

NONSUIT: A PREMATURE OBITUARY

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Clack v. Arthur's Engineering Ltd.,¹ offered to the Court of Appeal the now rare opportunity to emulate Uriah Heep and seek inspiration from the pages of *Tidd's Practice*.² The occasion was a consideration of the old common law practice of nonsuit; but while demonstrative attention was again given to that great work, it does not seem to have excited quite the same admiration, for the Court concluded its judgment with the recommendation that the power to nonsuit might be abolished in the county court, as it has been in the High Court. The practice was one which it ventured to think "few practitioners of today fully understand."³

The curious survival in the county court of the power of nonsuit is carefully traced in the judgment of the Court of Appeal.⁴ It was conferred upon that court by section 79 of the original County Courts Act, 1846, and survived the Judicature Acts, 1873-75, in the same limited way in which it survived in the High Court.⁵ But whereas nonsuit disappeared from the High Court with the introduction of the Rules of the Supreme Court, 1883,⁶ it was specifically preserved in the county court by section 88 of the County Courts Act, 1888. This provision was not included in the consolidating Act of 1934,⁷ but survives in substance in the County Court Rules, 1936, Ord. 23, r. 3.

In *Clack's* case the plaintiff had brought an action in the county court for damages for wrongful dismissal. The judge preferred the evidence of the defendants to that of the plaintiff and found that he had not proved his claim to have been engaged for a fixed period. No other question arose on the pleadings as they stood, as the plaintiff had previously declined the judge's invitation to amend them to include a claim based on the absence of proper notice. The judge did not, however, give judgment for the defendants, but merely nonsuited the plaintiff.

The defendant appealed on three grounds, of which the first

¹ [1959] 2 Q.B. 211.

² *David Copperfield*, chap. xvi.

³ [1959] 2 Q.B. at p. 225.

⁴ [1959] 2 Q.B. at pp. 217-218.

⁵ See *Poyser v. Minors* (1881) 7 Q.B.D. 329.

⁶ See *Fox v. Star Newspaper Co., Ltd.* [1900] A.C. 19.

⁷ But see s. 99 (3) (d) and Sched. III.

alone raised any point of historical interest. This was the contention that the power to nonsuit a plaintiff could not be exercised without his consent.

At first sight the wording of the present rule might seem to provide a straightforward answer to this, as it states that "where the plaintiff appears but does not prove his claim to the satisfaction of the court, it may either nonsuit him, or give judgment for the defendant." But the County Courts Act, 1846, had also appeared to give an unfettered discretion to the judge yet the courts had imported the common law practice of nonsuit *in its entirety*, and there could be no doubt of the direct line of descent from that statute to the present rule. The "powers of the county court today in relation to nonsuit" had therefore to be "related to the practice of the old courts of common law as it existed prior to 1873."⁸

Could, therefore, a plaintiff be nonsuited against his will at common law? In the Court's view he could be, certainly after verdict, and even before verdict, if all the evidence on both sides had been taken.⁹ But this conclusion was based very largely—and, it is submitted, erroneously—upon the practice of raising points of law at *nisi prius* for consideration by the court *in banc*. This practice, which grew up in the eighteenth century unaided by statute, was of great importance to the working of the common law before the Judicature Acts, but it has never been adequately described. It is therefore the writer's purpose (1) to examine the proposition that a plaintiff could be nonsuited against his will, and (2) to give a short account of the development of this practice of reserving points of law at trial.

NONSUIT AGAINST THE PLAINTIFF'S WILL

The Court of Appeal drew three conclusions from its investigation of the practice at common law: first, that the plaintiff was entitled to a nonsuit as of right at any time up to verdict, and the court had no discretion to refuse; second, that, if before verdict the plaintiff refused to be nonsuited, the court apparently had power none the less to enter a nonsuit, once all the evidence had been taken or if the action was not sustainable in point of law; third, that after verdict¹⁰ the court clearly had an unfettered discretion, if the verdict were against the plaintiff, either to nonsuit him or to give judgment for the defendant.¹¹

⁸ [1959] 2 Q.B. at p. 218.

⁹ *Ibid.* at pp. 221–222.

¹⁰ Or, where there was no jury, once the judge had found the facts. *Cf. Snelling v. Norton* (1595) Cro.Eliz. 409.

¹¹ [1959] 2 Q.B. at pp. 221–222.

