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## THE VOLUNTARY NONSUIT IN VIRGINIA

The availability of the voluntary nonsuit to the plaintiff and the inequities of its operation against the defendant were amply illustrated in *Berryman v. Moody*,<sup>1</sup> a decision which, while a correct interpretation of the Virginia nonsuit statute, shows how antiquated the nonsuit has become in this state. Regardless of its merits or demerits, the voluntary nonsuit can be of immense value to a plaintiff during the course of his action; however, mainly because of the confusion surrounding this and other related methods of terminating a suit, the voluntary nonsuit is, for many lawyers, a somewhat nebulous term. Due to this and other reasons, the voluntary nonsuit, for better or for worse, is often completely ignored by the plaintiff's lawyer, or else is resorted to only in desperation. In order to utilize the voluntary nonsuit to its full potentiality and likewise to effectively oppose a voluntary nonsuit, both the plaintiff's attorney and the defendant's attorney must not only fully understand the nonsuit in Virginia as compared with other jurisdictions and with the federal practice, but in what ways it differs from related methods of terminating a legal proceeding.

### THE VOLUNTARY NONSUIT AND ITS COUSINS

The nonsuit, as used in Virginia procedure, is entirely voluntary. In this state, unlike the practice of other jurisdictions, there is no compulsory or involuntary nonsuit.<sup>2</sup> While the court may recommend or advise the plaintiff to take a nonsuit, it has no means of forcing a nonsuit upon an unwilling plaintiff.<sup>3</sup>

The practice in Virginia has always been to allow the plaintiff a nonsuit as a matter of right,<sup>4</sup> unless, of course, it would result in a grievous wrong to the defendant or other interested parties. The Virginia statute does not modify this basic premise, but states only that after a certain stage in the proceedings the court shall not allow the plaintiff to take a voluntary nonsuit.<sup>5</sup> The best summation of the

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1. 205 Va. 516, 137 S.E.2d 900 (1964).

2. "It is the practice in some of the states to direct the plaintiff to suffer a nonsuit, where the plaintiff has failed to make out even a *prima facie* case, or where, if the verdict were rendered for him, the court would feel compelled to set it aside." BURKS, PLEADING AND PRACTICE 646 (4th ed., Boyd, 1952). "In England, and in some of these states, it is a frequent practice to *direct the plaintiff to suffer a non-suit* whenever the court thinks the evidence *palpably insufficient* to maintain the action, and that without consulting the wishes of the plaintiff. In Virginia . . . no such practice has ever prevailed." 4 MINOR, INSTITUTES OF COMMON AND STATUTE LAW 867 (2d ed. 1883).

3. *Ross v. Gill*, 1 Va. (1 Wash.) 87 (1792).

4. *Harrison v. Clemens*, 112 Va. 371, 71 S.E. 538 (1911).

5. VA. CODE ANN. 1950, § 8-220 (REPL. VOL. 1957).

nature and effect of the voluntary nonsuit in Virginia is that of Professor Minor, who said:

In Virginia all employ the word 'nonsuit' to express any failure on the part of the plaintiff to prosecute his suit, whether upon being called at trial or any other time. . . . The effect of the nonsuit . . . is to put an end to the pending suit without prejudicing another for the same cause of action. The nonsuit is resorted to in our practice when the plaintiff finds himself unprepared with evidence to maintain his cause, either in consequence of his being ruled into a trial when he is not ready or for any other reason.<sup>6</sup>

The voluntary nonsuit has a number of close relatives which are often confused with the nonsuit and with each other. While many statements concerning voluntary nonsuit frequently apply equally well to other methods of terminating an action, one must remember that each of these modes of procedure has its own peculiarities and its own functions; thus, it is the better practice to avoid making any broad generalizations as to their operation as a group. In general, those terms most often confused with the voluntary nonsuit are the involuntary nonsuit,<sup>7</sup> dismissal,<sup>8</sup> discontinuance,<sup>9</sup> *nolle prosequi*,<sup>10</sup> *non prosequitur*,<sup>11</sup> and *retraxit*.<sup>12</sup>

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6. 4 MINOR, *INSTITUTES OF COMMON AND STATUTE LAW* 867 (2d ed. 1883). "The object and purpose of suffering a nonsuit is to avoid an adverse verdict, for if the pleadings be correct, and the evidence does not support the allegation of the pleadings, a verdict would be conclusive against the plaintiff and bar another action for the same cause. The matter would then be *res judicata*." BURKS, *PLEADING AND PRACTICE* 644 (4th ed., Boyd, 1952).

