the
 leave of the Court discontinue the action. I think the Lord
 Chief Justice had power to take the course which he took, and
 that the appeal must therefore fail.

CHITTY L.J. I am of the same opinion. The provisions
 of Order XXVI. of the present rules appear to me to cover the
 case of what was formerly termed a nonsuit. That order
 applies to both Divisions of the High Court. The term "non-
 suit" was not known in Chancery, but a plaintiff in Chancery
 could formerly dismiss his own bill. Now, both Divisions being
 subject to the provisions of Order XXVI., it is clear that, after
 the stage in the proceedings indicated by rule 1 of that order,
 it is no longer competent to the plaintiff in an action in the
 Chancery Division to withdraw a matter of complaint from the
 Court. The same rule applies to the withdrawal of matter of

(1) (1888) 36 W. R. 602; 58 L. T. 617. (2) (1886) 32 Ch. D. 123, at p. 131.

defence or counter-claim by the defendant. It seems to me that Order xxvi. is intended to form a complete code applicable to the whole subject of discontinuing an action. I have no doubt that the explanation of the omission from the present rules of the provision contained in the old rules as to nonsuit is that, having regard to the provisions of Order xxvi., it was seen to be unnecessary. The term "discontinuance" may have had at one time a more limited meaning than it has in Order xxvi., r. 1, but it is obvious on the face of that rule that the term is there used in a broad sense, and is intended to cover the case of what in a common law action was termed a nonsuit as well as the power which a plaintiff in Chancery formerly had of dismissing his own bill. The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer dominus litis, and it is for the judge to say whether the action shall be discontinued or not and upon what terms. I think it would be a great error to construe the rule by reference to the old meaning of the term "discontinuance" or any mere technical sense of words. The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject-matter.

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Chitty L.J.

COLLINS L.J. concurred.

Appeal dismissed.

Solicitor for plaintiff: *Lincoln.*

Solicitors for defendants: *Harrison & Davies.*

E. L.