The first proposition can be accepted unreservedly. A nonsuit was simply a declaration that the plaintiff had made default in appearing at a time when he was demandable, his failure to prosecute his writ leading to judgment that the defendant go without a day and the plaintiff be in mercy for a false claim. The importance of a nonsuit lay in the fact that the judgment did not rest upon a verdict and therefore did not, in most cases, bar a subsequent action.¹² At common law the default might occur at any time before verdict, and sometimes, indeed, even after verdict, but before final judgment.¹³

The default was a bodily one and it was early recognised to be within the power of the plaintiff: in other words, he was not merely demandable, but must be demanded. Thus in 1313, when a woman sued the Abbot of Fountains, he "went out to imparl and returned to the bar with his champion, and the lady saw that he intended to claim trial by battle, and by the advice of Toudeby she left the bar."¹⁴ And in 1318, "while the inquest was out, the plaintiff, because he had heard that the inquest was going to pass against him, withdrew from the bar; and when the inquest came back, he was called and did not come."¹⁵

That the default was essentially physical seems clear from, for example, the fact that to the very end the record of a nonsuit included a statement that the plaintiff had been solemnly called and came not¹⁶; thus, too, it was disputed whether a plaintiff could be nonsuited on the same day that he had appeared or been seen in court,¹⁷ and the king, who was deemed always to be present in his own courts, could not be nonsuited, even if he wished.¹⁸ This being so, it would be surprising if a court could nonsuit a plaintiff against his will and despite his presence.

It is indisputable that plaintiffs were very frequently nonsuited at the instance of the court and not upon their own initiative. This might occur whenever the plaintiff's action could not be sustained in point of law, whether it be because he had no cause of action at all, had chosen the wrong writ, had pleaded badly, or had failed to adduce sufficient evidence. Examples of such "involuntary" nonsuits can be found in the earliest Year Books and reading between the lines we may perhaps guess that judges like Bereford C.J. on occasions rode roughshod over a plaintiff's wishes in this

¹² Com.Dig., Pleader (X.4).

¹³ Co.Lit. 139b.

¹⁴ Y.B. 6 Edw. 2, S.S. vol. 43, p. 134.

¹⁵ Y.B. 12 Edw. 2, S.S. vol. 65, p. 145.

¹⁶ *Tidd's Practical Forms* (8th ed., (1840) p. 323.

¹⁷ Vin.Abr., Nonsuit (D).

¹⁸ *Ibid.* Nonsuit (C). A *nolle prosequi* was necessary.

matter.¹⁹ Such nonsuits became increasingly important as the rules of pleading became more and more intimidating and rules of evidence developed; but it is, nevertheless, very doubtful, at least in later times, whether the court could nonsuit a plaintiff who remained steadfast.²⁰ The Court of Appeal concluded that it could do so, but, it should be noted, *only when all the evidence on both sides had been taken.*²¹ Now at this stage the question would rarely arise. In a clear case the plaintiff would hardly refuse his consent, for a nonsuit was preferable to the alternative, which was a verdict for the defendant; and, anyhow, by then very little time would be gained by a nonsuit, so that the court would have no reason to insist, for it would simply direct such a verdict and leave the plaintiff to his remedies. Moreover, as we shall see, the practice of reserving points of law provided a convenient way of avoiding such a clash.

It is respectfully submitted, however, that the Court of Appeal was wrong and that a plaintiff could not be nonsuited against his will even at that stage. The Court relied upon a statement in *Tidd's Practice* that in certain circumstances "the judge at Nisi Prius will nonsuit the plaintiff"²²; but this passage must surely be read subject to his later, emphatic statement that "the plaintiff is in no case compellable to be nonsuited,"²³ which was not quoted. The Court also relied on *Davis v. Hardy*,²⁴ where the trial judge had nonsuited the plaintiff despite his insistence that the case should be left to the jury. The nonsuit was indeed upheld by the court *in banc* upon a motion for a new trial, and it must be admitted that this case does support the Court of Appeal's second proposition. But it should be noted that in *Davis v. Hardy* the court held that on the evidence the plaintiff *could not* win. This therefore left, as his only ground of complaint, the fact that the judge had nonsuited him instead of directing a verdict for the defendant!²⁵ For this very reason a plaintiff was not likely to secure a new trial *solely* upon the ground that he had not consented to a nonsuit (at that stage), and thus it is difficult to find cases which do rebut this second proposition of the Court of Appeal—for a motion for a new trial was the *one* remedy available to a nonsuited plaintiff. Yet it is possible to find just such an instance in which a new trial was granted upon that

¹⁹ See, e.g., Y.B. 6 Edw. 2, S.S. vol. 43, pp. 91, 94–95, 120–121.