7. *Supra* note 2.

8. "Dismissal signifies the final ending of a suit, not a final judgment on the controversy, but an end of that proceeding." *Hewitt v. International Shoe Co.*, 110 Fla. 37, 148 So. 533, 536 (1933).

9. "A discontinuance, generally speaking, is a failure to continue the case regularly from day to day and from term to term the commencement of the suit until final judgment." *Bagby v. Kirby*, 225 Mo. App. 1190, 35 S.W.2d 54, 56 (1951). See VA. CODE ANN. 1950, § 8-154 (REPL. VOL. 1957).

10. "A *nolle prosequi* is an acknowledgement or agreement not to prosecute further in the suit as to a particular person or cause of action." *Supra* note 8 at 148 So. 536.

11. "A *non prosequitur* is a form of dismissal judgment which is entered against a plaintiff by reason of his failure to continue his suit from time to time as he ought." *Ibid.*

12. "A *retraxit* is an open and voluntary renunciation of a claim in court; a formal and final renunciation of the plaintiff's right of action, operating as a perpetual bar thereto." *Ibid.* A *retraxit* "differs from a nonsuit in that . . . [the latter] is negative and . . . [the former] is positive." *Hoover v. Mitchell*, 66 Va. (25 Gratt.) 387, 390 (1874).

## FROM ANTIQUITY TO § 8-220

The voluntary nonsuit in Virginia, being a creature of case precedent as well as statutory command, stems from the common law and to a certain extent relies upon that background for its basic precepts. To fully understand the nonsuit as it exists and functions in Virginia today, it is desirable to briefly examine its early beginnings and development.

Under the common law, the plaintiff was nonsuited upon his nonappearance in court when his presence was required. This was the result of a rule which required the presence of the plaintiff or his counsel before a verdict could be given. It was therefore the usual practice for the plaintiff to deliberately absent himself from the proceedings whenever he had any indication that the case was going against him.<sup>13</sup> The plaintiff would forthwith be nonsuited and thus be free to bring another suit on the same cause of action at a more convenient time. This practice, to the delight of all plaintiffs, developed in such a manner that whenever the plaintiff chose, for one reason or another, not to risk an adverse verdict, he was allowed to suffer a voluntary nonsuit even though he was actually present in court.<sup>14</sup>

The injustices done to the defendant by this early rule gave rise to modifying acts of Parliament;<sup>15</sup> and, upon the importation of the common law to America, the rule was further refined by decisions, court rules, and statutes. After its emergence from this remodeling phase, the rule still stated that the right of the plaintiff to suffer a nonsuit was "absolute"; however, this right did not exist at all times and in all circumstances. The right to the voluntary termination of an action now depended upon the effect it would have upon the rights of the defendant and/or other interested parties.<sup>16</sup> The general rule stated that no nonsuit should be granted if it would place the defendant at an unjust disadvantage or burden him with oppressive expenses. However, "it is said that the mere possibility that the defendant might be harassed by another litigation directed to the same object is not enough to disentitle the plaintiff to dismiss, [since] the ordinary inconvenience of double

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13. SCOTT & SIMPSON, CIVIL PROCEDURE 618 (1951).

14. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913).

15. *E.g.*, 2 HEN. IV, c. 7.

16. *Rozen v. Goattan*, 369 S.W.2d 882 (Mo. App. 1963); *Gulledge v. Young*, 130 S.E.2d 695 (S.C. 1963); *In Frear v. Lewis*, 201 App. Div. 660, 195 N.Y.S. 3 (1922), it was held that the right of a plaintiff to voluntarily terminate the suit could not be used as a guise to cheat an attorney out of his compensation.

litigation is not legal prejudice, and can be compensated by costs.”<sup>17</sup> In short, while the right to a voluntary nonsuit was technically no longer an “absolute” right, it was still a very powerful weapon on the side of the plaintiff.

In the majority of jurisdictions today, a plaintiff will generally not be granted a nonsuit after his case reached the appellate level. Also, where the appellate court remands the case to a lower court for proceedings in accordance with its opinion, the plaintiff will not be permitted a nonsuit in the lower court. Where, however, an action is to be heard *de novo* by the appellate court, the plaintiff is generally allowed a voluntary nonsuit on the appellate level if he otherwise proceeds properly. The following illustrative example shows how this may occur:

In a detinue action . . . , judgment was given for the plaintiff and defendant appealed to the circuit court. During the county court trial it became apparant that this would have been a proper case [in which] to have sought punitive damages. Such damages however do not ordinarily lie in a detinue case. On appeal, counsel for plaintiff wishes to take a voluntary nonsuit in the circuit court followed by a motion for judgment for conversion . . . , asking damages for . . . value plus punitive damages . . . . The question arises whether the former adjudication is a bar to non-suit on appeal—the answer should clearly be No. Since the trial *de novo* effect of such an appeal is to abrogate the lower court judgment, a non-suit may be taken on appeal . . . .<sup>18</sup>

Virginia, too, recognizes that an exception exists when the appellate court hears the case *de novo*. In *Gemmell v. Svea Fire & Life Ins. Co.*,<sup>19</sup> the defendant had transmitted a check to the plaintiff company. The check was not paid owing to the closing of the drawee bank. Upon hearing in a civil justice court, judgment was given for the defendant. The case was appealed to the Law and Equity Court of Richmond and the plaintiff was therein granted a voluntary nonsuit. Thereafter plaintiff again brought suit in the same court and the defendant pleaded *res adjudicata*. The Supreme Court of Appeals held that the nonsuit should not have been granted, but since no exception was taken, the objection of the defendant now came too late. In examining the question of non-

17. 17 AM. JUR. 105 (1957); *Pullman Palace Car Co. v. Central Transp. Co.*, 171 U.S. 138, 146 (1898).

18. Maxson, *Some Problems of Removal and Appeal from Courts Not of Record in Virginia*, 2 W. & M. L. Rev. 40, 48 (1959).

19. 166 Va. 95, 184 S.E., 457 (1936).

suit at the appellate level, the court said: "A court which hears a case *de novo*, which disregards the judgment of the court below, which hears evidence anew and new evidence, and which makes final disposition of the case, acts not as a court of appeals but as one exercising original jurisdiction."<sup>20</sup>

It was established very early in *Ross v. Gill*<sup>21</sup> that the nonsuit was completely voluntary in Virginia and that the court ". . . had no power to direct a nonsuit, however destitute the plaintiff might be of a right to recover. They may advise it, and may direct the plaintiff to be called; but if he refuse to suffer a nonsuit, the court can no otherwise protect and enforce their opinion. . . ." <sup>22</sup> "The privilege of a voluntary [nonsuit] . . . , without prejudice, is absolute and, unlike the federal system, is not within the discretion of the court."<sup>23</sup>

The granting of a voluntary nonsuit to the plaintiff is not a decision on the merits; thus, it does not prevent the plaintiff from bringing a new action against the same defendant.<sup>24</sup> In examining the effect of a voluntary nonsuit, the court in *Cahoon v. McCulloch*,<sup>25</sup> stated that ". . . suffering a nonsuit does not bar a right of recovery upon a cause of action then existing. It has not the effect of merging the cause of action or preventing a new action against the same party. The only effect is to put an end to the pending suit, without precluding another [suit] for the same cause of action."<sup>26</sup>

Under the common law, and among the statutes, there is a divergence of opinion as to the right of the plaintiff to take a nonsuit after the defendant has interposed a counterclaim. The three main views on this subject are as follows: (1) the plaintiff may take a voluntary nonsuit and end the entire action, including the defendant's counterclaim; (2) plaintiff may suffer a nonsuit as to his own cause of action but the counterclaim is unaffected and will continue as a separate cause of action; and, (3) the plaintiff is not permitted a nonsuit after the defendant has filed his counterclaim.<sup>27</sup> Virginia has chosen the third view

20. *Id.* 166 Va. at 98.