²⁰ *Macbeath v. Haldimand* (1786) 1 T.R. at p. 176; *Watkins v. Towers* (1788) 2 T.R. at p. 281.

²¹ [1959] 2 Q.B. at pp. 221–222. It conceded that a nonsuit against the plaintiff's wishes at any earlier stage was inadmissible.

²² *Tidd's Practice* (9th ed., 1828), vol. 2, p. 867.

²³ *Ibid.* at p. 869.

²⁴ (1827) 6 B. & C. 225.

²⁵ See Bayley J., *ibid.* at p. 231.

ground. In *Dewar v. Purday*,²⁶ the jury had been unable to agree after sixteen hours and the trial judge then acted upon his first impression and nonsuited the plaintiff without his consent. The court awarded a new trial without considering the grounds for the nonsuit. This case runs directly counter to *Davis v. Hardy*, but appears to accord more easily with the principle underlying nonsuit.

The case is particularly interesting because the defendant had applied for a nonsuit at the close of the plaintiff's case, and the trial judge, though allowing the cause to continue, had given the defendant leave to move to enter a nonsuit. This is in fact an example of the practice of reserving points of law at trial which is described below, and if the case had preceded the verdict such leave would have allowed the court *in banc* to place itself in the position of the trial judge at the time and enter a nonsuit if it thought fit. It was therefore tempting for the court first to say that the nonsuited plaintiff could be in no better position than if he had obtained a favourable verdict and then to proceed to consider the grounds for the nonsuit. It did not do so: *the whole practice of reserving points rested upon the consent, express or implied, of all parties, as well as upon the leave of the judge; and the plaintiff's consent had been given on the understanding that (subject to the point reserved for the court) the case should proceed to verdict—which it had not done.* The court therefore refrained from considering whether plaintiff had made out his case, and, having done so, it assumed as beyond argument that the nonsuit without the plaintiff's consent was indefensible.

But this case is fatal not only to the Court of Appeal's second proposition, but also to its third, namely, that *after* verdict the court's power to nonsuit was unfettered; for this conclusion was based entirely upon examples of the practice of reserving points at trial, and without any doubt that depended upon consent, as *Dewar v. Purday* so neatly shows.

THE RESERVATION OF POINTS OF LAW AT TRIAL

It is customary to point to the equity system of rehearing which served as the model for the Court of Appeal and by way of contrast to emphasise the inadequacies of the Writ of Error and Bill of Exceptions at law.²⁷ But it is less commonly emphasised that the common law had of its own accord evolved a reasonably satisfactory system of "appeal" insofar as the decisions of a trial judge could be reviewed by a court of three or four judges sitting *in banc*. Four days of term had to elapse before judgment could be signed, and,

²⁶ (1835) 4 N. & M. 633.

²⁷ See, e.g., Holdsworth, H.E.L., vol. 1, p. 643; Sir Raymond Evershed, *The Court of Appeal in England* (1950) pp. 5-6.

as is well known, during that time the unsuccessful party might move the court for a new trial, for a repleader or a *venire facias de novo*, in arrest of judgment, or for judgment *non obstante veredicto*. But the first three of these involved the expense of a new trial, the fourth was stultifying and the fifth was much narrower than it might seem.²⁸ There was, however, another way in which the case might come before the court *in banc*. This was the practice whereby a trial judge could by *consent of the parties* reserve points of law for the court by giving leave to move for a nonsuit or verdict. If, for example, it was suggested that the plaintiff had failed to make out his case, or an objection was taken to the admissibility of vital evidence or to a critical direction in the summing up, the judge would decide the point in such a way that the trial could continue and give leave to the dissatisfied party to move the court. It was then possible to dispose of the matter without the expense of a new trial, special verdict or special case. The principle underlying the practice was that "where the judge at *Nisi Prius* has thought fit to save a point; the court has been in the habit of considering itself in the situation of a judge, at the time of the objection raised."²⁹ It was thus an application of the principle that "the day at *Nisi Prius* and the day *in banc* is all one."³⁰ This practice was a most important factor in the later working of the circuit system, but it is in danger of becoming lost from sight; the only modern account which is at all adequate is contained in two speeches of Lord Blackburn,³¹ and very little can be found even in the books of practice before 1875.³²