21. 1 Va. (1 Wash.) 87 (1792).

22. *Id.* at 89.

23. *Rivers v. Norfolk, Baltimore & Carolina Line, Inc.*, 210 F. Supp. 283, 284 (E.D. Va. 1962).

24. *Mallory v. Taylor*, 90 Va. 348, 18 S.E. 438 (1893).

25. 92 Va. 177, 23 S.E. 225 (1895).

26. *Id.* 92 Va. at 180.

27. SCOTT & SIMPSON, CIVIL PROCEDURE 618 (1951). *Moore v. Young*, 139 S.E.2d 704 (N.C. 1965) held that a plaintiff who had agreed that compromise of his claim should be without prejudice to the defendant's counterclaim and who had taken a voluntary

and has commanded, by statute, that ". . . the plaintiff shall not, after the counterclaim is filed, dismiss his case without the defendant's consent."<sup>28</sup>

There is also a conflict of authority as to whether a hearing of the issues raised by a demurrer has the effect of precluding the plaintiff from taking a nonsuit. Some jurisdictions have allowed the nonsuit under such circumstances,<sup>29</sup> while others have not.<sup>30</sup> Virginia, by statute, provides that ". . . the court shall allow the demurree to withdraw his joinder in such demurrer and introduce new evidence, or suffer a nonsuit, at any time before the jury retire from the bar."<sup>31</sup>

#### THE STATUTE

Although the right of the plaintiff to take a voluntary nonsuit is derived from the common law and is not statutory, the Virginia statute does put certain limitations or conditions upon the exercise of that right. This statutory fixing of a stage in the proceedings beyond which the plaintiff is precluded from suffering a nonsuit had a very early beginning in Virginia. In the Code of 1802 it was stipulated that "every person desirous of suffering a non-suit on trial, shall be barred therefrom unless he do so before the jury retire from the bar."<sup>32</sup>

Until 1954, § 8-220 of the Virginia Code restricted the plaintiff's right only to the extent that he was precluded from taking a voluntary nonsuit after the jury had retired to consider their verdict.<sup>33</sup> In cases where the court sat without a jury, it was established by the case precedent that the plaintiff was not to be permitted a nonsuit after the case was submitted to the decision of the court.<sup>34</sup> In 1954, § 8-220 was amended and its present form now reads:

A party shall not be allowed to suffer a nonsuit unless he do so before the jury retire from the bar *or before the suit or action has been*

nonsuit as to his cause of action was not entitled to reinstate his complaint for the purpose of going forward with the evidence or of showing that he had first instituted the suit.

28. VA. CODE ANN. 1950, § 8-244 (REPL. VOL. 1957).

In Virginia, the defendant is allowed to take a nonsuit on any counterclaim that he may have instituted. PHELPS, VIRGINIA RULES OF PROCEDURE IN ACTIONS AT LAW 200 (1959). Likewise, a nonsuit may be taken on a cross-claim. *Id.* at 204.

29. *E.g.*, Elliott v. Collins, 6 Idaho 266, 55 P. 301 (1898).

30. *E.g.*, Day v. Mountin, 89 Minn. 297, 94 N.W. 887 (1903).

31. VA. CODE ANN. 1950, § 8-140 (REPL. VOL. 1957).

32. VA. REV. CODE 1802, c. 76, § 33.

33. VA. CODE 1919, § 6256.

34. Norfolk v. Norfolk County, 194 Va. 716, 75 S.E.2d 66 (1953); Harrison v. Clemens, 112 Va. 371, 71 S.E. 538 (1911).

*submitted to the court for decision or before a motion to strike the evidence has been sustained by the court.* And after a nonsuit no new proceeding on the same cause of action shall be had in any court other than that in which the nonsuit was taken, unless that court is without jurisdiction, or not a proper venue, or other good cause be shown for proceeding in another court.<sup>35</sup>

The last sentence of the present statute was under consideration in *Rosenbloom v. St. Paul Fire & Marine Ins. Co.*<sup>36</sup> In that case, the plaintiff had previously brought an action against the defendant in the Virginia courts and had been granted a nonsuit. In this federal proceeding, the defendant argued that the Federal District Court was without jurisdiction because the Virginia statute commands that after the granting of a nonsuit “. . . no new proceeding on the same cause of action shall be had in any court other than that in which the nonsuit was taken. . .”<sup>37</sup> The court, in striking down the defendant’s contention, said: “The Virginia statute is procedural only. It applies only to actions in Virginia courts. It does not affect plaintiff’s substantive rights. Therefore it cannot affect the jurisdiction of the federal courts and does not prevent an action in a federal court after a nonsuit in a Virginia court.”<sup>38</sup>

#### STAGE OF THE PROCEEDING

Under the early common law, the plaintiff might be granted a voluntary non-suit either before or after the rendering of the verdict by the jury.<sup>39</sup> When the proceeding took place before the court without a jury, the plaintiff was allowed to suffer nonsuit at any time prior to the announcement of the court’s decision.<sup>40</sup> In 1400 the statute of 2 Henry IV declared that once the verdict was rendered against the plaintiff he could not thereafter be voluntarily nonsuited.<sup>41</sup> Under the common law as it existed after this statute, and as subsequently adopted in this country,

35. VA. CODE ANN. 1950, § 8-220 (REPL. VOL. 1957). The italicized portion was the result of the 1954 Amendment, ACTS 1954, c. 333, p. 417.

36. 214 F. Supp. 301 (S.D.N.Y. 1963).

37. *Supra* note 35.

38. *Supra* note 36 at 304. “The effect of the statute is merely to limit the venue of any new action brought on the same cause of action which has been nonsuited; and of course, a state venue statute can have no application to the courts of the United States.” *Popp v. Archbell*, 203 F.2d 287, 288 (4th Cir. 1953).

39. *Wilkes v. Gernon*, Y.B. Pasch., 48 Edw. 3, 30 (1371).

40. *Robinson v. Lawrence*, 7 Exch. 380, 155 Eng. Rep. 995 (1852).

41. 2 HEN. IV, c. 7. But the court still had within its discretion the power to grant a nonsuit after the finding of a special verdict. *Oxford v. Waterhouse*, Cro. Car. 575, 79 Eng. Rep. 1095 (1641).

the plaintiff had an absolute right to take a nonsuit at any time before the jury rendered its verdict<sup>42</sup> or the court announced its decision.<sup>43</sup> Today, in the great majority of American jurisdictions, the question of the proper stage of the proceeding at which voluntary termination may be had is now governed, completely, or in part, by statute or court rule.

It is to be noted that the Virginia statute also precludes the granting of a voluntary nonsuit after the defendant's motion to strike the evidence has been sustained by the court.<sup>44</sup> This particular portion of § 8-220 was fully explained by the court in *Berryman v. Moody*.<sup>45</sup> In the lower court, the defendant's motion to strike plaintiff's evidence was being argued and the court made certain remarks which gave plaintiff the impression that the motion would be sustained. Thereupon, the plaintiff's counsel moved to nonsuit, but the court held that plaintiff's motion came too late. On appeal, it was held that under § 8-220 the plaintiff was entitled to take a nonsuit at any time before the motion to strike had actually been sustained and that the lower court, in the instant case, had not actually sustained defendant's motion but at most had only indicated how it might rule. The court noted that ". . . a ruling is not accomplished by words which lend themselves only to an inference. The inference may be warranted but the question remains open and the ruling may eventually be contrary to the inference."<sup>46</sup>

Along this same line, and cited in the *Berryman* opinion, is *Texas Van Lines, Inc. v. Templeton*.<sup>47</sup> In this Texas decision, it was held that even where the lower court had stated it was inclined to feel that defendant's motion for a directed verdict was well taken, this did not prevent the plaintiff from suffering a voluntary nonsuit. "The fact that the court has indicated how he will probably decide a case does not

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42. *O'Mealey v. Wilson*, 1 Campb. 482, 172 Eng. Rep. 1029 (1808); *Keat v. Barker*, 5 Mod. 208, 87 Eng. Rep. 612 (1696).