We cannot be quite certain when the practice began. The difficulty lies in disentangling it from the kindred (and, indeed, parent) practice of taking a verdict subject to a special case.³³ Special case, like the new trial, goes back to the Restoration and for a hundred years was the only convenient way of bringing a case before the court from *Nisi Prius*.³⁴ A general verdict would be taken, but by agreement of the parties the trial judge could make a "rule of *Nisi Prius*" that the verdict should ultimately be entered in accordance with the opinion of the court *in banc* upon a

²⁸ See *Stephen on Pleading*, chap. 1.

²⁹ *Cox v. Kitchin* (1798) 1 B. & P. at p. 339, *per Buller J.*

³⁰ Bro.Abr., Assise, 32.

³¹ Cited Thayer, *Evidence*, p. 241, n. 1. Holdsworth, H.E.L., vol. 1, pp. 282-283; but *cf.* vol. 9, pp. 277-278. Sutton, *Personal Actions*, pp. 129, 133. Elementary textbooks on the legal system appear to ignore the development.

³² *Cf.* Tidd, *op. cit.* vol. 2, p. 900; *Stephen on Pleading*, 5th ed., p. 103. I am indebted to Professor H. A. Hollond, who first drew my attention to the absence of any account of this practice several years ago.

³³ Tidd, *op. cit.* vol. 2, p. 898.

³⁴ Apart, of course, from a motion for a new trial. Special verdicts were cumbersome.

written statement of the case drawn by the parties' counsel. Until the reign of George II the jury's verdict had always to be given for the plaintiff and in the event of the court's being against him a nonsuit would be substituted.³⁵ No doubt this was based upon the idea that thereby the court was not usurping the function of the jury, but merely doing what the trial judge might have done. Thereafter it was considered permissible to enter a verdict for the defendant, on the ground that the jury had assented to the whole proceeding.³⁶

In theory it should be easy to distinguish special case from the later practice of reserving points by giving leave to move for a nonsuit or verdict: the latter required a rule nisi, *i.e.*, to show cause, and ended in the rule being discharged or made absolute, while a special case was merely set down for argument and ended in the delivery of the *postea* to the successful party.³⁷ In fact, in the eighteenth century it is far from easy to distinguish the two, for a special case might happen to come before the court on motion,³⁸ and the earlier reports are anyhow very careless of procedural points. The essential difference between the two procedures lay in the fact that the special case *had* to come before the court if the cause was to be concluded³⁹; but where the trial judge merely reserved leave to a party to move the court, the cause would proceed normally and judgment could be signed in the succeeding term, unless the dissatisfied party made a motion within the first four days thereof.

The first move towards a simpler procedure than that of special case is to be found in the practice of some trial judges of making the case subject to *their own* further consideration: no doubt it was not necessary for counsel to draw up any written statements in such circumstances. Holt C.J. seems to have been quite fond of this procedure, which was particularly convenient for the chief justices hearing London or Middlesex cases, as they could adjourn them to their chambers in Serjeants' Inn.⁴⁰ But Lord Mansfield probably deserves the credit for starting the practice of reserving points of law for the court by giving leave to move. It is first found clearly in the 1760s, and its appearance does not seem to be due simply to the advent of better reports: the procedure was

³⁵ *Kemp's Case* (1745) Barnes 455; *Moyse v. Cocksedge* (1749) Barnes 459. Cf. Willes 636, and at pp. 192-193.

³⁶ *Mead v. Robinson* (1743?) Barnes 451.

³⁷ Tidd, *op. cit.* vol. 2, pp. 898-899; Sutton, *op. cit.* p. 134.

³⁸ See, *e.g.*, *Parsons v. Thompson* (1790) 1 H.Bl. 322.

³⁹ Stephen, *op. cit.* p. 102. Cf. *Chandler v. The Hundred of Sunning* (1749) Barnes 458.