In some states the plaintiff's right to a nonsuit ends when the jury retires to consider its verdict. *Williams v. Whitfield*, 163 S.2d 688 (Miss. 1964). In other states the court has discretion to grant a nonsuit even after the jury has retired, but before it has rendered its verdict. *Albert v. Albert*, 377 S.W.2d 772 (Tex. Cir. App.). Virginia has chosen the former view.

43. *Jenkins v. Faulkner*, 174 Va. 43, 4 S.E.2d 788 (1939); *Harrison v. Clemens*, *supra* note 34.

As to the allowance of nonsuit after submission of the case to a referee, arbitrators, or similar officers, see 17 AM. JUR., *Dismissal, Discontinuance, and Nonsuit* § 23 (1957).

44. *Supra* note 35.

45. 205 Va. 516, 137 S.E.2d 900 (1964).

46. *Id.* at 137 S.E. 2d 902.

47. 305 S.W.2d 646 (Tex. Cir. App. 1957).

preclude a plaintiff from taking a nonsuit."<sup>48</sup>

### EQUITY

Under the early equity practice in England, it was the general rule that the plaintiff could dismiss his bill as a matter of course at any time before decree, unless such dismissal would prejudice the rights of the defendant or interested third parties.<sup>49</sup>

In American courts, the rule has varied greatly from state to state in the absence of any controlling statute.<sup>50</sup> Some jurisdictions hold that the allowance of voluntary nonsuits is restricted to actions at law and have no place in equity except where expressly authorized by statute.<sup>51</sup> In other jurisdictions, the question is held to rest entirely in the discretion of the court. Under this rule, it is generally a matter of course to allow dismissal before the rendering of the decree.<sup>52</sup> In still other jurisdictions, it is held to be the undisputed right of the plaintiff to dismiss his bill at any time before final decree.<sup>53</sup>

In Virginia, voluntary termination of the proceedings is permitted in chancery. By § 8-122.1 of the Virginia Code, it is provided that where a motion is made to strike the evidence in an equity proceeding "the procedure shall be the same and shall have the same effect as the motion to strike the evidence in an action at law."<sup>54</sup> Thus, by this statute, the nonsuit provisions of § 8-220 are made applicable to certain chancery proceedings.

In this state, the plaintiff may not dismiss his bill after a counterclaim is made or after the filing of a cross-bill.<sup>55</sup> Neither is the plaintiff allowed to voluntarily terminate the proceedings in equity where he is acting in a fiduciary capacity<sup>56</sup> or where the proceedings involve the administration of a trust estate.<sup>57</sup>

48. *Id.* at 650. It was held in *Phipps v. Carmichael*, 376 S.W.2d 499 (Tex. Cir. App. 1963) that plaintiff was entitled to take a nonsuit where the court had stated it believed that there was no case for the jury but had not actually announced its ruling.

49. *Carrington v. Holly*, 1 Dick. 280, 21 Eng. Rep. 276 (1775).

50. See generally *Annot.*, 89 A.L.R. 13 (1934); *Anno.*, 126 A.L.R. 284 (1940).

51. *Case v. Case*, 134 S.E.2d 394 (S.C. 1964).

52. *E.g.*, *Ogens v. Northern Industrial Chemical Co.*, 304 Mass. 401, 24 N.E.2d 1 (1937).

53. *E.g.*, *Re Skinner & E. Corp.*, 265 U.S. 86, 44 S. Ct. 446, 68 L. Ed. 912 (1924).

54. VA. CODE ANN. 1950, § 8-122.1 (REPL. VOL. 1957); see *PHELPS, VIRGINIA RULES OF EQUITY PRACTICE AND PROCEDURE* 96 (1961).

55. *Supra* note 28.

56. *Patterson v. Old Dominion Trust Co.*, 136 Va. 246, 123 S.E. 549 (1924).

57. *Commonwealth v. Staunton Mut. Tel. Co.*, 134 Va. 219, 114 S.E. 600 (1922).

## THE FEDERAL APPROACH

Not only are law and equity merged under the federal practice, but the Federal Rules of Civil Procedure have also combined the various methods by which a plaintiff may voluntarily terminate his action. This single rule, 41(a)(1),<sup>58</sup> does not give the plaintiff a right to a voluntary nonsuit as such, but provides for the voluntary termination of litigation by a motion for dismissal. Under this rule, the plaintiff is permitted to dismiss his action without prejudice at any time before the defendant serves his answer or makes a motion for summary judgment. After either of these two occurrences, plaintiff may obtain a dismissal only if he files a notice of dismissal signed by all the parties to the litigation. Rule 41(a)(1) is commonly known as the "two-dismissal rule" since it provides that a ". . . dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim."<sup>59</sup>

The effect of Rule 41(a)(1) is to safeguard the rights of the defendant and other parties involved in the litigation by restricting the plaintiff's use of voluntary dismissal to the early stages of the proceeding. Although the federal courts usually follow the literal wording of the rule, they consider it flexible enough to allow implementation in such a way as to prevent any injustices that may arise during the course of the litigation.<sup>60</sup> In short, this single rule gives the federal courts much more flexibility in protecting rights and defending against injustices than do the outmoded and overly-complicated rules and statutes of many of the states.

## CONCLUSION

The federal rule, 41(a)(1), by virtue of its simplicity and flexibility, offers far more protection to the defendant than does § 8-220 and related provisions of the Virginia Code. While the Virginia provisions for voluntary nonsuit are more desirable than those of some other jurisdictions, these rules are still cumbersome when compared to 41(a)(1). Under § 8-220 the plaintiff may, up to certain late stages, elect to take a nonsuit at any time he thinks his case is going badly. And even though this may not affect the substantive rights of the de-

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58. FED. R. CIV. P. 41(a)(1).

59. *Ibid.*

60. *E.g.*, *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105 (2d Cir. 1953).

fendant, it cannot be denied that such a practice frequently results in loss of time and money to the defendant, plus the vexing imposition of prolonged litigation. With the new methods of discovery now available to a plaintiff and in face of the success of Rule 41(a)(1), there seems little advantage in maintaining a system which permits the person initiating the action to withdraw so easily after he has presented his case. Although procedure is a necessary aspect of any legal system, procedure should be fitted to modern needs and circumstances. The retention of a basically ancient system, whose only real result today is to prolong litigation, necessarily leads to needless decisions based upon mere technicalities of procedure.<sup>61</sup> A single dismissal statute, such as Rule 41(a)(1), while protecting the rights of all the parties to the action, leads to just decisions, arrived at within a framework of modern procedure and practice.

*James L. Tucker*

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61. In *Maryland Cas. Co. v. Cole*, 156 Va. 707, 713, 158 S.E. 873 (1931), though speaking specifically of limiting new proceedings to the court in which the nonsuit was taken, the court reveals the unjust results that can accrue from a liberal allowance of voluntary nonsuit: "Though outside of this record, we may remark in passing that by many it has long been considered a great public evil that litigants can prosecute their cases to the point when they are met with [the probability] of an adverse ruling . . . and thereupon can in that action take a nonsuit and thereafter institute another action and litigate the same questions again. . . . That litigation can be so prolonged . . . [as to impose] an undue hardship upon one of the litigants is apparent. . . . A plaintiff who has fairly lost his case once . . . should be limited to his appeal . . . , and should not be permitted to reopen the case. . . ."

In *Clack v. Arthur's Eng'r., Ltd.*, [1959] 2 W.L.R. 916, the court, in suggesting that the nonsuit be abolished in the English county courts, stated that although the nonsuit had been a suitable procedure in the past, "we find it difficult to appreciate what object is served by preserving in the county court today the old common law remedy of non-suit, which we venture to think few practitioners of today fully understand." See 75 L.Q. REV. 437 (1959).