⁴⁰ See, *e.g.*, *Norris v. Napper* (1704) 2 Ld.Raym. 1007; *Gravelly v. Ford* (1705) 2 Ld.Raym. 1209; *Dale v. Lubbock* (1729) 1 Barn.K.B. 199; *Jury v. Glover* (1729) 1 Barn.K.B. 200.

specially noted as if it were novel.⁴¹ As with special case, the jury's verdict was at first (it seems) given for the plaintiff and the defendant would be left to move for a nonsuit or (in appropriate cases⁴²) a verdict, even if the trial judge inclined towards the defendant. By the end of the century, however, if the judge felt that the point of law should be decided in the defendant's favour, he would simply nonsuit the plaintiff and give him leave to move the court to enter a verdict in his favour.⁴³

As has been stressed already, the practice depended on the consent of the parties; and, of course, the leave of the trial judge was also necessary. But these conditions do not seem to have acted as excessive brakes. From the beginning of the nineteenth century the practice becomes increasingly prominent in the reports, and, while there is no way of discovering in how many cases it was used, it is clear that it was found a most convenient way of securing the review of a trial.⁴⁴

By way of postscript it may be noted that it was *not* part of the Judicature Commission's scheme to abolish the practice,⁴⁵ nor did the Judicature Acts, 1873–75, do so.⁴⁶ The procedure was simplified and the consent of the parties was no longer to be necessary, but basically the principle of review by the court *in banc*—in its new guise of divisional court—was retained. It only disappeared with the Appellate Jurisdiction Act, 1876, which transferred three more judges from the common law Divisions to the Court of Appeal and decreed that every action should, “so far as is practicable and convenient, be heard, determined, and disposed of before a single judge.”⁴⁷ The old practice was swept away,

⁴¹ See *Baskerville v. Brown* (1761) 2 Burr. 1229; *Dally v. Smith* (1768) 4 Burr. 2148; *Saunderson v. Rowles* (1771) 4 Burr. 2064. Cf. *Dale v. Sollet* (1767) 4 Burr. 2133 (special case?). Tidd, *op. cit.* vol. 2, p. 900 (d) cites earlier cases, but these appear to be examples of special case. The new procedure may perhaps be traced back to the time of Holt C.J.; *Greene v. Crane* (1705) 2 Ld.Raym. 1101; *Lamine v. Dorrell* (1705) 2 Ld.Raym. 1216; *Lock v. Hayton*, Fort. 246; *Depaba v. Ludlow* (1720) 1 Comyns 360; but these may also be instances of special case; cf. *Buckmyr v. Darnall* (1704) 2 Ld.Raym. 1085.

⁴² As, for example, in ejectionment, where a verdict did not bar a subsequent action.

⁴³ See, e.g., *Clay v. Willan* (1789) 1 H.Bl. 298; *Graff v. Greffuhle* (1807) 1 Camp.N.P. 89.

⁴⁴ See *Wymer v. Page* (1814) 1 Stark. 9; J. Chitty, *Practice of the Law* (2nd ed., 1838), vol. 4, p. 915. By the time of the Judicature Acts, the great majority of “*Nisi Prius* cases” seem to have come to Westminster in this way. See, e.g., the first volumes of the Law Reports, L.R. 1 Q.B. and L.R. 1 C.P.

⁴⁵ The Judicature Commission, 1st Report, at p. 15; 1868–69 [4130] xxv.

⁴⁶ Supreme Court of Judicature Act, 1873, s. 46; Supreme Court of Judicature Act, 1875, Sched. I, Ord. 36, r. 22, Ord. 40, r. 2.

⁴⁷ ss. 15, 17; R.S.C., December 1876. Cf. *Yetts v. Foster* (1878) 3 C.P.D. 437 and compare R.S.C., 1883, Ord. 36, r. 39, Ord. 40, rr. 2–5, with the rules cited in note 46, *supra*.

not because it was inadequate, but because it was unnecessary—a single appeal to the Court of Appeal was sufficient. That court took rather longer to swallow up the motion for a new trial, and a last vestige of the common law procedure still survives insofar as an application for a new trial is not by way of rehearing.⁴⁸ But all the rest has gone down before the Chancery principle of rehearing. This principle has triumphed primarily because it was better suited for the review of cases heard by judges sitting without juries, which were a phenomenon to which the common law procedure had difficulty in adapting itself. It is the same difficulty which really underlies *Clack v. Arthur's Engineering Ltd.*

⁴⁸ See *Annual Practice*, 1960, note to Ord. 58, r. 2. Even this survival was much narrowed by the rule that a person dissatisfied with the findings of a judge sitting alone must appeal and should not move for a new trial. See *Potter v. Cotton* (1879) 5 Ex.D. 137.